HOUSE OF LORDS

Merits of Statutory Instruments Committee

16th Report of Session 2009-10

Drawing special attention to:

Draft State Pension Credit Pilot Scheme Regulations 2010

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

Social Security (Claims and Payments) Amendment Regulations 2010

Correspondence:

Proceeds of Crime Act 2002 (References to Financial Investigators) (Amendment) Order 2009

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The Select Committee on the Merits of Statutory Instruments

The Committee has the following terms of reference:

(1) The Committee shall, subject to the exceptions in paragraph (2), consider—

(a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;

(b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (3).

(2) The exceptions are—

(a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;

(b) draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, and subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001;

(c) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.

(3) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—

(a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;

(b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;

(c) that it may inappropriately implement European Union legislation;

(d) that it may imperfectly achieve its policy objectives.

(4) The Committee shall also consider such other general matters relating to the effective scrutiny of the merits of statutory instruments and arising from the performance of its functions under paragraphs (1) to (3) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

The members of the Committee are:

Rt Hon. the Baroness Butler-Sloss GBE
The Baroness Deech DBE
The Lord Hart of Chilton
The Lord James of Blackheath CBE
The Lord Lucas
The Lord Methuen
The Baroness Morris of Yardley
The Lord Norton of Louth
The Lord Rosser (*Chairman*)
The Lord Scott of Foscote
The Baroness Thomas of Winchester

Registered interests

Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the House of Lords Record Office and is available for purchase from the Stationery Office.

Publications

The Committee's Reports are published by the Stationery Office by Order of the House in hard copy and on the internet at www.parliament.uk/parliamentary_committees/merits.cfm

Contacts

If you have a query about the Committee or its work, please contact the Clerk of the Merits of Statutory Instruments Committee, Delegated Legislation Office, House of Lords, London SW1A 0PW; telephone 020-7219 8821; fax 020-7219 2571; email merits@parliament.uk. The Committee's website, www.parliament.uk, has guidance for the public on how to contact the Committee if you have a concern or opinion about any new item of secondary legislation.

Statutory instruments

The Government's Office of Public Sector Information publishes statutory instruments on the internet at www.opsi.gov.uk/stat.htm, together with an explanatory memorandum (a short, plain-English explanation of what the instrument does) for each instrument.

Sixteenth Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the following instruments and has determined that the special attention of the House should be drawn to them on the ground specified.

Draft State Pension Credit Pilot Scheme Regulations 2010

Summary: The instrument makes provision for a time-limited pilot exercise to trial making payments of State Pension Credit to a randomly selected sample group of 2,000 pensioners without them having first claimed the benefit. The pilot seeks to find out more about why the 1 million additional people who are believed to be entitled to Pension Credit do not claim it. At the end of the pilot in autumn of 2010, the evaluation phase will assess participants' reactions to receiving the payments and also the accuracy of the records used to estimate entitlement for the pilot. The evaluation will take some eighteen months to complete. The House may wish to note the experiment and look forward to receiving the results in due course.

These Regulations are drawn to the special attention of the House on the grounds that they give rise to issues of public policy likely to be of interest to the House.

1. The Department of Work and Pensions (DWP) has laid this instrument under the State Pension Credit Act 2002, along with an Explanatory Memorandum (EM).

2. The instrument makes provision for a time-limited pilot exercise to trial making payments of State Pension Credit to a randomly selected sample group of 2,000 pensioners without them having first claimed the benefit.

3. Pension Credit is a non-taxable, means-tested benefit that has been in existence since October 2003. It has two components:

    - The Guarantee Credit element of Pension Credit is available to anyone over 60 living in Great Britain and guarantees a minimum income by topping up people's weekly income to £130.00 for singles and £198.45 for couples.
    - The Savings Credit element provides extra money to those aged 65 and over. It is intended to reward savings by giving a cash addition of up to £20.40 per week for single pensioners and up to £27.03 per week for couples to those who have a second pension or modest savings. The Savings Credit element may be payable on its own or with the Guarantee Credit element depending on a person's financial circumstances.

4. In August 2009 around 2.7 million pensioner households (3.3 million individuals) were receiving Pension Credit, but DWP estimate that there are over 1 million more pensioners who are entitled that are not claiming it. Considerable resources have been dedicated to encourage this group to claim their entitlement, but with only limited success. The pilot seeks to find out more about why these people do not claim.

5. Using a database which collates data from HMRC and DWP and contains information about a range of income and capital sources, as well as other benefit information, DWP will create a list of those who appear to be entitled but are not already claiming Pension Credit and who are recorded as receiving a State Pension via a bank or Post Office Card Account. The participants will be randomly selected from that list. Those selected will be given advance notice that they will receive the payments, for a 12 week period. DWP have given an undertaking that they will not seek to recover any money paid to pilot participants, and that the payments will have no effect on other social security benefits.

6. At the end of the pilot in autumn of 2010, the evaluation phase will involve face-to-face interviews with a sub-sample of participants, and tracking of any claims for Pension Credit made by participants using administrative data. DWP will assess participants' reactions to receiving the payments and also the accuracy of the records used to estimate entitlement for the pilot. It is anticipated that the evaluation will take some eighteen months to complete.

7. These pilot arrangements are in complete contrast to the normal provision in Section 1(1) of the Social Security Administration Act 1992 which provides that no person shall be entitled to any benefit unless they make a claim for it in the manner, and within the time, prescribed. With this project in mind, DWP took specific powers in section 27 of the Welfare Reform Act 2009 to vary those provisions but it is it is limited to 12 months from the commencement date of this instrument and could not be rolled out more widely without further primary legislation. The House may wish to note the experiment and look forward to receiving the results in due course.

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

Summary: The purpose of this draft Order is to direct the Office of Communications (OFCOM) to carry out a package of spectrum management measures that will support the deployment of the next generation of mobile broadband services ("the Direction"). The Committee has received letters from four of the industry operators (see Appendix 1) expressing significantly different positions on the draft Order. The SI has been laid with an Impact Assessment which includes a 'Competition Assessment' which provides useful context on the operations of the main companies, including their revenue shares and their current holdings in the various frequencies. The House may wish to use the debate to ensure that the policy development process behind this SI is sound, including that: the consultation was full and effective; the lack of consensus will not hamper delivery against the Government's policy objective; and the Government is justified in proceeding with the Direction at this time.

This instrument is drawn to the special attention of the House on the ground that it gives rise to issues of public policy likely to be of interest to the House.

8. This draft order has been laid by the Department for Business, Innovation and Skills (BIS), together with an Explanatory Memorandum (EM) and Impact Assessment.

9. The purpose of the Order is to direct the Office of Communications (OFCOM) to carry out a package of spectrum management measures that

will support the deployment of the next generation of mobile broadband services ("the Direction"). The Order is to be made under section 5 of the Wireless Telegraphy Act 2006: the first time that this power for the Secretary of State to give Directions to Ofcom about its radio spectrum functions has been used. The Direction to OFCOM will require it to take a variety of actions in respect of existing spectrum holdings, competition and supporting the availability of higher speed mobile broadband services across the UK. The EM also says that the measures will enable the UK to meet its obligations under Directive 2009/114/EC and Commission Decision 2009/766/EC which deal with the liberalisation of certain frequencies to allow them to be used for different mobile phone technologies (EM paragraph 2.1).

10. The EM sets out the policy background for this draft Order (EM paragraphs 7.1 to 7.5). In its interim Digital Britain report in January 2009, the Government identified a set of challenges that were hindering the release and use of additional spectrum that could support the deployment of the next generation of broadband services. The Government subsequently appointed an Independent Spectrum Broker (ISB) to look at this issue. Following the ISB's report, the Government decided that the proposals represented a basis for further action, and would seek to take the matter forward through a Direction to OFCOM.

11. The Government was obliged to consult on the proposals and did so between 16 October 2009 and 8 January 2010. The EM says that the majority of respondents broadly welcomed the overall objectives of the spectrum modernisation programme, but given the complex nature of the issues and the differing positions of many of the stakeholders, there was a significant divergence of views around a number of proposals (EM paragraph 8.1). The IA says that Government intervention is considered necessary to find a broader solution to overcome the disagreements between operators (IA page 4).

12. The differences of opinion about this draft Order amongst operators are significant. The Merits Committee has received correspondence from four operators (Telefonica O2 UK Ltd; BT; Hutchison 3G UK Limited and Vodafone Ltd), all of which make a number of detailed points about the proposals (see Appendix 1). These include:

    - Telefonica O2 UK Ltd: say that they think the proposals are ultra vires as inadequate account has been taken in the consultation of the merger between Orange and T-Mobile. They also say that the Government's proposals for spectrum caps are inappropriate in the light of this merger, and the proposed wholesale access conditions in 900MHz licences are contrary to Community law.

    - Hutchison 3G UK Ltd: say that OFCOM has spent the last six years consulting on spectrum without reaching a consensus. But they believe the draft SI will deliver a range of benefits, including: enhanced competition; providing better mobile services for consumers and businesses; providing revenue for the Treasury; and maintaining UK competitiveness.

    - Vodafone Ltd: say that the Government are acting in haste and Parliament will not be able to scrutinise the Direction properly because full details of the EC undertakings regarding the T-Mobile

and Orange merger are not yet available. They also say that the Direction is illegal and open to challenge because it is incompatible with the EU Framework Directive and the Authorisation Directive.

- BT: say that the policy to extend the 3G licences in the hands of current holders appears to be underpinned by the principle that in return for continuing to hold these licences, an annual fee will be payable to Government, but that the draft SI makes no mention or provision for such a charging mechanism. They also say that the limits on frequency holdings which appear to be intended to ensure a better distribution of spectrum, including to new entrants, can be circumvented under the current proposals.

13. In considering the positions of the four operators set out in their evidence in Appendix 1, the House may wish to note the 'Competition assessment' section of the IA (IA pages 13 to 16). This provides useful context on the operations of the various companies, including their revenue shares and their current holdings in the various frequencies.

14. The House may wish to use the debate on this affirmative instrument to ensure that the policy development process behind the SI is sound. In particular, the House may wish to satisfy itself that:

- the consultation on these proposals has been full and effective;
- the lack of consensus amongst the various operators will not hamper delivery against the Government's policy objective; and
- the Government is justified in proceeding with the Direction at this time.

15. A significant amount of evidence has been presented to the Committee by four of the various industry operators. The House may therefore wish to take the different impacts on the various operators into account in satisfying itself that the proposals are fair and reasonable.

Social Security (Claims and Payments) Amendment Regulations 2010 (SI 2010/796)

Summary: Previous Regulations temporarily extended the scope of Support for Mortgage Interest (SMI) which is paid to home-owners who are claiming certain social security benefits and applied a standardised interest rate of 6.08%. DWP now find that 92% of current claimants have mortgage interest rates below 6.08%, over half are receiving payments that are at least 50% higher than the actual interest due to the lenders, and some 30,000 people are receiving at least four times the actual interest due. Consequently the value of the excess has built up over time and about 200 claimants per week are now asking lenders if they can access this money. These Regulations close the loophole to make clear that excess housing costs payments can only be credited to claimants' mortgage accounts, as intended, and that customers would have no legal grounds to draw excess payments from their mortgage accounts to use for other purposes. However in doing so, the Regulations confirm that excess payments can be applied to paying off the principal sum. This does not address the underlying problem, that, through the generous interest rate, taxpayers are now funding payments that not only Support Mortgage Interest but, for a significant proportion of claimants, begin to pay off capital, which was not the original policy intention.

These Regulations are drawn to the special attention of the House on the ground that they may imperfectly achieve their policy objective.

16. The Department for Work and Pensions (DWP) has laid these Regulations under sections of the Social Security Administration Act 1992, together with an Explanatory Memorandum (EM). They aim to close a loophole in the Support for Mortgage Interest scheme to make it clear that mortgage interest payments deducted from benefits and paid directly to the mortgage lender can only be used to meet housing costs.

17. Support for Mortgage Interest (SMI) is a long established benefit that can be paid to homeowners on Income Support, Pension Credit and income-based Jobseeker's Allowance and aims to cover all or part of the interest payments on their mortgage. Mortgage interest payments are made direct to the lender. The SMI payment is not intended to pay off the capital of the mortgage but may include help to pay interest on loans taken out for essential repairs or improvements to the home (for example, adding a bathroom or repairing a roof).[1]

18. Temporary changes to the scheme were made in 2009[2] to amend the loan ceiling limit to £200,000 and shorten the waiting periods to cope with the downturn in the economy. Those regulations also changed the interest rate on which SMI is calculated from Bank of England base rate plus 1.58% to a static 6.08%. This Committee had a number of concerns with those regulations and called the Minister in to give oral evidence on 3 February 2009 in the course of which she explained how DWP decided to fix the Standard Interest Rate (SIR) at 6.08% (Q27) and commented that, because lenders were now feeding through the fall in interest rates, "SIR was likely to pay some claimants a little bit of a surplus" (Q8).

19. The SIR is subject to review at six monthly intervals but has remained at 6.08%. At the end of 2009, DWP laid some correcting Regulations to address some significant over- and underpayments arising out of some flaws in the drafting of the scheme.[3] As the explanation of the financial impact of this remained vague, on 12 January 2010, we took evidence from a DWP Minister again. In written evidence in that report we asked about the interest rate:

> **Q4.** The original regulations set the interest rate at 6.08% for 6 months, and it was announced in the recent PBR that it would continue at this level for a further 6 months (Act Paper paragraph 36). This was thought to be overly generous when the first regulations were discussed in comparison to the mortgage rate. Given that the benefit is called Support for Mortgage Interest which implies that only the interest should be covered - what is the estimate

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[1] See for example, the section on SMI on the Directgov website:

http://www.direct.gov.uk/en/MoneyTaxAndBenefits/BenefitsTaxCreditsAndOtherSupport/On_a_low_income/DG_180321 or the Jobcentreplus website:

http://www.jobcentreplus.gov.uk/JCP/Partners/allowancesandbenefits/Dev_010056.xml.html which both state SMI is not available to pay the amount borrowed (only the interest on the mortgage paid)

[2] Social Security (Housing Costs Special Arrangements) (Amendment and Modification) Regulations 2008 (SI 2008/3195) report and oral evidence in our 5th report of session 2007-08

[3] Social Security (Housing Costs Special Arrangements) (Amendment) Regulations 2009 (SI 2009/3257) report and oral evidence in our 5th report of session 2008-09

of current outturn - ie how much is the average claimant receiving above the actual level of interest due on the sum mortgaged (up to 200k)?

A4. DWP does not have detailed information available on the individual interest rates payable by those receiving SMI and so is unable to provide information on the proportion of SMI recipients with mortgage interest rates above, at or below 6.08%. However, following the decrease in Bank of England base rates over the last year, we believe that the majority of customers are likely to have interest rates that are below 6.08%. It is not necessarily the case that SMI payments have helped to reduce a claimants' outstanding capital on their mortgages given that there is a waiting period before SMI can be paid and that some SMI recipients may well have accrued mortgage arrears before claiming benefit.

20. However according to the EM to the current Regulations, laid just two months later, 92% of current claimants are thought to have mortgage interest rates below the current standard interest rate of 6.08% and over half are receiving payments that are at least 50% higher than the actual interest due to the lenders.(EM paragraphs 7.7-8). Information received subsequently indicates some 30,000 customers are receiving four times the actual interest due (See Table 4 in Appendix 2). The value of the excess has built up over time (for illustrative amounts see Table 5, for example someone with a 4% mortgage rate on a £75,000 mortgage would receive a monthly excess payment of £130).

21. Consequently significant number of claimants, about 200 per week, are now asking their lender about this cash including whether they can have it "refunded" to them for other purposes. DWP understand that no actual refunds have been paid but the lenders have asked for the matter to be clarified in law.

22. These Regulations close one loophole so that excess housing costs payments can only be credited to claimants' mortgage accounts, as intended, and that customers would have no legal grounds to draw excess payments from their mortgage accounts to use for other purposes. We are not clear whether this prohibition can be applied retrospectively to the sums already accrued. However in doing so, the Regulations confirm that excess payments can be applied to paying off the principal sum. This does not address the underlying problem, that, through the generous interest rate, taxpayers are now funding payments that not only Support Mortgage Interest but, for a significant proportion of claimants, begin to pay off capital, which was not the original policy intention. On that basis we draw the instrument to the special attention of the House on the ground that it may imperfectly achieve its policy objective.

OTHER INSTRUMENTS OF INTEREST

Draft Code of Practice for the Welfare of Gamebirds Reared for Sporting Purposes

23. The Animal Welfare Act 2006 introduced a statutory duty of care on all owners and keepers to provide for the welfare and needs of their animals. This is the latest in a number of Codes of Practice aimed at helping owners

and keepers to fulfil their statutory duty. The Explanatory Memorandum (EM) says (paragraph 4.1) that Ministerial commitments were given during the passage of the 2006 Act to consult widely on the rearing of gamebirds to address the issue of the activity being outside the scope of regulations relating to on-farm poultry. The subsequent consultation received a high number of responses, with over 2,000 coming from individuals alone. The EM says (paragraph 8.2) that most respondees confined their views to the use of cages for breeding birds and that there will be an impact on users of cages, with the annual costs for industry being between £1.46 million and £2.47 million (EM paragraph 10.1). On this point the EM states that "the government decided that the form of wording on the housing of breeding pheasants and partridges should specify space allowances, so removing the smaller cages but enabling the larger partridge boxes to continue to be used" (paragraph 8.4).

Childcare (Exemptions from Registration) (Amendment) Order 2010 (SI 2010/744)

24. This Order amends the Childcare (Exemptions from Registration) Order 2008 so as to exempt from registration under the Childcare Act 2006 ("the 2006 Act") a further category of childminding. This category is childminding for the children of friends where this is not provided in return for a payment of money or money's worth. The Explanatory Memorandum (EM) says (paragraph 7.4) that the Government does not believe that it is appropriate to regulate informal care arrangements between friends where there is no monetary payment; and the purpose of the SI is to clarify this by formally exempting such arrangements from the requirement to register with Ofsted under the 2006 Act. There was a public consultation on the proposal between 3 December 2009 and 31 January 2010, and the EM provides a summary of the responses (paragraph 8.4 to 8.17). The House may be interested to note that the responses in favour and against the proposal were very finely balanced (128 in favour and 127 disagreeing).

British Nationality (General) (Amendment) Regulations 2010 (SI 2010/785)

25. These Regulations amend the British Nationality (General) Regulations 2003, part of which make provision for determining whether a person has sufficient knowledge of language and life in the UK for the purpose of an application for naturalisation as a British Citizen. The Explanatory Memorandum says (paragraph 7.2) that there is evidence that there has been some misinterpretation and abuse of the existing requirements by unaccredited private sector language schools. The changes introduced by this SI include: an express requirement that qualifications for the purpose of naturalisation as a British citizen are to be taken at an accredited college; and an express requirement to demonstrate progress in knowledge of language dependent upon the applicant's level on initial assessment.

Family Proceedings (Amendment) Rules 2010 (SI 2010/786)

Family Proceedings Courts (Children Act 1989) (Amendment) Rules 2010 (SI 2010/787)

26. The Practice Direction Guide to Case Management in Public Law Proceedings came into force on 1 April 2008 to help reduce unnecessary

delays in care and supervision proceedings for children. It was reviewed a year after its implementation, and as a result these Rules make changes to reduce the documentary requirements and improve the forms. In addition, it was considered that greater emphasis needed to be given to the Timetable for the Child, and further guidance on this is to be provided. We regard the prompt review of a new system using a process that involves a wide range of interested parties as an example of good practice.

Retention of Knives in Court Regulations 2010 (SI 2010/790)

The Retention of Knives in Court Regulations 2010 (Northern Ireland) (SR105)

27. In January 2010, 1936 knives were seized from those entering court buildings, but under current legislation these implements either have to be returned to the person when they leave or can only be retained for 24 hours to allow the knife to be referred to the police. Following a change in the law made by the Coroners and Justice Act 2009, these Regulations now set out procedures for courts to seize and retain knives for 28 days and dispose of them if their return is not formally requested.

Community Legal Service (Financial) (Amendment No.2) Regulations 2010 (SI 2010/818)

28. Legal aid is not normally available at inquests. However, in exceptional circumstances, funding may be made available for any excluded service via individual authorisations by the Lord Chancellor, if the Legal Services Commission recommends it. This instrument allows the restriction for applicants who are not related to the deceased and the financial eligibility criteria to be disregarded, so that survivors of the 7th July bombings may receive legal aid to participate in the forthcoming inquest.

Audiovisual Media Services (Product Placement) Regulations 2010 (SI 2010/831)

29. In our first report of this session we informed the House that DCMS was conducting a consultation exercise on whether product placement should be allowed in television programmes in the UK. That process has now concluded and these Regulations permit product placement in programmes transmitted after 16th April. Restrictions apply to both the types of programme which can include product placement, for example not in news or current affairs programmes, and to the types of products that can be promoted: for example tobacco, alcohol, medicines, high fat foods and gambling services are all prohibited. There were 1486 responses to the most recent consultation. The Committee notes that in pursuing this initiative the DCMS has given greater weight to a small number of media respondents who saw commercial advantage in the proposal than to the approximately 1300 objections which were sent in by e-mail as part of three coordinated campaigns. The Explanatory Memorandum sums up the consultation thus: "the broadcasting and advertising industries generally supported product placement ... civil society organisations and the individual responses were overwhelmingly hostile"(paragraph 8.4).

Statement of Changes in Immigration Rules (HC 439)

30. The purpose of this statement is to make a number of changes to the various Tiers of the Points-Based System as well as other changes to the Immigration Rules. In a recent consultation document, "Simplifying Immigration Law: A New Framework for Immigration Rules" (November 2009), the UK Border Agency committed to scheduling routine Rules changes for April and October. This is the first package of changes to have been co-ordinated on that basis. The Explanatory Memorandum says (paragraph 3.1) that they believe the new initiative will assist Parliament, the public, business and applicants. The EM also says (paragraph 3.1) that there has been a delay in laying the Statement because the new process is bedding in, and the Government regrets that it has therefore not been able to comply with the convention that changes should be laid before Parliament no less than 21 days before they will come into force.

PROCEEDS OF CRIME ACT 2002 (REFERENCES TO FINANCIAL INVESTIGATORS) (AMENDMENT) ORDER 2009 (SI 2009/2707): FURTHER CORRESPONDENCE

31. This SI lists those who are accredited financial investigators for the purposes of the relevant powers under the Proceeds of Crime Act 2002 ("the 2002 Act"). It replaces a previous Order which came into force in May 2009, but gives some agencies powers they did not have previously.

32. The Committee identified this SI as an instrument of interest in its 31st Report of Session 2008-09, highlighting the lack of broad consultation in the development of the SI. Possibly more importantly however, the House will recall that some key stakeholders were concerned with some of the proposals: comments from the Chairman of the Police Federation were reported in The Times[4]; and the Chief Executive of the British Bankers Association wrote to the Home Office [5th Report of this Session, Appendix 6]. A motion calling for the SI to be revoked was carried in the House on 7 December 2009, and Lord Brett's subsequent Ministerial statement set out the steps the Government would take to address the House's concerns.

33. The Committee has received a letter from the Home Office, addressed to the former chairman of the Committee. This is printed at Appendix 3 as the House may be interested to note developments since the debate on 7 December.

34. Lord Brett had suggested in his statement that a draft of a circular to accredited financial investigators would be cleared with the Committee. In a subsequent exchange of correspondence with Lord Brett and the Leader of the House, the Chairman made it very clear that the Committee's role is not to assess the content of draft circulars [5th Report of this Session, Appendix 5]. However, the Home Office have now enclosed a draft of the circular and said that they would welcome any comments we may have. The Chairman has taken the decision not to circulate the draft circular to the Committee.

35. This is clearly a disappointing development and the Chairman has written again to the Government to reiterate that their offer is outside the remit of

[4] 'Councils get 'Al Capone' power to seize assets over minor offences': The Times 28 October

the Committee. The House is invited to note that the Committee expresses no view whatsoever on the draft circular or sanctions the actions of the Government on this matter more generally.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the instruments set out below and has determined that the special attention of the House need not be drawn to them.

Draft Instruments requiring affirmative approval

Draft Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2010

Draft Instruments subject to annulment

Draft Code of Practice for the Welfare of Gamebirds Reared for Sporting Purposes

Instruments subject to annulment

SI 2010/662 Housing and Regeneration Act 2008 (Penalty and Compensation Notices) Regulations 2010

SI 2010/663 Housing Management Agreements (Break Clause) (England) Regulations 2010

SI 2010/676 Environmental Permitting (England and Wales) (Amendment) Regulations 2010

SI 2010/720 Health Act 2009 (Powers in Relation to NHS Bodies - Consequential Amendments) Regulations 2010

SI 2010/723 Policing and Crime Act 2009 (Consequential Provisions) (England) Order 2010

SI 2010/725 Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2010

SI 2010/726 Human Fertilisation and Embryology (Procedure on Applications and Execution of Warrants) Regulations 2010

SI 2010/728 Measuring Instruments (EEC Requirements) (Fees) (Amendment) Regulations 2010

SI 2010/732 Insolvency Proceedings (Fees) (Amendment) Order 2010

SI 2010/738 School Teachers' Incentive Payments (England) Order 2010

SI 2010/739 Diseases of Animals (Approved Disinfectants) (Fees) (England) Order 2010

SI 2010/740 Detergents Regulations 2010

SI 2010/743 National Health Service Trusts (Consultation on Establishment and Dissolution) Regulations 2010

SI 2010/744 Childcare (Exemptions from Registration) (Amendment) Order 2010

SI 2010/745 Biocidal Products (Amendment) Regulations 2010

SI 2010/751 Tax Credits (Miscellaneous Amendments) Regulations 2010

SI 2010/752 Council Tax and Non-Domestic Rating (Amendment) (England) Regulations 2010

SI 2010/761 European Communities (Designation) Order 2010

SI 2010/775 M20 Motorway (Junctions 4 to 7) (Variable Speed Limits) Regulations 2010

SI 2010/782 UK Border Agency (Complaints and Misconduct) Regulations 2010

SI 2010/783 Volatile Organic Compounds in Paints, Varnishes and Vehicle Refinishing Products (Amendment) Regulations 2010

SI 2010/784 Asylum Support (Amendment) Regulations 2010

SI 2010/785 British Nationality (General) (Amendment) Regulations 2010

SI 2010/786 Family Proceedings (Amendment) Rules 2010

SI 2010/787 Family Proceedings Courts (Children Act 1989) (Amendment) Rules 2010

SI 2010/788 Social Security Benefit (Persons Abroad) (Amendment) Regulations 2010

SI 2010/789 Education (Publication of Draft Proposals and Orders) (Further Education Corporations) (England) (Amendment) Regulations 2010

SI 2010/790 Retention of Knives in Court Regulations 2010

SI 2010/791 Copyright Tribunal Rules 2010

SI 2010/792 Schedule 39 to the Finance Act 2002 and Recovery of Taxes etc Due in Other Member States (Amendment) Regulations 2010

SI 2010/801 Transmissable Spongiform Encephalopathies (England) Regulations 2010

SI 2010/804 Goods Vehicles (Licensing of Operators) (Temporary Use in Great Britain) (Amendment) Regulations 2010

SI 2010/807 Health and Social Care Act 2008 (Commencement No. 16, Transitory and Transitional Provisions) Order 2010

SI 2010/811 Notification of Conventional Tower Cranes (Amendment) Regulations 2010

SI 2010/817 Police Act 1997 (Criminal Records) (Amendment) Regulations 2010

SI 2010/818 Community Legal Service (Financial) (Amendment No. 2) Regulations 2010

SI 2010/826 Social Security Benefits Up-rating Regulations 2010

SI 2010/828	Banking Act 2009 (Inter-Bank Payment Systems) (Disclosure and Publication of Specified Information) Regulations 2010
SI 2010/831	Audiovisual Media Services (Product Placement) Regulations 2010
SI 2010/832	Armed Forces (Redundancy, Resettlement and Gratuity Earnings Scheme) (No. 2) Order 2010
HC439	Statement of Changes in Immigration Rules

Instruments subject to annulment (Northern Ireland)

SR 2010/59	Carriage of Explosives Regulations (Northern Ireland) 2010
SR 2010/104	Valuation Tribunal (Amendment) Rules (Northern Ireland) 2010
SR 2010/105	Retention of Knives in Court Regulations (Northern Ireland) 2010
SR 2010/116	Judgement Enforcement (Amendment) Rules (Northern Ireland) 2010

APPENDIX 1: DRAFT WIRELESS TELEGRAPHY ACT 2006 (DIRECTIONS TO OFCOM) ORDER 2010

Submission from BT

Summary

The policy to extend 3G licences in the hands of current holders appears to be underpinned by the principle that in return for continuing to hold these licences, an annual fee will be payable to Government. However, this Statutory Instrument (SI) makes no mention or provision for such a charging mechanism.

The limits on frequency holdings which appear to be intended to ensure a better distribution of spectrum, including to new entrants, can be circumvented under the current proposals.

Key issues arising as a result of the SI:

3G licence extension

- licences in the 2100MHz range which were due to expire in 2021 will be extended indefinitely;
- BIS has previously announced that the UK Government would be able to recover the value of extending the licences through means of an annual Administrative Incentive Pricing (AIP) charge;
- the SI makes no provision for introducing such a charge;
- this means it would allow current licence holders to keep the spectrum indefinitely without any charge.

Combined spectrum holdings

- limits are specified on the amount of spectrum that a company may hold as a result of the Combined Auction (i.e. across various spectrum bands) that Ofcom is required to conduct as a result of the SI;
- companies holding or bidding for spectrum in excess of these limits must commit to surrendering sufficient spectrum to stay within the limits;
- but there is a 2 year period before surrendered spectrum must be returned;
- this means that the specified limits could be exceeded for 2 years;
- in particular, licences granted in respect of the 2600MHz band come into force immediately, so the holding limit could be breached for a full 2 years;
- the same may apply to licences in the 800MHz band, although it is not clear when those licences would come into force;
- the imminent merger of two major Mobile Network Operators raises real concerns, since the merged entity already holds spectrum which is only marginally below the limit introduced by the SI.

Drafting issues

- a 'relevant network provider' is defined in article 3 in a way that appears to embrace satellite systems or High Altitude Platforms, whereas the BIS policy objective is to refer only to terrestrially based networks;
- the 'combined auction' is defined in article 3 with a cross reference to article 7, but that does not help clarify the definition (article 8 may be a better cross reference);

- in article 14(3)(a) no date is given from which the 90% population coverage condition on re-auctioned 2.1 GHz licences must apply.

Introduction

BT respectfully invites the Committee to consider the issues described within this submission on the grounds that they may render the draft SI defective. The draft wording of the statutory instrument was not made available by the Department for BIS for public consultation in advance of its submission to Parliament. The issues raised appear to be relevant to the following point in the Terms of Reference of the Committee for which matters may be drawn to the special attention of the House:

(3) (d) that it may imperfectly achieve its policy objectives.

1. Variation of 900MHz, 1800MHz and 2100MHz licences

Article 4(4)(c) of the draft Order has the effect of requiring Ofcom to implement an indefinite extension of the 2100 MHz licences that were awarded by auction in 2000 and expire in 2021.

We note that the complementary element of the BIS policy proposals to charge annual Administrative Incentive Pricing (AIP) to attempt to recover value for these extended licences is absent from these regulations and thus the effect of the regulations is to award these licence extensions for free.

2. Limits on frequency holdings

Article 9(2) specifies limits on the amount of spectrum that a person may hold as a result of the Combined Auction required under this SI. **Article 9(4)** allows for holdings or bids above these limits so long as a commitment is made to surrender sufficient spectrum to return the holding to within the specified limits. However, **article 13** allows 2 years for such surrendered spectrum to be given up. Thus, as a result of the auction, the limits specified could actually be exceeded for 2 years rendering the clauses contradictory and also failing to implement the intended policy of a 2x90MHz (180MHz) cap on spectrum holdings.

The problem might, on a generous interpretation of **article 14(1)**, be argued not to occur in the case of bidding for 900/1800/2100MHz spectrum, as those licences would come into force 2 years after the auction and it could be debatable as to whether a person "holds" such spectrum when the licence is issued or when it comes in to force. However, if 2.6GHz (and indeed 800MHz) spectrum is purchased on the basis of surrendering other spectrum, the limits on frequency holdings could be broken immediately. In the case of acquiring 2.6GHz spectrum the limit on spectrum holding could be breached for a full 2 years since those licences are not delayed before entering force. The situation is less clear if 800MHz spectrum is acquired since it is unclear in the regulations as to when those licences would enter force.

The issue is particularly pertinent since following the imminent merger of two MNOs that was recently approved conditionally by the European Commission, that merged entity would (before divestment of spectrum required as a condition of the merger) already hold 170MHz of spectrum. It is entirely unclear as to how the (yet unpublished) details of the spectrum divestiture will be taken into account in the application of these regulations, as these regulations appear to be in direct contradiction to the European Commission decision.

In summary, articles 9(2), 9(4) and 13 are inconsistent, at least in the case of a bidder acquiring 2.6GHz spectrum, and will enable the cap on total spectrum holdings of 180MHz to be breached for up to 2 years. This will harm the ability of other parties to

secure spectrum at auction and is not in line with the policy objectives for limits on spectrum holding set out by BIS in its Decisions.

3. Definition of "relevant network provider"

In **article 3** (Interpretation) the definition of "relevant network provider" appears to be sufficiently broad that many types of Electronic Communications Networks including future professional mobile radio (e.g. TETRA systems), satellite systems or High Altitude Platforms providing mobile telecommunications services would be included, whereas it is our understanding that the policy objective is to refer only to terrestrially based public mobile networks.

4. Definition of "Combined auction"

In **article 3** (Interpretation) the 'combined auction' is defined with a cross reference to article 7, but that does not help clarify the definition (article 8 may be a better cross reference).

5. Licence conditions

In **article 14(3) (a)** no date is given from which the 90% population coverage condition on reauctioned 2.1 GHz licences must apply.

26 March 2010

Submission from O2

We, Telefonica O2 UK Ltd ("O2"), write concerning the above draft Statutory Instrument ("the proposed Order") and Government response to consultation. As outlined in this letter, O2 believes that in its present form the proposed Order is ultra vires and unlawful under European and domestic law.

O2 understands that the House of Lords Select Committee on the Merits of Statutory Instruments will be considering the proposed Order at its next meeting on Tuesday, 23 March 2010. In light of the nature of O2's concerns, we have written to the Committee outlining the relevant elements of the Statutory Instruments and the reasons why they are unlawful.

Separately, we have today written to the Secretary of State for Business, Innovation and Skills providing him with the same information.

Lawfulness and fairness of consultation

O2 considers that the proposed Order has been produced following an inadequate and unlawful consultation process, and as such is ultra vires the Wireless Telegraphy Act 2006 ("WTA 2006").

Consultation in the area of telecommunications regulation is required by European Community law. Article 6 of Directive 20O2/21/EC ("the Framework Directive") requires Member States to ensure that where national regulators intend to take measures which have a significant impact on the market, they give interested parties the opportunity to comment on the draft measure within a reasonable period.

In the present context this requirement is given effect by section 6(2) of WTA 2006, which requires the Secretary of State to consult before making any order for directions under section 5 of that Act. An order without such consultation would be invalid and *ultra vires*. The consultation required under section 6(2) is, of course, a lawful, full and proper consultation (in the sense understood and defined by the Courts).

Shortly before Government's publication of its October 2009 *Consultation* on a Direction to Ofcom (the "Consultation"), two of the five incumbent mobile network operators, T-

Mobile and Orange, announced proposals for a joint venture which could radically affect the competitive dynamics of the market. In the *Consultation,* Government recognised that a merger might affect the proposals which were subject to consulting, but expressly signalled that the consultation would treat the possibility of the merger as an open question:

> *'Any such joint venture, should it proceed, will be subject to review by the competition authorities and the outcome of any such review is uncertain. It has been suggested that the Government might delay a Direction until such time as there is certainty on the outcome of any joint venture proposal. The Government has considered this suggestion, but is of the view that any such delay would be unlikely to benefit either consumers or industry.*
>
> *As the Competition Authorities are independent of Government, any decision on the joint venture, or any remedies that might be applied to allow the joint venture to proceed, will be a matter for them. However, if remedies are applied then there is a possibility that these will have implications for the proposals the Government is consulting upon. The Direction will therefore need to allow sufficient latitude for Ofcom to act in the most appropriate manner in the light of any remedies imposed by the Competition Authorities' (§§3.7-3.8).*

The T-Mobile-Orange proposed merger was notified to the European Commission on 11 January 2010. Government's *Consultation* closed on 5 February 2010, before the Commission had reached any decision.

On 1 March 2010, the European Commission decided to approve the T-MobileOrange merger subject to competition remedies, including the divestment by the joint venture of 2x15MHz of spectrum ("the Merger Decision"). A press release to that effect was issued on 1 March, but a non-confidential version of the Merger Decision has yet to be made available; indeed, O2 understands that not even Government has yet seen the full decision, and indeed the merger has yet even to complete (we understand that it is not scheduled to do so until the end of April).

Little more than a week later, on 10 March 2010, Government published its Response to the Consultation together with the proposed Order. Government noted in the Response that the Merger Decision 'has been taken into account in the Government response and subsequent direction' (§10), not least because that decision is 'obviously relevant to any decisions now taken' (§11 0).

The detailed terms of divestiture process for this spectrum (not just the quantum of the spectrum to be divested) which has yet to be set out in a published Merger Decision, will have important implications for the Government's proposals and in particular the competitive position going forward. However, the Government has given no opportunity to O2 or to any other stakeholder to comment on the Merger Decision or how it should be taken into account in the proposed directions to Ofcom, notwithstanding the decision's admitted relevance to and influence on the Government's thinking, and even though it is plain that the Merger Decision fundamentally changed the terrain upon which the Consultation had been premised such as, of itself, to call for modification of the proposals in the Consultation. This is an obvious breach of the Government's duty to carry out a fair consultation under European and domestic law: cf. Interbrew v Competition Commission [2001] ECC 40, §§62, 86 and 90, and Edwards v Environment Agency [2006) EWCA Civ 877, [2007] Env LR 9, §103.

O2's principal, particular concerns about this failure in consultation relate to the spectrum caps provided for at Article 9(2) of the proposed Order: O2 believes that the current proposals are inappropriate in light of the Merger Decision, and O2 has the right to explain why. However, O2's own position is subsidiary to the more fundamental point that until the Secretary of State completes a lawful consultation (which he has not done).

he has no power to make the proposed Order under section 5 of WTA 2006, and the proposed Order is ultra vires.

Proposed wholesale access conditions in 900MHz licences are contrary to Community law

O2 has further, specific concerns about the lawfulness of Article 4(2), subparagraphs (b) to (d) of the proposed Order: O2 believes that these provisions are inconsistent with and unlawful under Article 6 of Directive 20O2l20/EC ("the Authorisation Directive").

By Article 4(2Xb}-(d) of the proposed Order, Government would direct Ofcom to exercise its powers under section 10 and Schedule 1 of the 2006 Act to oblige licensees of 900MHz spectrum to offer wholesale access services on UMTS900 systems to other mobile network operators which have obtained an 800MHz licence at the spectrum auction defined elsewhere in the Order.

There are two key elements to this proposed obligation:

- To provide wholesale access services, for an indefinite period in rural areas, where -rural areas is defined at Article 3, to the extent that the 900MHz licensee itself has deployed UMTS900 systems for its own retail purposes (Art. 4(2)(b)); and
- For a time limited period from 31st March 2013 to a date two years after the granting of licences from the auction of 800MHz spectrum, wholesale access services are to be provided across the whole footprint of the 900MHz licensee's UMTS900 deployment (Art. 4(2)(c)).

It should be noted that the obligation is an onerous and enduring one.

Article 6(1) of the Authorisation Directive restricts the kinds of conditions to which Member States may subject radio-telecommunications licences:

> *'The general authorisation for the provision of electronic communications networks or services and the rights of use for radio frequencies and rights of use for numbers may be subject only to the conditions listed respectively in parts A. Band C of the Annex. Such conditions shall be objectively justified in relation to the network or service concerned, non-discriminatory, proportionate and transparent'*

The relevant part of the Annex to the Directive (Part B) accordingly sets out an exhaustive list of 'Conditions which may be attached to rights of use for radio frequencies':

> *'1. Designation of service or type of network or technology for which the rights of use for the frequency has been granted, including, where applicable, the exclusive use of a frequency for the transmission of specific audiovisual services.*
>
> *2. Effective and efficient use of frequencies in conformity with Directive 20O2l211EC (Framework Directive), including, where appropriate, coverage requirements.*
>
> *3. Technical and operating conditions necessary for the avoidance of harmful interference and for the limitation of exposure of the general public to electromagnetic fields, where such conditions are different from those included in the general authorisation.*
>
> *4. Maximum duration in conformity with Article 5 of this Directive, subject to any changes in the national frequency plan.*
>
> *5. Transfer of rights at the initiative of the right holder and conditions for such transfer in conformity with Directive 20O2/21/EC (Framework Directive).*
>
> *6. Usage fees in accordance with Article 13 of this Directive.*
>
> *7. Any commitments which the undertaking obtaining the usage right has made in the course of a competitive or comparative selection procedure.*
>
> *8. Obligations under relevant international agreements relating to the use of frequencies.'*

Item 7 in Annex 8 is the only possible basis under which an obligation of the kind contained in Article 4(2)(b)-(d) of the proposed Order could be imposed, because of the broad scope of the term "commitments". However, it is clear from 8.7 that commitments can be secured only in relation to a usage right that is being auctioned or awarded through some competitive process. A licensee cannot have commitments imposed on it at the will of the Secretary of State.

When O2 was assigned its 900MHz licences in the 1990s, O2 did not give any of the commitments set out in Article 4(2)(b)-(d) in exchange for obtaining these usage rights, as required by the Authorisation Directive. The Secretary of State cannot lawfully impose (or require Ofcom to impose) the conditions contained in those provisions. Consequently, the Secretary of State has no legal power to make directions in the terms of Article 4(2)(b)-(d), and these provisions are ultra vires on this independent ground.

The way forward

In light of the fact that the Secretary of State has not yet conducted a lawful consultation on the Merger Decision, it is inappropriate for Government to ask Parliament to make the proposed Order in its current form. Those aspects of the proposed Order to which the Merger Decision is relevant and which that Decision has influenced require further consultation, and would, without such consultation, be ultra vires. O2 has accordingly invited Government to withdraw these parts of the proposed Order and to conduct a short further consultation as soon as the full text of the Merger Decision is available.

Furthermore, O2 has asked Government to reconsider Article 4(2)(b)-(d) of the proposed Order, not only because the Merger Decision is relevant to those provisions but on the independent ground that they are unlawful under European Community law and would be *ultra vires* the Secretary of State's powers of direction for that reason.

As set out in the Explanatory Memorandum to this 51, this is the first time that the Secretary of State's powers under section 5 of the Wireless Telegraphy Act 2006 have been used. We trust that in such circumstances that the Committee will give this 51 the appropriate level of scrutiny.

16 March 2010

Further submission from O2

Further to Telefónica O2 UK Limited ("O2")'s letter of 16th March, regarding the initial version of this Order, I can confirm that O2 wishes for that letter to be placed as evidence before the Committee. The concerns that O2 expresses in that letter, particularly about *vires*, are unaffected by the revisions to the SI contained in the present version.

In addition, O2 would like to draw one drafting error to the attention of the Committee.

The Purpose of the Directions at Article 2 includes "*maximising the coverage*" of next generation wireless mobile broadband and "*creating greater investment certainty for operators*".

To that end, a series of Conditions and Retail Service Obligations are specified at Articles 4(4)(a), 14(3)(a) and 15(2).

Under Articles 4(4)(a) and 15(2) the compliance date for these obligations is clearly stated, respectively as "*30th June 2013*" and "*3 years after the relevant 800MHz licence comes into force*". However, in the case of Article 14(3)(a), whilst the level of service is specified in a form identical to that in Article 4(4)(a), no compliance date is specified.

In O2's submission this would lead to an imperfect implementation of the Purpose set out for these Directions because it creates considerable uncertainty as to the what compliance date (if any) Ofcom is required to insert in the relevant obligation:

1. Is Ofcom free to choose the compliance date itself? If so, Ofcom may subsequently determine that a compliance date well beyond that set out in Article 4(4)(a) is appropriate – this would fail to "*maximise coverage*" in a temporal sense. Alternatively, Ofcom might decide that in order not to discriminate unduly against existing 2100MHz licensees a compliance date of 30th June 2013 is required.

2. Alternatively, is Ofcom required to insert an obligation for immediate compliance? That would appear to be the literal meaning of the wording of the SI, but this would be a surprising and impracticable result.

Given the range of possible interpretations, it is O2's submission that this Article fails to "*maximise the certainty for investors"* and consequently the SI as drafted imperfectly achieves its policy objectives.

26 March 2010

Submission from 3

Ofcom has spent the last six years consulting on spectrum without achieving consensus. Meanwhile Kip Meek, the Independent Spectrum Broker (ISB), has described spectrum as a "policy orphan". Unless the ISB proposals are implemented now (after 18 months of discussion and four months of public consultation) then the likelihood of a resolution being found in the next few months is negligible.

The Independent Spectrum Broker's proposals will:

1. Enhance competition.

The issues around the release of new spectrum and liberalising the use of existing 900MHz and 1800MHz spectrum have to be considered together in order to maintain a competitive market. New entrants can bid for the new spectrum. Restrictions have been placed on bidding by existing spectrum holders to make sure they don't gain an unfair share of spectrum, this will assist new entrants in the spectrum auctions.

2. Maintain UK competitiveness

Other European Countries have already begun to rollout next generation mobile services. Rollout of the new technologies will take a further 2-3 years even once spectrum is allocated/liberalised, delaying now will mean the UK will fall further behind.

3. Provide revenue to the Treasury

There will be a return to the Treasury and the Tax Payer from the auction for 2.6GHz & 800MHz spectrum and from the Administered Incentive Pricing (AIP) that will become payable on the 2.1GHz (3G) licences and continue to apply to 900MHz and 1800Mhz licences.

4. Provide better mobile services for consumers and businesses

In order to achieve increased broadband coverage the ISB proposed:

- In return for extending the current 2.1GHz (3G) licences, operators will be required to provide 90% population coverage.
- 2.1GHz licence holders will be required to provide a minimum speed.
- Operators who acquire the new 800Mhz spectrum or any 900GHz spectrum that is released will be required to provide 99% population coverage.

- Holders of 800 or released 900 spectrum will be obliged to provide wholesale access to other operators, thereby expanding the choice of provider further.
- Holders of 800 or released 900 spectrum will be required to provide a guaranteed minimum speed.

Wouldn't the auctions raise more money if spectrum was sold off individually rather than as a combined package?

A choice has to be made as to what the main objective of spectrum allocation is. Is it about raising revenue or is it about delivering universal broadband and enhancing competition to the benefit of consumers? Piecemeal sales will delay the availability of mobile broadband services, give an advantage to some operators and wreck competition in the mobile market to the detriment of consumers.

Don't we lose money by not having a second auction of the 3G licences?

No, because the licence holders will have to pay Administrative Incentive Pricing (AIP) from the end of the current licence term which will provide an ongoing source of revenue. AIP will be set at a level that reflects the economic value of the spectrum. More worryingly if the licences were re-auctioned then the existing operators would have to choose whether or not to bid for the new spectrum which could mean fewer bidders in the auctions for 2.6GHz & 800, meaning lower revenue from, or possibly even the failure of, those auctions.

Doesn't the Orange T-mobile merger mean we have to reconsider the proposals?

The Orange/T-Mobile merger and the possibility of remedies from the competition authorities were

contemplated in the consultation on the ISB's proposals. It was envisaged that if Orange and T-Mobile merged and then succeeded in the spectrum auction, the merged entity would have to divest 2 x 10 MHz of 1800 spectrum. When the Commission determined the Orange/T -Mobile merger they decided that in order to preserve competition in the UK mobile market, the merged operator should be required to divest an additional 2 x 5 MHz of 1800 spectrum on top of what the ISB had already proposed. Having secured the additional divestment, both the European Commission and the Office of Fair Trading are content that the competition impacts of the merger are now fully satisfied.

In reality the merger only serves to validate the overall objectives of the ISB's proposals (i.e. to expedite transition to next generation mobile to benefit consumers and to sustain competition in the UK by taking appropriate steps to limit the concentration of spectrum). It was this need to balance overall spectrum holdings and to protect competition that underpinned the work of the ISB from the outset.

Public Policy outcomes

Once the SI is agreed the proposals require no further legislative time but will deliver key public policy outcomes:

- The proposals will enable the digital economy to play its part in Britain's economic recovery and sustained growth, as well as guaranteeing significant investment from those operators rolling out networks to use the spectrum.
- Provided the auction occurs early in the next Parliament, mobile broadband speeds of around 4Mbps across UK and more than 50 Mbps in many urban areas coupled with universal mobile broadband coverage could be in place, or being delivered at the time of the 2014/15 General Election.

March 2010

Submission from Vodafone

Vodafone wishes to draw the Committee's attention to the above Statutory Instrument ('the Direction') which was laid before Parliament on 10 March 2010 by the Department for Business, Innovation and Skills ('BIS'). The Direction is made under section 5 of the Wireless Telegraphy Act 2006.

For the reasons set out in this letter, and in more detail in the attached Annexe, we urge the Committee to draw the deficiencies of the Direction to the attention of the House. In summary, these are:

- The Government is acting in haste and risks damaging the long term position for mobile broadband services in the UK. The Direction therefore fails to achieve the policy objectives laid down in the Digital Britain report: the successful deployment of next generation mobile broadband networks and the maintenance of the competitive intensity in the UK market because it restricts, without valid reason, Vodafone's future access to the spectrum required to operate such networks through the imposition of a spectrum cap.
- The Direction has been laid only a week after the merger between Orange and T-Mobile has been cleared and before the full details of the undertakings required by the European Commission are available; this means that Parliament is unable to scrutinise the Direction properly.
- The Direction is itself illegal and open to challenge because it is incompatible with the EU Framework Directive and Authorisation Directive. The Secretary of State is therefore giving an illegal Order to Ofcom.

The current spectrum allocations in the UK are shown in the diagram *[not printed]* below, which shows the amount of spectrum at each frequency that is used by each operator.

As you will no doubt be aware, the European Commission cleared the joint venture between Orange and T-Mobile (the 'JV') on 1 March 2010. Vodafone has been very concerned to ensure that the anti-competitive effects of the consequent concentration in spectrum allocations received full and thorough scrutiny by the competition authorities. As a consequence of this process we now know that 2x15MHz of 1800MHz spectrum will be divested by the JV in a single lot (i.e. only purchasable by a single party), although the precise details of the divestment procedure are not yet known because the Commission's decision has yet to be published.

The Commission's decision to require a divestment of spectrum was a positive step, however it is now crucial to ensure that the effect of that spectrum divestment is not reversed by the Direction. Unfortunately, this is the effect of the proposed Direction; it will result in a significant weakening of competition because it prevents one of the existing mobile operators from accessing additional radio spectrum in the so-called 800MHz band (this is the spectrum released by the digital switchover from analogue to digital TV) to build a next generation mobile broadband network (4G).

As set out in more detail in the Annexe, the Government (or Ofcom) can only exclude Vodafone from the Digital Dividend auction if there is a "*a strong competition case*".[5] These are BIS's own words, but no such case has been put forward as to why Vodafone has a superior spectrum position in a four player market where Digital Dividend spectrum is being purchased for use with 4G "Long Term Evolution" (so-called "LTE") mobile broadband technology.

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[5] 'Impact Assessment for the Digital Britain Final Report' June 2009 (see pages 80 and 81 which discussed the option of preventing Vodafone and O2 from purchasing 800MHz spectrum without having to relinquish equivalent amounts of their existing holdings in the 900MHz band)

The European Commission's decision to require a divestment of spectrum by the JV is based on the fact that LTE technology requires large contiguous blocks of spectrum in order to be effective (at least 10MHz but preferably 20MHz blocks). The JV's 2x45MHz holding is all in one contiguous block, while Vodafone's (and O2's) spectrum is in two blocks (17.5MHz at 900MHz and 5.8MHz at 1800MHz). The precise rationale for the European Commission's decision to require a spectrum divestment is not yet published, but the Office of Fair Trading ("OFT") did publish its reasons for requesting that the JV be referred to the United Kingdom authorities for further investigation. The OFT clearly came to the view that the JV will be able to launch an LTE network using a 2x20MHz block of spectrum and that rivals need to be able to do the same in order to be able to compete in next generation mobile broadband.

Vodafone and O2 only have 2x17.5MHz of 900MHz spectrum and this spectrum is heavily utilised by voice and data traffic. This traffic is not expected to start declining for several years and so Vodafone will not be able to clear sufficient spectrum to use its 900MHz spectrum for LTE in anything but the very long term[6]. The fundamental issue is that without further spectrum in the 800MHz or 1800MHz bands, Vodafone simply does not have enough contiguous spectrum to build an LTE network. This is why the European Commission ordered the divestment of 2x15MHz of 1800MHz spectrum, but this only enables one of Vodafone and O2 to build an LTE network. The Direction therefore stifles competition by preventing Vodafone or O2 from purchasing the Digital Dividend spectrum that one of them will need to build an LTE network.

Given that Vodafone's holding of 900MHz does not give it an advantage in relation to LTE compared to the JV's much larger holding of 1800MHz, BIS has no reason to discriminate against Vodafone (and O2). Such discrimination runs contrary to the regulatory objectives under the EU Electronic Communications framework[7] to promote competition rather than stifle it, and also contrary to the one of the core principles of the Digital Britain project, that of "maintenance of the competitive intensity in the UK market" and should not be acceptable to Government.

Finally, Vodafone objects to the lack of due process in the formulation of the Direction. After many months of consultation on what the Direction might look like in a five player market based on 3G technology, no analysis has been done of the four player market and the impact on spectrum requirements of 4G/LTE technology rather than existing 3G technology. These are fundamental errors.

BIS also does not appear to have considered the impact of the, as yet unpublished, European Commission decision to request a divestment of spectrum by the JV. Proceeding with the Direction without having given full and proper consideration to this crucial development in the market (both the actual terms of the divestment package and the competition analysis that underpins the divestment requirement) is beyond belief.

Vodafone is handicapped in writing this letter by not knowing the exact details of the final divestment package, but so is BIS in writing the Direction, the accompanying Explanatory Memorandum and the Impact Assessment. All three documents are consequently fundamentally flawed.

Vodafone believes that BIS should withdraw the Direction, review the European Commission's decision and divestment package fully and then consult on revised proposals. If BIS still considers that there might be grounds for excluding Vodafone (or any other operator) from the Digital Dividend auction, it must conduct a proper analysis

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[6] Table at paragraph 104 of the OFT Request

[7] Article 8(2) of the Framework Directive 2002/21/EC

of competition in a four player market using LTE technology and, in its own words, put forward a "strong competition case".

If you consider that it would be helpful to discuss this further, we are at your disposal to meet or discuss this over the telephone.

Annexe

The Direction is illegal for the following reasons:

1. Illegality

The statutory instrument is incompatible with the EU Framework Directive (2002/21/EC) and Authorisation Directive (2002/20/EC). In particular, the application of discriminatory criteria in relation to the ability of Vodafone (and O2) to participate in the proposed auction of Digital Dividend spectrum (the 800MHz band) is in breach of Article 7(3) of the Authorisation Directive, which states that any auction must be "*based on selection criteria which must be objective, transparent, non-discriminatory and proportionate*".

There can be no doubt that, even after the divestment of 2x15MHz of 1800MHz spectrum enforced by the European Commission, the JV now has the strongest spectrum position in the UK mobile market with 2x65MHz – almost double Vodafone's holding of 2x38MHz (O2 and Hutchison have even less). There can therefore be no justification in restricting Vodafone's participation in the Digital Dividend 800MHz auction, while giving the JV a clear run to acquire more spectrum. Crucially, in a next generation mobile broadband world, the extra capacity and speed delivered by the JV's advantage in volume of spectrum more than offsets any perceived advantage in coverage from using Vodafone and O2's 900MHz v T-Mobile and Orange's 1800MHz spectrum.[8] This is especially true since the JV will be able to use its existing network grid and its extensive portfolio of mast sites (double the number of either Vodafone or O2) to launch its next generation mobile broadband.

More importantly, Vodafone does not have sufficient 900MHz spectrum to be able to clear enough spectrum for use with LTE technology, which requires large contiguous blocks of at least 2x10MHz, preferably 2x20MHz.[9] In contrast, the JV has a contiguous block of 2x45MHz of 1800MHz, which will be perfect for clearing for LTE. Thus Vodafone's existing 900MHz holding gives it no advantage over the JV in relation to LTE

The proposed Direction also fails to achieve the core objective of promoting competition contained in Article 8(2) of the Framework Directive if both Vodafone and O2 are prevented from purchasing 800MHz spectrum. The Government will be effectively preventing one of those networks from building a national mobile broadband network. The divested 1800MHz will be the only option for both operators and one will lose out which will mean less choice for consumers.

There is nothing in the Wireless Telegraphy Act 2006, under which the Direction is made, which disapplies these EU Directives that govern regulation of the electronic communications sector in the United Kingdom and the European Union. Ofcom, therefore, remains bound by the Framework Directive and the Authorisation Directive and will not be able to comply with the Direction without breaking the law. The Secretary of State is giving Ofcom an order to act illegally and so the Direction itself is also illegal.

2. Irrationality

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[8] NB – 5.8MHz of each of Vodafone and O2's spectrum is in the same 1800MHz spectrum band as the JV's.

[9] See the table in paragraph 104 of the OFT Request

It is evident from the Government Response to the Consultation on the Direction[10] (published on 10 March), the Impact Assessment (dated 5 March) and the Explanatory Memorandum (laid before Parliament on 10 March) that BIS has not properly considered whether the Direction promotes efficiency and effective competition in a four player market where T-Mobile and Orange have merged and the spectrum to be auctioned is going to be used for fourth generation LTE mobile networks, rather than networks based on existing 3G technology.

On the face of the documents, BIS relies on old Ofcom analysis of the five player market to conclude that "there is evidence that the current allocation of spectrum provides Vodafone and O2 with a cost advantage over the other operators".[11] This is preceded by a chart showing the allocation of spectrum in the five player market. No consideration is made of the impact of the creation of the JV. In fact, it is clear that no competition analysis was performed.

It is also clear that no analysis has been conducted on the impact of the proposed auction restrictions in an LTE/4G world. Ofcom's previous analysis was based on 3G networks and evolutions of that technology (such as 3G over the 900MHz band) rather than LTE networks. As mentioned above, the key difference is that LTE networks require large blocks of contiguous spectrum (at least 10MHz, if not 20MHz) compared to the smaller 5MHz channels used by 3G. The European Commission recognised the necessity of competitors holding such large blocks of spectrum for LTE – the very rationale for forcing the JV to divest 2x15MHz so that one of Vodafone or O2 could build an LTE network using 20MHz channels.[12] There is no indication that BIS has given any consideration to the impact of LTE on its analysis.

Paragraph 114 of the Government Response states that Vodafone and O2 will effectively be excluded from the 800MHz auction in order to:

> *"improve the scope for competition for this spectrum and to achieve the objective of making the holdings of sub-1GHz spectrum less concentrated."*

There is no analysis of whether Vodafone and O2 enjoy any competitive advantages from their spectrum holdings relative to the JV in an LTE world – this is simply assumed. In addition, according to paragraph 115 of the Government Response, there are no longer to be any constraints at all on the JV bidding for 800MHz spectrum. In the previous proposal it was stated that, both in a five player market and a four player market, T-Mobile or Orange would have to relinquish 1800MHz spectrum if they wished to bid for 800MHz spectrum.

The JV will have 2x45MHz of 1800MHz post-divestment and yet it will have no restriction on bidding in the 800MHz auction. In contrast, Vodafone and O2 with 2x23.2MHz of equivalent 2G spectrum (split between the 900MHz band and the 1800MHz) are effectively barred from bidding in the 800MHz auction because, in order to do so, they will have to divest equal amounts of 900MHz. The JV will also have more 3G/2.1GHz spectrum (2x20MHz) than Vodafone (2x15MHz) and O2 (2x10MHz). The effect of this will be to fossilise the JV's superior spectrum position and prevent its rivals from purchasing the spectrum necessary to compete in offering next generation LTE network services.

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[10] Government Response to the Consultation on a Direction to Ofcom to Implement the Wireless Radio Spectrum Modernisation Programme

[11] Government Response page 42 and Explanatory Memorandum page 16

[12] The Commission's decision is not published yet but the Office of Fair Trading ("OFT") published its 2 February 2010 request for the JV deal to be referred to the OFT for investigation on 22 February 2010 and comes to the same conclusion, see paragraphs 82, 85, 87, 104 (summary table), 106 and 110.

It is irrational, both in a legal and layman sense, to conclude that Vodafone and O2 have a competitive advantage over the JV due to their spectrum holdings. In fact the opposite is true, and the European Commission's decision to require a divestment of 2x15MHz was necessarily based on a conclusion that Vodafone and O2 could not compete with the JV in next generation broadband services:

> *"the investigation also revealed that the combined amount of contiguous spectrum held by the parties at the 1800 MHz level (60 MHz) would be significantly larger than that of their competitors. This could result in the new entity being the only MNO in the UK able to offer next-generation mobile data services through Long Term Evolution (LTE) technology at the best possible speeds within the medium term.*

In order to address the competition concerns identified by the Commission, the parties concluded a revised agreement with 3UK which will secure its position as a competitive force on the market, and offered to divest 15 MHz of spectrum at the 1800 MHz level. The Commission concluded that the commitments offered by the parties remedy the identified competition concerns."[13]

The divestment was designed to ensure that at least one other network could compete with the JV, which it appears the European Commission considered met its narrow merger control duties. Equally, the European Commission implicitly accepted that if either Vodafone or O2 failed to purchase the divested 2x15MHz of 1800MHz spectrum AND the losing operator was prohibited from purchasing additional spectrum suitable for next generation mobile broadband services, it would not be able to compete with the JV. The Commission and the OFT accepted that Vodafone and O2's 900MHz spectrum was not going to be useful for LTE in a relevant timeframe, because this spectrum was fully utilised for existing 2G (GSM) services and they did not have sufficiently large blocks of spectrum to be able to clear 10MHz channels for LTE[14]. The Digital Dividend 800MHz spectrum and any further 1800MHz spectrum that the JV might have to relinquish are the only suitable spectrum available for next generation LTE mobile broadband (the European Commission accepted that 2.6GHz was not an alternative on its own).

It is therefore clear that either Vodafone or O2 would be at a substantial competitive disadvantage if they were unable to purchase the divested 1800MHz spectrum AND they were prevented by the Direction from purchasing additional sub-1GHz spectrum in the Digital Dividend auction.

BIS accepted itself that it would need to make a strong competition case to justify preventing Vodafone or O2 from participating in the 800MHz auction:

> *"There is a risk that the option is legally challenged by some operators under the terms of recital 23 [and Article 7(3)] of the Authorisation Directive since it excludes bidders from, and constrains how they bid in, an auction, which runs contrary to the legal obligation to allocate spectrum through open, transparent, non-discriminatory procedures. This would extend the transition time, potentially resulting in an opportunity cost to consumers and businesses. Government must present a strong competition case in order to minimize this risk"*[15]

BIS has presented no competition case (strong or otherwise) for excluding Vodafone from the 800MHz auction in a market context where the JV has a clear competitive advantage in building LTE networks due to its significantly larger and contiguous spectrum holdings

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[13] European Commission Press Release of 1 March 2010 (Decision not yet published)

[14] For example, see paragraph 82, 85, 87, 104 (summary table), 106 and 110 of the OFT Request

[15] 'Impact Assessment for the Digital Britain Final Report' June 2009 (see pages 80 and 81 which discussed the option of preventing Vodafone and O2 from purchasing 800MHz spectrum without having to relinquish equivalent amounts of their existing holdings in the 900MHz band)

– which has been recognised in the European Commission's decision to clear the JV. In fact, it cannot make such a case because it is clearly untrue.

Not only is there no basis to maintain the restriction on Vodafone, but the discriminatory effect is magnified by the Government's decision (without consultation – see below) to relieve the JV of any obligation to divest further 1800MHz spectrum in the event that it purchases 800MHz spectrum. Unlike Vodafone and O2, the JV could divest further existing spectrum and still have a path to an LTE network (based on its existing spectrum holdings) because of its much larger and contiguous holdings (2x45MHz in the 1800MHz band). The effect of the Direction is to give the JV the opportunity to reverse the effect of the European Commission's divestment ordered under the European Merger Regulation and increase its holdings of LTE-suitable spectrum compared to the pre-divestment position (2x65MHz, if it purchases the maximum 2x20MHz of 800MHz, compared to 2x60MHz pre-divestment), while restricting one or more of its competitors from using the auction to catch up and create a spectrum path for a competing LTE next generation mobile broadband network.

For the above reasons, it is clear that BIS has failed to take account of the impact of the JV's spectrum holding and the concomitant distortion to competition in next generation broadband services which arises by allowing the JV preferential access to the 800MHz auction, while blocking Vodafone and O2.

BIS has also failed to consider whether the European Commission's divestment remedy under its *narrow* merger control powers is adequate in light of the Government's/Ofcom's *different and broader* non-discrimination and competition duties under the EU Framework Directive and Authorisation Directive. It clearly does not – the European Commission's obligation is to eliminate a significant impediment of effective competition arising from the creation of the JV. For that purpose it appears to be sufficient from the Commission's perspective to give only one other operator the opportunity to purchase additional spectrum to enable it to build a next generation mobile broadband network. In contrast, the Government and Ofcom has a broader obligation to ensure that auction processes are fair to all and restrictions are only imposed that are non-discriminatory - i.e. necessary to remedy a demonstrable competitive advantage arising from existing spectrum holdings. Vodafone holds no such advantage in the United Kingdom mobile market once T-Mobile and Orange have merged, (even with the JV's 2x15MHz divestment of 1800MHz spectrum).

BIS has also adopted a Direction which is not proportionate to the legitimate aims being pursued[16]. For the above reasons, the proposed Direction is disproportionate and applies discriminatory criteria for participation in the 800MHz auction in circumstances where Vodafone clearly does not have competitive advantage relative to the JV, in terms of its existing spectrum holdings and the requirements of LTE, which were recognised by the European Commission and the OFT.

3. Procedural Unfairness

From 1 March 2010 (the date of the European Commission's press release clearing the JV) there has been a new set of facts which the Secretary of State needs to consider when deciding whether to use his powers under section 5 of the Wireless Telegraphy Act to make the Direction. It is unclear whether BIS has seen the text of the final divestment undertaking given by the JV and/or the Commission's decision setting out its rationale for requiring the spectrum divestment, as the decision has yet to be published.

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[16] BIS's March 2010 Impact Assessment, summarises the Government's objectives with respect to wireless infrastructure as : (a) a rapid transition to next generation high speed mobile broadband; (b) progress towards universal coverage in 3G and Next Generation Mobile; and (c) maintaining a highly competitive mobile market.

It also not clear that BIS has had regard to the Office of Fair Trading's request for the JV to be referred to the United Kingdom authorities for investigation. This document, published on 22 February 2010, sets out the analysis of the competitive advantages that the JV will have post-merger and concludes, inter alia, that Vodafone and O2 will be at a competitive disadvantage in relation to next generation LTE mobile services compared to the JV, if they do not gain access to further spectrum suitable for LTE (i.e. either the divested 1800MHz spectrum or 800MHz spectrum).

The European Commission's narrow merger remedy only removes the competitive disadvantage for one of Vodafone and O2. Given the extraordinarily tight timescales (the Impact Assessment was finalised on 5 March while the Commission press release was only issued on the afternoon of 1 March!), it is pretty clear that BIS has had insufficient time to consider adequately the legality and proportionality of the Direction in light of the *new* market conditions and the Commission's as yet unpublished conditional clearance of the JV, nor has it considered the impact of its Direction in a market context where networks will be built using LTE technology and so require much larger contiguous blocks of spectrum.

It is also procedurally unfair to parties such as Vodafone for BIS to proceed with a Direction before such parties have seen the final text of the JV's undertakings and the European Commission's decision and understood the implications on the proposed Direction. BIS should also have then consulted on these implications. The Government's Response to the Consultation does not explain why the Commission's spectrum remedy is adequate to meet the UK's broader duties under the EU Framework Directive and Authorisation Directive. It is not adequate.

In addition, following the European Commission's divestment remedy, the Government has removed the 2G relinquishment requirement previously imposed on T-Mobile and Orange, noting that the requirement was designed to avoid overconcentration of 2G spectrum, without reference to the impact this has on the overall competitive landscape. Thus, the JV could end up with even more sub 2GHz spectrum than it had pre-divestment if it purchases 2x20MHz of 800MHz – including two large contiguous blocks of spectrum, both of which could support a national LTE network, while Vodafone could end up without a single clear block big enough for LTE. So the effect of the Direction could be to reverse the effect of the European Commission's divestment in terms of spectrum concentration – the JV would have 2x65MHz of sub-2GHz spectrum (2x20 of 800MHz spectrum and 2x45MHz of 1800MHz spectrum) compared to 2x60MHz of 1800MHz spectrum pre-divestment. This decision has not been the subject of any consultation and Vodafone has not had the opportunity to comment on it.

It is unlawful and irrational for BIS to proceed with the Direction without taking the time to carry out a proper competition assessment of the effect of the Direction in a post-merger four player market based on LTE technology – given that, in the words of BIS itself, a "strong competition case" is required to justify discrimination in the auction.

For the above reasons Vodafone believes that the Direction is illegal and BIS should withdraw the Direction, review the European Commission's decision and divestment package fully and then consult on revised proposals. .

Vodafone hopes that the Committee will find these submissions helpful. Vodafone's aim in its dealings with BIS has been to be constructive and reach a solution that is fair to all parties and will deliver a competitive market now and in the next generation LTE mobile broadband world. The proposed Direction evidently does not do this and if it is adopted Vodafone will have no option but to challenge it in the courts.

15 March 2010

Further submission from Vodafone

We understand that a further draft of the above Statutory Instrument ('the Direction') has been laid before Parliament by the Department for Business, Innovation and Skills ('BIS'). Further to our letter of 16 March 2010 in which we raised our concerns in relation to the first draft of the Direction, we wish to re-iterate those concerns which have not been addressed by the minor amendments made by BIS, and also bring to the Committee's attention a number of technical and drafting errors that remain in the Direction.

Vodafone very much regrets that BIS have not taken the opportunity in re-submitting the Direction to revisit the inadequate and factually inaccurate Impact Assessment. Section 2 of the Direction makes it clear that the purpose of the Direction is to ensure the allocation of spectrum for "next generation wireless mobile broadband". However, the Explanatory Memorandum and the Impact Assessment still make no attempt to analyse the impact of the restrictions on Vodafone's and O2's participation in the 800MHz auction based on this objective.

The documentation still fails to take account of the new circumstances created by the merger of T-Mobile and Orange and the precise terms of the divestment remedy imposed by the European Commission (which is still unpublished). The Impact Assessment appears to assume that the spectrum to be divested by T-Mobile and Orange in accordance with the European Commission's merger clearance decision is going to be sold in more than one block. The Impact Assessment says at page 13 that the divestment will allow "competitors" to roll out services more quickly, but that the extent of the benefit will vary depending on which "player(s)" purchase the spectrum. This is incorrect as far as Vodafone is aware – our understanding is that the European Commission remedy envisages a divestment in a single lot which is why one operator (out of Vodafone and O2) will be left unable to purchase sufficient spectrum for a national LTE network if the Direction is adopted unamended.

Technical and Drafting Errors

The Direction also still contains material errors which undermine its effect in a number of ways:

- Interpretation Section – there is no definition of "surrendered spectrum" and, in particular, whether it includes the spectrum to be divested by T-Mobile and Orange pursuant to the European Commission's decision clearing the joint venture. It is not clear from the Direction whether (and in what form) the spectrum to be divested by T-Mobile and Orange is to be included in the auction. This needs to be clarified in light of the terms imposed by the European Commission, which are as yet not published.
- Interpretation Section – there is no definition of when a licence "comes into force" and yet a number of the provisions and deadlines depend on this definition (e.g. sections 4(2)(c), 15(1), 15(2), 16(5), 16(7)).
- Section 5(1) – this provision only refers to "after the competition of the Combined Auction" but should also include "and any subsequent auction" as contemplated in section 7.
- Section 5(2) – This clause states that in setting licence fees Ofcom must take into account sums bid for licences in the Combined Auction. This should include not only the sums bid in the auction but also the sums paid (under the auction rules proposed by Ofcom) to the party that has relinquished the spectrum, otherwise the auction will discriminate against those who buy the relinquished spectrum rather than the new spectrum, by paying higher licence fees. It is Ofcom that is

determining the amount that is paid to the relinquishing party and it is part of the capital cost of purchasing the spectrum and so should be considered in the same way as the sums bid in the auction.

- Section 6(c)(ii) – the "or" should be an "and" to be consistent with section 9(2)(b).
- Section 9(4) – the surrender clauses must refer to "contiguous" spectrum. LTE technology requires large blocks of contiguous spectrum and this is the competitive advantage that the T-Mobile/Orange joint venture has (it has 2x45MHz of contiguous 1800MHz spectrum and 2x20MHz of 2100MHz spectrum). This forms a key part of the legal basis for the European Commission's decision to require a spectrum divestment by T-Mobile and Orange (see the Office of Fair Trading's request for a reference of the case to the United Kingdom). Where an operator has to divest more than one block of 2x5MHz, it must be contiguous.
- Section 14(3)(a) – unlike all the other coverage obligations, this clause contains no deadline for compliance with the coverage obligation for new licences of 2100MHz spectrum, thereby rendering it unenforceable.

Vodafone is still handicapped by not knowing the exact details of the final divestment package ordered by the European Commission, but so is BIS in writing the Direction, the accompanying Explanatory Memorandum and the Impact Assessment. All three documents are consequently fundamentally flawed.

Vodafone believes that BIS should withdraw the Direction, review the European Commission's decision and divestment package fully and then consult on revised proposals.

25 March 2010

APPENDIX 2: SOCIAL SECURITY (CLAIMS AND PAYMENTS) AMENDMENT REGULATIONS 2010 (SI 2010/796)

Information from the Department for Work and Pensions

7. How many customers receive Excess Payments?

7.1 In December 2008, the Standard Interest Rate (SIR) at which Support for Mortgage Interest is paid was frozen at 6.08% for 6 months from its baseline level of Bank of England Base Rate + 1.58% (2.08%). After subsequent extensions and the announcement made by the Chancellor for Budget 2010, the Standard Interest Rate will remain at 6.08% until December 2010.

7.2 The Support for Mortgage Interest caseload is currently estimated to stand at 220,000[17]. Around 190,000[18] Support for Mortgage Interest customers have their awards paid directly to lenders through Mortgage Interest Direct (MID), the remaining 30,000 customers have their awards paid directly to themselves.

7.3 Data from the Council of Mortgage Lenders and the Bank of England shows that the weighted average interest rate (at the point of sale) for mortgages taken out in the two years to January 2010 is 4.9%. Table 1 shows the average interest rate for different types of mortgage and the proportion of new mortgages by type.

Table 1 - Average Mortgage Rate and Mortgage Market by Type

	Fixed Rate	Tracker	Standard Variable	All
Average Interest Rate	5.4%	4.6%	5.1%	4.9%
Proportion of new mortgages issued over the last two years	62%	26%	5%	100%

Source: Council of Mortgage Lenders and Bank of England January 2010

7.4 In November 2009, we received a sample of data on almost 6,000 Support for Mortgage Interest claimants (around 3% of the total caseload) from sixteen different mortgage lenders, collected on our behalf by Council of Mortgage Lenders and HM Treasury. While the data is not a statistically robust sample and any results should be considered illustrative, and it is likely that the distribution of mortgage rates will have changed since the data was collected, it can provide a useful insight into the mortgages of Support for Mortgage Interest customers.

7.5 The Council of Mortgage Lenders sample data implies an average mortgage rate paid by Support for Mortgage Interest customers of 3.8%, well below the current Standard Interest Rate of 6.08%. Table 2 shows the average interest rate for different types of mortgage held by Support for Mortgage Interest customers and the proportion of customers holding these mortgages[19]. While Tables 1 and 2 provide useful background information on the mortgage market, they are not directly comparable as Table 1 provides information on the average mortgage rate at the point of sale from the past two years while

[17] August 2009 DWP Quarterly Statistical Enquiry

[18] August 2009 DWP Quarterly Statistical Enquiry

[19] Only around half of the records in the CML sample data declared a mortgage type

Table 2 provides information of the average mortgage rate being paid at the time the survey was taken (Autumn 2009).

Table 2 - Average SMI Customer's Interest Rate and Mortgage Type

	Fixed Rate	Tracker	Other Variable
Average Interest Rate	5.7%	2.1%	4.2%
Proportion of mortgages held by SMI customers	32%	28%	40%

Source: Council of Mortgage Lenders, November 2009

7.6 The estimated distribution of the mortgage rates paid by Support for Mortgage Interest customers is given in Table 3. At the current Standard Interest Rate of 6.08%, we estimate that 92% of Support for Mortgage Interest customers (180,000 people excluding non- Mortgage Interest Direct customers) will receive awards in excess of their eligible mortgage interest outgoings. However, even customers in this position do not necessarily receive Support for Mortgage Interest payments in excess of their full housing costs where part of their mortgage is ineligible (taken out for some purpose other than purchasing the property or making certain home improvements).

Table 3 – Distribution of SMI customer's Mortgage Rates

Interest Rate	% of SMI Customers	No. SMI Customers	No. MID SMI Customers[20]
Below 7%	99%	220,000	190,000
<6.08%	92%	200,000	180,000
<5%	73%	160,000	140,000
<4%	52%	110,000	100,000
<3%	38%	80,000	70,000
<2%	17%	40,000	30,000
<1%	3%	10,000	7,000

Source: Council of Mortgage Lenders & DWP Quarterly Statistical Enquiry August 2009

7.7 Under the regulations, lenders will be required to apply Support for Mortgage Interest payments to customers' mortgage accounts in the way set out above; lenders would be unable to agree to any request for the excess to be paid over to the customer. The first priority will be to meet any current mortgage interest payments and the second priority will be to meet any arrears of mortgage interest. Thereafter lenders will be able to use the excess to repay the outstanding principal sum or any other liability in respect of the loan. Details of the extent of the excess payments that Support for Mortgage Interest customers might receive are given in Table 4.

[20] Assumes MID customers have the same distribution of Mortgage Rates as Non-MID customers

Table 4 – Extent of Excess Payments for SMI Customers

Proportion of Applicable Mortgage Interest Covered by SMI	% of SMI Customers	No. SMI Customers	No. MID SMI Customers
>400%	14%	30,000	28,000
>300%	18%	40,000	35,000
>200%	38%	80,000	75,000
>150%	52%	110,000	100,000
>125%	65%	140,000	130,000
>110%	82%	180,000	160,000
>100%	92%	200,000	180,000

Source: Council of Mortgage Lenders & DWP Quarterly Statistical Enquiry August 2009

7.8 Table 4 shows that over half of Support for Mortgage Interest customers are currently receiving payments that are at least 50 per cent higher than the actual interest due to lenders on the eligible loan. Around one fifth receive awards that are more than three times their mortgage interest payments.

7.9 Table 5 shows in cash terms what monthly excess Support for Mortgage Interest payments would be for various mortgage rates and various sizes of mortgages under the current Standard Interest Rate of 6.08%. For example, a Support for Mortgage Interest customer with a mortgage rate of 5% and an eligible mortgage of £25,000 would receive a monthly excess payment of £23. A customer with a mortgage rate of 1% and an eligible mortgage of £200,000 would receive a monthly excess payment of £847.

Table 5: Relationship Between Excess Payments, Mortgage Rates and Outstanding Capital[21]

	Monthly Excess Payment					
	On an eligible mortgage of:					
Mortgage Rate	£25,000	£50,000	£75,000	£100,000	£150,000	£200,000
5%	£23	£45	£68	£90	£135	£180
4%	£43	£87	£130	£173	£260	£347
3%	£64	£128	£193	£257	£385	£513
2%	£85	£170	£255	£340	£510	£680
1%	£106	£212	£318	£423	£635	£847

[21] These figures are indicative amounts based on stylised individuals. The monthly excess payment has calculated by applying the standard rate of interest to the capital amount of the mortgage and dividing this by 12

APPENDIX 3: PROCEEDS OF CRIME ACT 2002 (REFERENCES TO FINANCIAL INVESTIGATORS) (AMENDMENT) ORDER 2009 (SI 2009/2707): FURTHER CORRESPONDENCE

Letter from Alan Campbell MP, Parliamentary Under Secretary of State for the Home Office

You will recall an exchange of correspondence with David Normington late last year on the Statutory Instrument that extends certain powers under the Proceeds of Crime Act 2002 ("the 2002 Act"). The concerns were triggered by comments by the Chairman of the Police Federation in "The Tirnes" on 28 October. He voiced two issues regarding the extension of investigation and ancillary powers under the SI; firstly, he had concerns about the powers being extended to non-police agencies and secondly, the lack of consultation on the SI before it was laid and came into force.

The Earl of Onslow subsequently tabled a motion on 7 December calling for the SI to be revoked on account of the Chairman's comments. That motion was carried by 182 voted to 118. Lord Brett then made a written Ministerial statement on 14 December setting out the steps the Government would undertake to address the concerns of the House of Lords.

In that statement the Government undertook to draft a circular for the attention of financial investigators operating under the 2002 Act to ensure that the powers were used in a proportionate and effective manner. An initial draft of the circular was discussed with the Earl of Onslow and Lord Bowness. We have also consulted with the Law Society, the British Bankers' Association and the Council of Circuit Judges. The Law Society has made a few comments which have been included, the British Bankers' Association made no substantive comment and I received no reply from the Council.

The draft circular has also been approved by the National Policing Improvement Agency who have responsibility for the training, accreditation and monitoring of financial investigators and by the Association of Chief Police Officers.

In response to a question from Lord James of Blackheath on 16 December, Lord Brett said that a draft of the circular would be sent to the Merits of Statutory Instruments Committee and that if you wished to make any observations on the draft we would give them careful consideration. I would welcome any comments that you have by the 13th of April 2010. A copy of this letter and its enclosures has been sent to the Earl of Onslow.

23 March 2010