

ARNOLD & PORTER (UK) LLP

ADVISORY

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THE DIGITAL BRITAIN REPORT

PART I: IMPLICATIONS FOR TELECOMMUNICATIONS OPERATORS, SERVICE PROVIDERS, AND USERS

On 16 June 2009, Communications Minister Lord Carter presented his report "Digital Britain." The Report was commissioned by the British government to provide a strategy for the development of the digital economy in the UK and to establish a programme of action. The Report makes recommendations across a range of topics spanning the communications sector, including broadband rollout, digital radio, public service broadcasting, and video piracy.

In this advisory, we focus on issues of importance to the telecommunications industry. We will address the elements of the Report concerning content and the treatment of creative works in a subsequent advisory.

HIGHLIGHTS

The Report proposes:

- The government commit to a project to deliver at least 90% coverage of next generation broadband to homes and businesses by 2017;
- This initiative be funded, in part, by imposing a supplement of 50p per month on charges for all fixed copper lines from 2010;
- The Universal Service Commitment, which currently requires BT to provide functional internet access at a minimum speed of 28.8kbps, be revised to 2Mbps by 2012;
- To complement these initiatives, the Communications Act 2003 be amended to make the promotion of investment in communications infrastructure one of Ofcom's principal duties alongside the promotion of competition;
- The government take action to expedite the transition to next generation mobile, *inter alia*, by adopting some new approaches to the use and allocation of spectrum.

SUMMARY OF THE REPORT

The stated aim of the Report is to assist in accelerating the "rate of growth, and cement the UK's position as a world leader in the knowledge and learning economy." To achieve this, the Report outlines proposals, addressed to both government and industry, to support and help develop the British digital economy

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through both legislative and non-legislative measures. The key proposals in the area of telecommunications are summarised below.

1. Establishing a “Final Third” Project and Fund

The British government, like many governments around the world, is currently grappling with how best to provide next generation broadband for all its citizens. The Report examines the likelihood of market-led investment occurring throughout the country. It concludes that the UK’s competitive markets will provide the stimulus for further investment in next generation networks without the need for further investment from the British government for between half and two thirds of the population. However, between a third and a half of UK households will remain un-served. The Report suggests that there is no obvious means whereby the market, unaided, will serve these areas of the population. The Report therefore proposes that a “Final Third Project” be launched with a view to delivering at least 90% coverage of next generation broadband for homes and businesses by 2017. The “Final Third Project” would focus resources on geographic areas where the market would not otherwise invest and to subsidise only those activities that contribute to next generation broadband deployment.

In order to support such an undertaking, the Report proposes a supplement of 50p per month be imposed on operators’ charges for fixed copper lines from 2010 (except for customers on social telephony schemes, who would be exempt) to fund the delivery of broadband to the “Final Third.” The proceeds would be collected by all fixed line operators (including cable operators) and then passed to Ofcom and placed in a consolidated fund. Controversially, the supplement would only apply to fixed lines on the rationale that mobile operators already contribute under licence coverage requirements to mobile telephony and broadband.

Tenders would then be put out to all operators (including cable operators) proposing to install a next generation service and all such operators would be eligible for funds, on a reverse auction basis, to fund the delivery of next generation broadband to un-served households.

2. Adopting a Universal Service Commitment for Broadband at 2Mbps

Analysis suggests that 11% of all UK lines are currently unable to deliver a 2Mbps service, with the gaps in current supply being widely dispersed across the UK and not only in rural areas. At present, the Universal Service obligation requires BT to provide “functional internet access,” defined as being access at a minimum speed of 28.8kbps. The government estimates that up to 1.5 million households, many of whom have little or no broadband availability, might be able to access next-generation super-fast broadband if a Universal Service Commitment were introduced. The Report therefore proposes the introduction of a Universal Service Commitment at 2Mbps to be funded from the Digital Switchover Help Scheme Underspend, Strategic Investment Fund contributions, and from other organisations, both public and private.

The Report proposes that a delivery body, the Network Design and Procurement Group, be established that will be responsible for structuring and running future procurement processes with its CEO to be recruited by October 2009.

In addition, while acknowledging the progress in mobile broadband the UK government:

1. Wants a universal coverage for mobile broadband that matches that of current global system for mobile communications (GSM) coverage (99%);
2. Recognises that network sharing, reciprocal access, and interconnection regimes are increasingly a means of assisting in achieving that coverage level;
3. Will, as part of its integrated package, convert existing 3G licences from time limited to indefinite to give Mobile Network Operators certainty in being able to plan to achieve these coverage requirements; and
4. Will look at Administrative Incentive Pricing (AIP) levels that take into account the contributions being made by the operators to universal service.

3. Changing Ofcom’s Focus and Priorities

The government has concluded that to become a leading Information Society economy and to be internationally competitive Britain needs leading-edge infrastructure. The

Report therefore proposes that the Communications Act 2003 be amended to make the promotion of investment in communications infrastructure one of Ofcom's principal duties, alongside the promotion of competition, to meet its overarching duty of securing the interests of citizens and consumers in the provision of communications services.

4. Accelerating Deployment of Next Generation Mobile Services

The Report considers that progress towards deployment of next generation mobile networks and greater coverage has been restricted by the differing circumstances facing, and the incentives provided to, existing mobile operators. These issues were considered in an Interim Report delivered by Lord Carter on 29 January 2009 in which a Spectrum Modernisation Programme was proposed that would involve:

- Establishing a plan that will allow existing 2G radio spectrum to be used for next generation mobile services;
- Making more radio spectrum available for next generation mobile services;
- Increasing investment certainty for existing 3G operators to encourage "commercially-sensible" investment in network capacity and coverage; and
- Encouraging greater network sharing, particularly where this could lead to greater coverage; and commitments by mobile operators to push out coverage of mobile broadband to replicate 2G coverage.

On 13 February 2009, Ofcom published a consultation entitled "Application of spectrum liberalisation and trading to the mobile sector" setting out its proposals for a compulsory release of 2x5MHz of the spectrum shared between the two operators holding 2G spectrum in the 900MHz band (Vodafone and O2). The proposals and processes put forward in this consultation have been opposed by a number of operators on varying grounds. As a consequence, the UK government appointed an Independent Spectrum Broker (ISB) to report on a comprehensive approach to resolving the future of mobile spectrum and the transition to next generation mobile networks. (His report was published on 13 May 2009.)

Based on the ISB's report, the Report proposes a range of measures as part of an integrated package. The measures involve some complex issues and consideration of the details of these proposals is beyond the scope of this Advisory. The chief initiatives are the following:

- The immediate release of WiMAX-suitable 2.6GHz unpaired Time Division Duplex (TDD) spectrum for auction;
- The alignment of 2.6GHz paired Frequency Division Duplex (FDD) spectrum and planned 800MHz auctions (the Big Auction) at the earliest practicable date (probably mid 2010);
- An overall spectrum cap of 2x65MHz on sub-3GHz spectrum for any operator participating in the Big Auction, for a specified period, including TDD holdings. Any operator acquiring spectrum in excess of this cap to relinquish other spectrum in 2x5MHz blocks to remain within the cap. This cap to include existing TDD holdings;
- An exchange of 900MHz spectrum by current holders for any acquisition of spectrum in the 800MHz auction, at a ratio to be determined;
- A specified time period for the relinquishment of 900MHz or other spectrum released as a result of this exchange;
- Taking steps to minimise any competitive distortion which emerges as a result of any time difference between the possibility to liberalise existing 2G spectrum holdings and the availability of the 800MHz spectrum;
- Making indefinite the 3G licence terms in return for acceptance by operators of AIP from the end of those terms and additional coverage obligations; and
- The alignment of AIP for liberalised 2G licences reflecting the full economic value of this spectrum.

5. Liberalising Mobile Spectrum

The Report recognises that there is a need to address the ratio at which 900MHz spectrum is to be exchanged for 800MHz spectrum as well as the timing and cost

of 900MHz re-farming, changing the use that this spectrum is being used for from GSM to universal mobile telecommunications system technologies and the availability of 800MHz spectrum. There has been considerable debate surrounding these issues and the government intends to have an independently produced guiding technical arbitration by September 2009 on this area. Subject to the finding of the technical arbitration, the government will move to implement the ISB's proposals in line with its responses (as previously outlined).

6. Monitoring of the UK Communications Infrastructure

The Report emphasises the increasing importance of communications infrastructure and for regulators to take a broad view of the UK's needs and any potential gaps in that infrastructure. The Report therefore proposes to expand Ofcom's duties to include a statutory obligation to write as necessary to the government alerting the Secretary of State to any matters of high concern regarding developments affecting the communications infrastructure and to carry out a review of the communications infrastructure every two years.

We hope that you have found this advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

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