



House of Lords  
House of Commons  
Joint Committee on  
Statutory Instruments

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**Seventh Report  
of Session 2010-11**

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**Drawing special attention to:**

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

*Ordered by the House of Lords to be printed  
17 November 2010*

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# Joint Committee on Statutory Instruments

## Current membership

### House of Lords

Lord Campbell of Alloway (*Conservative*)  
Lord Clinton-Davis (*Labour*)  
Baroness Eccles (*Conservative*)  
Lord Kennedy (*Labour*)  
Earl of Mar and Kellie (*Liberal Democrat*)  
Lord Rees Mogg (*Crossbench*)  
Baroness Stern (*Crossbench*)

### House of Commons

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Michael Ellis MP (*Conservative, Northampton North*)  
John Hemming MP (*Liberal Democrat, Birmingham, Yardley*)  
Mr Ian Liddell-Grainger MP (*Conservative, Bridgwater and West Somerset*)  
Toby Perkins MP (*Labour, Chesterfield*)

## Powers

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

## Remit

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

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

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

The Committee usually meets weekly when Parliament is sitting.

## Publications

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

## Committee staff

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

## Contacts

All correspondence should be addressed to the Clerk of the Joint Committee on Statutory Instruments, 7 Millbank, London SW1P 3JA. The telephone number for general inquiries is: 020 7219 2026; the Committee's email address is: [jcsi@parliament.uk](mailto:jcsi@parliament.uk).

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## Instruments reported

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At its meeting on 17 November 2010 the Committee scrutinised a number of Instruments in accordance with Standing Orders. It was agreed that the special attention of both Houses should be drawn to one of those considered. The Instrument and the grounds for reporting it are given below. The relevant Departmental memorandum is published as an appendix to this report.

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

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

1.1 The Committee draws the special attention of both Houses to this Order on the ground that in one respect it is defectively drafted and in one respect there is a doubt as to whether it is *intra vires*.

1.2 Article 3 includes a definition of “the Directive” but that expression appears nowhere else in the Order. In a memorandum printed in the Appendix the Department for Business, Innovation and Skills acknowledges that the definition is unnecessary, and **the Committee accordingly reports article 3 for defective drafting acknowledged by the Department.**

1.3 The Order sets out directions to the Office of Communications (OFCOM) with respect to the exercise by that body of their radio spectrum functions. Article 5(3)(b) directs OFCOM to vary a specified kind of wireless telegraphy licence (subject to the consent of the holder) to provide for the licence to continue in force unless or until revoked by OFCOM. Paragraph 5 of Schedule 1 to the Wireless Telegraphy Act 2006 (“the 2006 Act”) provides for wireless telegraphy licences to “continue in force, unless previously revoked by OFCOM, for such period as may be specified in the licence”. This appears to preclude a licence of indefinite duration.

1.4 The provision made by article 5(3)(b) is the same as that made by article 4 of the draft order of the same title which this Order supersedes (“the previous order”) on which the Committee reported in its 13th Report of the 2009-10 Session. The Department was asked whether it wanted to add anything to what was said in its memoranda on the previous order to explain why article 5(3)(b) is compatible with paragraph 5 of Schedule 1 to the 2006 Act.

1.5 In the memorandum printed in the Appendix the Department refers to the discretion conferred on OFCOM by section 9 of the 2006 Act which provides that a licence “may be granted subject to such terms, provisions and limitations as OFCOM think fit”. The Department argues the effect of this is to confer on OFCOM the discretion to provide for a licence not to be subject to any period, but to run until brought to an end. The Department also refers to the fact that OFCOM have previously issued licences of indefinite duration and that such licences have been issued under the Wireless Telegraphy Act 1949 (whose provisions are consolidated in the 2006 Act). However, despite expressing these views, the Department concedes in its memorandum that the point is arguable.

1.6 In the view of the Committee the fact that licences of indefinite duration have been issued in the past is not something which is capable of determining the scope of OFCOM's powers. The Committee considers that the general discretion conferred on OFCOM under section 9 of the 2006 Act has to be read subject to the specific provision in paragraph 5 of Schedule 1 to that Act. The Committee remains of the view that the words "may be specified" in paragraph 5 do not necessarily indicate that OFCOM have a discretion as to whether or not to specify a period for a wireless telegraphy licence. In the view of the Committee, the word "period" ordinarily implies a finite length of time, and the words "may be specified" simply indicate that the length of the licence is in each case a matter for OFCOM to decide in the exercise of its discretion. **The Committee accordingly reports that there is a doubt whether article 5(3)(b) is *intra vires*.**

## Instruments not reported

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At its meeting on 17 November 2010 the Committee considered the Instruments set out in the Annex to this Report, none of which were required to be reported to both Houses.

## Annex

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### Draft Instruments requiring affirmative approval

**Draft S.I.**           Welfare of Farmed Animals (England) (Amendment) Regulations 2010

### Instruments subject to annulment

- S.I. 2010/2578**   Bank Administration (Scotland) (Amendment) Rules 2010
- S.I. 2010/2579**   Bank Insolvency (England and Wales) (Amendment) Rules 2010
- S.I. 2010/2580**   Building Society Special Administration (England and Wales) Rules 2010
- S.I. 2010/2581**   Building Society Insolvency (England and Wales) Rules 2010
- S.I. 2010/2583**   Bank Administration (England and Wales) (Amendment) Rules 2010
- S.I. 2010/2584**   Building Society Insolvency (Scotland) Rules 2010
- S.I. 2010/2586**   Bank Insolvency (Scotland) (Amendment) Rules 2010
- S.I. 2010/2600**   Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010
- S.I. 2010/2601**   Upper Tribunal (Lands Chamber) Fees (Amendment) Order 2010
- S.I. 2010/2609**   Education (Publication of Proposals) (Sixth Form College Corporations) (England) Regulations 2010
- S.I. 2010/2613**   Iran (European Community Financial Sanctions) (Amendment) Regulations 2010
- S.I. 2010/2622**   Equality Act 2010 (Amendment) Order 2010
- S.I. 2010/2649**   National Health Service (Functions of Strategic Health Authorities and Primary Care Trusts and Administration Arrangements) (England) Amendment (No. 2) Regulations 2010
- S.I. 2010/2653**   Tribunal Procedure (Amendment No.3) Rules 2010
- S.I. 2010/2655**   First-tier Tribunal and Upper Tribunal (Chambers) Order 2010

**Instruments not subject to Parliamentary proceedings not laid before Parliament**

- S.I. 2010/1878** Finance Act 2009, Sections 101 to 103 (Appointed Day and Supplemental Provision) Order 2010
- S.I. 2010/2556** Offshore Installations (Safety Zones) (No. 3) Order 2010
- S.I. 2010/2614** Education (Listed Bodies) (England) Order 2010
- S.I. 2010/2618** Education (Recognised Bodies) (England) Order 2010

## Appendix

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

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

- 1 This memorandum is submitted in response to 3 questions submitted by the Committee to the Department for Business, Innovation and Skills on 3<sup>rd</sup> November 2010.

*Why has a definition of "the Directive" been included in article 3 given that the expression does not appear elsewhere in the Order?*

- 2 This definition is a legacy from the previous draft Direction and should have been deleted. The Department apologises for this oversight.

*Article 5(3)(b) requires OFCOM to vary 2100MHz licences to provide for the licence to continue in force unless or until revoked by OFCOM. This is the same provision as article 4(4)(c) of the draft order of the same title which this Order supersedes ("the previous order"). Does the Department want to add anything to what was said in its memoranda on the previous order to explain why the provision is compatible with paragraph 5 of Schedule 1 to the Wireless Telegraphy Act 2006 ("the 2006 Act")?*

- 3 The Department has reconsidered this issue, but remains of the view that it expressed in its memorandum to the Committee in March. The Department considers that the discretion conferred on Ofcom by section 9 of and Schedule 1 to the WTA relates not only to the length of any given licence, but also as to whether or not a period should be specified in that licence, and that the licence should continue to run until brought to an end. The Act does not specify that a licence period must be specified in every case. Indeed, under the Act there are no provisions in a licence which are mandatory. The Department notes that this provision has survived intact since the Wireless Telegraphy Act 1949 (albeit with amendments when Ofcom was created), and there are existing "indefinite" licences created under this power.
- 4 The Department considers that it is thus legitimate to conclude that section 9 of and Schedule 1 to the Act do not specifically require that a definite period of time be specified on the face of the licence. The Act as a whole confers a very broad discretion on Ofcom in relation to the conditions which may be set out in the licence, and this discretion extends to whether or not to state a licence period, and the length of that period if it is thought appropriate for Ofcom to state a licence period. However, the Department concedes that this point is arguable.

*Explain what actions, if any, the Department took to comply with the duty to consult under section 6(2) of the 2006 Act apart from carrying out the consultation, referred to in paragraph 7.4 of the Explanatory Memorandum, which preceded the laying of the previous order.*

- 5 Following the election in May, the incoming administration considered the issues around release of spectrum. In coming to a decision on how to proceed, the Government considered the consultation referred to in the Explanatory Memorandum. The incoming administration decided on a less “interventionist” solution than the previous administration, considering that it was for Ofcom to make certain decisions around the forthcoming auction of spectrum. All of the proposals in the July Order were covered in the consultation that the Department carried out in advance of the March Order.
- 6 In addition, the Secretary of State took further advice from officials, Ofcom and industry in relation to the drafting of the July Order. Before the July Order was laid, the Minister held several meetings with all the mobile network operators and Ofcom to discuss the July Order and there have been further meetings over the summer between Departmental officials and the mobile network operators.
- 7 The Secretary of State considers that the consultation from October 2009 coupled with the further informal discussions relating to the proposed approach to the July Order with the industry operators which will be most affected by this Order is sufficient to satisfy the requirement for consultation in section 6(2) of the 2006 Act.