

DIGITAL BRITAIN REPORT

Government Response to the Consultation on the proposed new duties for Ofcom; to promote efficient investment in infrastructure, to provide a full assessment of UK communications infrastructure every two years

NOVEMBER 2009

Government Response to a Consultation on Legislative changes to Ofcoms Duties published on 13 August 2009 (closed 25 September);

a) To promote efficient investment in communications infrastructure;

b) Produce a biennial and (as required) ad hoc report for the Secretaries of State for BIS and DCMS.

1 The Consultation

1.1 The Digital Britain White Paper set out proposals to change Ofcom's general duties to give them additional duties in relation to the promotion of investment in communications infrastructure and regular reporting on the state of the UK's communications infrastructure. The Digital Britain White Paper also said that we would consult on these issues.

1.2 The consultation proposed that Government should give Ofcom an additional duty to promote efficient investment in communications infrastructure (where appropriate), alongside the promotion of competition, when furthering the interests of consumers. Such a duty was to sit alongside the existing duty to further the interests of citizens in relation to communication matters.

1.3 In addition the Digital Britain White Paper emphasised the increasing importance of monitoring the national communications infrastructure, and the need for both Government and Ofcom to take a broad view of the nation's needs and any ways in which those needs may not be being met. The new duty on Ofcom to report to the Secretaries of State for Business, Innovation and Skills and for Culture, Media and Sport every two years giving an assessment of the UK's communications infrastructure will address this. Further, Ofcom will be required to alert those Secretaries of State to any matters of high concern regarding developments affecting the communications infrastructure.

2 Response to the Consultation

2.1 We received 39 responses to the consultation (see list of respondents at Annex A) and stakeholders included; fixed line and mobile operators, trade associations/bodies, charities, consumer groups, devolved administrations and individuals. Two respondents asked that their comments be kept confidential.

3 Summary of views

3.1 The majority of the respondents were broadly supportive of one or both of the proposed changes and welcomed the focus on Ofcom to promote efficient investment, as well as producing a report every two years setting out the current communications infrastructure.

3.2 Many supported the need to consider investment alongside competition, particularly when considering longer term infrastructure issues. It was felt that the regulatory framework should deliver certainty in pricing to give operators and other investors the confidence to invest. It was made clear that any change must also preserve competition by enabling access and non discriminatory pricing.

3.3 Some respondents expressed concerns about how these changes would work in practice and we have reflected these concerns in the drafting of the clause in the Digital Economy Bill to amend Ofcom's general duties in section 3 of the Communications Act 2003 as well as in our further discussions with Ofcom. Stakeholders also expressed concerns that the new duty might be intended to allow Ofcom to permit higher charges at the wholesale level for access to the existing BT copper network in order to subsidise investment in next generation networks.

3.4 In addition, some respondents commented that the new investment duty should not take priority over that of promoting competition. Rather, both should be taken into account. Some also commented that Ofcom should encourage investment by all industry participants.

3.5 Comments received on the reporting duty were again generally supportive of the need for a single document which provides an overview of the UK communications infrastructure, as this would be useful for both Government and Ofcom in order to assist with long term planning and to identify potential problems with infrastructure provision at an early stage. Respondents thought the new duty to report would encourage a whole market approach to investment and that the report will identify strengths and weaknesses in the market.

3.6 Others highlighted the potential cost for both Ofcom and operators in the production of the two year reports. Respondents asked that this should be kept to the minimum required to produce the report. Scoping the information may also be problematic e.g. in determining the data to access when/if any intervention is needed. However, many felt that these risks can be minimised if Ofcom consulted with industry on the specific reporting proposals required.

4 How Might the New Investment Duty Work in Practice

4.1 Many respondents asked what difference the new investment duty would make and how it might work. We cannot predict how the duty will impact on decisions that Ofcom has not yet taken, since those decisions will be complex, based on extensive analysis of evidence and balancing all the relevant duties. It is not possible by way of illustration to guess at the outcome of a future regulatory decision without the new duty and speculate on how it might be different with the new duty.

4.2 However, investment has been a relevant criterion in a number of Ofcom's recent regulatory policies and decisions and these examples will give a flavour of the sort of areas where we might expect to see the promotion of

investment given a higher profile in the consideration of the issues. We set out some examples at paragraphs 4.3 to 4.6 below.

4.3 Ofcom's Strategic Review of Telecommunications¹ recognised that "innovation, range and choice in new services are increasingly prized; and the infrastructure that will support them consequently becomes more important" and went on to propose measures designed to "encourage investment in scale and reach by BT Group plc's competitors to the deepest possible point of connection with BT Group plc's network" and at the same time to ensure that "BT Group plc is able to reap an appropriate rate of return - one which recognises the risks involved in next generation networks". This focus on investment, by both BT and its competitors, is what has underpinned the success of current generation broadband.

4.4 Ofcom's recent policy documents² on the regulation of next generation 'superfast broadband' have set out a set of pricing principles which are designed to deliver both competition and investment. In particular, Ofcom proposes not to set prices for 'active' products based on the new infrastructure which BT proposes to deploy, but instead proposes to adopt a flexible pricing approach.

4.5 Ofcom recently carried out an assessment of the mobile telecommunications sector³, effectively its first strategic review of this sector. It emphasised that its '... principal statutory duties ... as well as [its] duty to encourage innovation, are at the heart of this assessment', effectively placing investment and innovation alongside its principal duties.

4.6 When Ofcom sets charge controls for existing BT products⁴ it normally does so using 4-year charge control periods. Assumptions are made about the level of efficiency savings which are expected during each period, but BT is then permitted to retain any additional efficiency savings, [providing an incentive for BT to innovate by means of efficient investments]. A recent example is the consultation on network charge controls which Ofcom published in March.

5 Government Response

Investment

5.1 The Government is committed, as stated in the Digital Britain White Paper, to encouraging investment in infrastructure and **will introduce a clause in the Digital Economy Bill to amend Ofcom's general duties in section 3 of the Communications Act 2003**. The effect of the amending provision would be to require Ofcom, whenever performing its principal duty, to have particular regard in all cases to the need to promote appropriate levels

¹ http://www.ofcom.org.uk/consult/condocs/telecoms_p2/tsrphase2/)

² http://www.ofcom.org.uk/consult/condocs/nga_future_broadband/main.pdf

³ <http://www.ofcom.org.uk/consult/condocs/msa08/summary/> para 1.2

⁴ http://www.ofcom.org.uk/consult/condocs/review_bt_ncc/

of investment in infrastructure. Currently, with respect to investment, Ofcom is required to have regard, if it appears to it to be relevant in the circumstances, to the desirability of encouraging investment and innovation in relevant markets. The new duty will require Ofcom to give greater weight to investment in infrastructure than is currently the case.

5.2 The new duty will recognise the specific importance of investment in electronic communications networks. We are at a time when many of our communications networks are being substantively upgraded – digital television, digital radio, high speed broadband, and next generation mobile. The duty will apply to investment across the sector, by all players, including new entrants. The duty will also require that where possible the investment promoted should be efficient investment.

Reporting on Communications Infrastructure

5.3 The Government has decided to move ahead with a new duty on Ofcom to report on the communications infrastructure as set out in the consultation. The new duty will require Ofcom to produce an initial snapshot of the position existing in the first year after the provision comes into force. Ofcom would then prepare subsequent reports at two-yearly intervals. If Ofcom becomes aware of a marked change in any of the reporting areas which is likely to have a significant adverse affect on business or the public, and which it considers should be brought to the attention of the Secretary of State, then it must write a further report.

5.4 The biennial reports will consist broadly of a survey of the different types of electronic communications networks and service in the UK, geographic and population coverage, downtime and measures in place to maintain or improve availability, emergency planning, and a comparison between UK network and service provision and that of our relevant competitors. Additionally, in relation to UK networks they will cover infrastructure sharing, capacity, and wholesale arrangements. In relation to services, they will also cover the use of the electromagnetic spectrum.

5.5 Finally, we would also introduce a new section 135 of the Communications Act to enable Ofcom to use their existing information gathering powers to require communications providers and others to supply the information which they will need to write their reports. The consultation highlighted concerns that Government should ensure that the administrative burdens in contributing to the initial and biennial reports are kept to the minimum necessary, so we will also apply the restrictions in section 137 on the imposition of information requirements, including that the request for information should be proportionate.

5.6 Ofcom acknowledge the concerns about the reporting requirement and have given an undertaking to further consult with industry on the specific measures to be reported on.

6 Next Steps

6.1 On 29 June 2009, the Government published its Legislative Programme in draft for consultation. This set out that the Government is proposing to introduce a number of bills in key areas in the next session of Parliament. One of these was the Digital Economy Bill to ensure a world class digital future.

6.2 The Digital Economy Bill includes provision for the sectoral regulator Ofcom to have two new duties: first, when performing their principal duty, Ofcom must have particular regard in all cases to the need to promote appropriate levels of investment in electronic communications networks and in public service media content; and second, to carry out a full assessment of the UK's communications infrastructure every two years.

7 Help with queries

Questions about the policy issues raised in the document can be addressed to:

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List Of Respondents to the New Duties Consultation

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Individual (Kevin Hill)
BBBritain
CBI
Campaign for National Parks
Individual (Richard Marshall)
Telefónica O2 UK Limited
Welsh Assembly Government
Middlesex University
Olswang LLP
Friends Of the Lake District
T-Mobile (UK) Limited
Logica
Communication Workers Union
Consumer Focus Scotland
Federation of Communication Services
Joint Radio Company Limited
Gamma Telecom
Electromagnetic Compatibility Industries Association
Virgin Media
The Number 118118
British Entertainment Industry Radio Group (BEIRG)
Scottish and Southern Energy
KCOM Group
The National Institute of Adult Continuing Education
Radio Regulatory Associates Ltd
Arqiva
RNIB
Cable and Wireless
Talk Talk Group
Intellect
Three
Colt
Communications Consumer Panel
UKTV
Warwickshire Rural Community Council
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