

DIGITAL BRITAIN REPORT

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.

AUGUST 2009

Contents

	Page
1. Executive Summary.....	5
1.1 Investment Duty	
1.4 Background	
1.6 Analysis	
1.9 Questions on Investment Duty	
1.10 Reporting Duty	
1.12 Background	
1.18 Questions on Reporting Duty	
1.19 Process	
2. How to respond	11
3. Additional copies	11
4. Confidentiality & Data Protection	12
5. Help with queries	12
6. What happens next?.....	13
 <u>Annexes</u>	
____Annex A: The Consultation Code of Practice Criteria.....	14
____Annex B: List of Individuals/Organisations consulted	15
____Annex C: Partial Impact Assessment	17
____Annex D: Summary of Consultation Questions	33

Consultation document 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 to Secretaries of State and to alert Secretaries of State to any matters of high concern regarding developments affecting the communications infrastructure.

Explanation of the wider context for the consultation and what it seeks to achieve

This consultation is intended to set out and gather views on two changes to Ofcom's duties that were outlined in the Digital Britain Report (Cm 7650)¹ published on 16 June 2009.

The Government considers that over recent years Ofcom's duty when carrying out its functions to further the interests of consumers of communications services where appropriate by promoting competition, has tended to put the emphasis on short term cost reduction rather than longer term investment in future infrastructure. The Government therefore concluded that it 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 will sit alongside the existing duty to further the interests of citizens in relation to communication matters.

In addition the report 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.

Issued: 13 August 2009

Respond by: 25 September 2009

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1 Victoria Street
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¹ http://www.culture.gov.uk/what_we_do/broadcasting/6216.aspx

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This consultation is relevant to: Telecommunication and Network providers, electronic product suppliers, consumers and citizens.

1. Executive Summary

Investment Duty

1.1 The Government's intention, as specified in paragraph 67 on page 66 of the Digital Britain Report, is for Ofcom, when exercising its functions, to further the interests of consumers, by promoting efficient investment in communications infrastructure where appropriate. This would mean that promoting such efficient investment would sit alongside Ofcom's duty to further the interests of consumers by promoting competition.

1.2 The ability to introduce innovative new services frequently depends on investment in communications infrastructure, and the Government therefore recognises that there is a potential tension between a short term regulatory goal of reducing prices, and a longer term regulatory goal of promoting efficient investment and the resulting innovation. This is a particular concern at a point in time when, for example, we expect that major new investments will be required to support the next generation of fixed and mobile broadband services.

1.3 The Government seeks to address a concern in the community that the promotion of competition has been at the expense of the promotion of investment in future infrastructure. The Government has therefore concluded that it should require Ofcom to further the interests of consumers in communications markets by promoting efficient investment in communications infrastructure, where appropriate and that this should sit alongside the duty to do so by promoting competition, where that is appropriate. These means of furthering the interests of consumers, together with the existing duty to further the interests of citizens in relation to communication matters, would be described as Ofcom's principal duty.

Background

1.4 The 2009 Budget stated that 'in advance of the Digital Britain final report, the Government will review the powers and duties of Ofcom to ensure that it can strike the right balance between delivering competition and encouraging investment in the communications infrastructure'.

1.5 In the Digital Britain Report, the Government concluded that there is a case for broadening what is referred to as Ofcom's principal duty. For Britain to become a leading Information Society economy, and for our international competitiveness, it will need leading edge infrastructure. That will require a climate and a set of governmental and regulatory frameworks that are conducive to efficient investment, while retaining a competitive market for consumers and business users. Ofcom needs to place the desirability of having a strong infrastructure, in the round, at the centre of its vision and strategy alongside its other core duties.

Analysis

1.6 The Digital Britain Report set out the intention to put the promotion of investment in infrastructure alongside the promotion of competition as the means by which Ofcom should, where appropriate, further the interests of consumers in communications markets when exercising its functions. Since publication of the Report, we have further refined this to the promotion of efficient investment in communications infrastructure. In practice, we expect to propose an amendment to section 3(1)(b) of the Communications Act 2003 to include an equivalent provision to that currently relating to competition. As with Ofcom's other general duties, where there is a conflict between the general duties and certain obligations on Ofcom² in the case of functions required to be exercised further to the implementation of EU law requirements, Ofcom must act in accordance with the latter. Whenever there is conflict between Ofcom's various duties in performing their functions, they will be expected to provide an explanation of how they reached their final decisions, including the balancing of competing duties.

1.7 It has been argued that Ofcom already (through the duty in 3(4)) has the obligation to consider the desirability of promoting investment in infrastructure. Whilst it is for Ofcom to balance its duties when decision-making, the Government considers that by reconfiguring the principal duty to include promotion of efficient investment in communications infrastructure, Ofcom will have the confidence that it might not otherwise have had to take regulatory decisions that recognise the need for investment in infrastructure. For example, Ofcom may be more willing to emphasise dynamic (and so, by their very nature, uncertain) benefits over static benefits to consumers. The legislative change being proposed should also address the perception that Ofcom is required to consider competition over all else.

1.8 The new provision may also result in Ofcom setting out investment considerations more explicitly in its impact assessments and might have an effect on the issues Ofcom considers it appropriate to prioritise from a strategic point of view e.g. in its Annual Plan.

1.9 Questions on Investment Duty

Question 1 Can you identify any specific benefits, or risks, arising from the new duty to promote efficient investment in infrastructure?

Question 2 Are the proposed limitations on the new duty, such as the reference to 'efficient' investment appropriate, and can you identify others?

Question 3 It is possible that the new duty will lead in some circumstances to conflicts with other duties. If so do you agree that the framework in the Communications Act provides sufficient flexibility for Ofcom to be able to resolve these?

² Implementing Article 8 of the Framework Directive

Question 4 How might the new principal duty influence the investment decisions your business takes?

Reporting Duty

1.10 Government will ensure the Board of Ofcom has a statutory obligation to write as necessary to the Government alerting the Secretary of State for Business, Innovation and Skills and the Secretary of State for Culture Media and Sport to any matters of high concern regarding developments affecting the communications infrastructure and a statutory obligation to write to those Secretaries of State every two years giving an assessment of the UK's communications infrastructure.

1.11 The Digital Britain Report emphasises the increasing importance of communications infrastructure, and the need for Government and Ofcom to take a broad view of the nation's needs and any gaps in infrastructure requirements. The intended amendments to Ofcom's duties will enable it explicitly to consider efficient investment in infrastructure, as an integral part of Ofcom's principal duty. Building on this, we are also asking Ofcom to monitor and report on the overall communications infrastructure in the UK on an ongoing basis. Examples of the areas which Government will require Ofcom to keep under review and report on are:

- a) Availability/coverage of the major communications platforms, to include fixed telecoms, cable, mobile, broadcasting and other platforms including core, backhaul, spectrum usage and access network capability;
- b) An assessment of the mitigating actions taken to improve resilience, and, where this does not concern critical national infrastructure, emergency preparedness to ensure the availability of networks;
- c) The availability of satisfactory risk assessments carried out by network operators on infrastructure resilience and emergency preparedness, including measures planned to mitigate those risks (taking into account the report of the ECRRG³ Chair);
- d) Services on offer over each platform, including details of wholesale arrangements and service competition; and
- (e) An assessment of the international competitiveness of the UK network infrastructure

³ Electronic Communications Resilience and Response Group

Background

1.12 The proposed new reporting duty will require an objective assessment by Ofcom of the condition of the UK's communications infrastructure. This new reporting duty falls into two parts.

1.13 Firstly there is a requirement for a bi-ennial report covering all of the examples set out in paragraph 1.11 above. We propose to consult on the matters that should be the subject of review. As the report may contain sensitive and/or confidential information, it will not be published. However, headline details will be made public. Secondly there is an ongoing requirement for Ofcom to report to Government on an ad hoc basis to alert Secretaries of State to any matters of high concern regarding developments affecting the communications infrastructure.

1.14 By 'any matters of high concern' we envisage this being in respect of any issues of substantive concern relating to the areas set out in paragraph 1.11 (a) - (e) above, or such other matters as appear to the Board of Ofcom to require to be brought to the attention of the Secretary of State.

1.15 It is for the Board of Ofcom to determine when an issue is of sufficient concern to warrant it being brought to the attention of the Secretary of State.

1.16 We would expect Ofcom to consider a matter to be of serious concern should there be a material and sudden change in their estimation of the performance of the UK's infrastructure on any of the areas outlined at paragraph 1.11 (a) - (e). This should provide a steer to Ofcom as to when, between biennial reports, an ad hoc report might be required.

1.17 We would suggest that Ofcom be required to provide the first of their regular reports in 2012. We would, however, expect Ofcom to produce a transitional report, limited to 1.11 (a), (d) and (e) above, within 9 months of the introduction of this new duty.

1.18 Questions on the Reporting Duty

Question 5 Can you identify any specific benefits, or risks, arising from the new duty for a biennial report?

Question 6 Are the general areas (coverage, quality, resilience, competitiveness) covered by the reporting duty appropriate? Would you add or remove any?

Question 7 Do you agree that the specific measures to be reported on should be the subject of further consultation between Ofcom and industry?

Question 8 Are there any specific measures which you can identify at this stage and which should be considered as part of this process i.e. additional to those in paragraph 1.11 (a) to (e)?

Question 9 Do you agree with the proposed frequency of the report, and the proposal that a non-confidential version of the headline conclusions only should be made public?

Question 10 Government are proposing to give Ofcom power to require information from operators to enable them to compile this report. Any information provided for this purpose will be fully exempt from disclosure under freedom of information legislation. Are there any risks or concerns with this approach?

In relation to both duties described here

Question 11 What is your estimate of the economic impact to consumers and business of the proposed changes to Ofcoms duties?

Process

1.19 The consultation is principally aimed at the industry stakeholders and consumers to comment on the proposed changes to Ofcoms duties to;

- a) **Promote efficient investment in communications infrastructure; and**
- b) **Provide a full assessment of UK communications infrastructure every two years and to alert Secretaries of State to any matters of high concern regarding developments affecting the communications infrastructure.**

1.20 The Government also plans to strengthen Ofcom's duties in relation to investment in content that meets public purposes. Ofcom's powers in relation to content are substantively different from their powers in relation to infrastructure – therefore the duty to promote investment in content does not raise similar questions to those raised by the duty to promote investment in infrastructure. This duty will be addressed separately by DCMS.

1.21 Following the publication of these proposals in the Digital Britain Report, we are setting the consultation period at 6 weeks rather than the 12 weeks set out in the Cabinet Office Code of Practice on Consultation as best practice. The shorter consultation period takes into account the period since the publication of the Digital Britain Report during which stakeholders have had the opportunity to reflect on the proposals. In addition, on 29 June 2009, the Government published its Legislative Programme in draft for consultation. This set out that the Government is proposing to introduce 11 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. It includes giving the sectoral regulator Ofcom two new duties: first, to promote efficient investment in infrastructure and content; and second, to carry out a full assessment of the UK's communications infrastructure every two years. Because of this it is considered important to begin the formal consultation process during August

and September to ensure that all comments can be considered. This approach was agreed by BIS ministers.

1.22 Responses will be made public unless marked otherwise.

2. How to respond

2.1 Consultation opened on 13 August 2009 and the last date for responses is 25 September 2009.

2.2 When responding please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group on the consultation response form and, where applicable, how the views of members were assembled.

2.3 If you decide to respond this way, your response can be submitted by letter or email to:

Name: Rachel Clark/John Brumwell/Simon Moseley
Team: Communications & Content Industries
Department for Business, Innovation and Skills
UG28-30
1 Victoria Street
London SW1H 0ET
Tel: 02072151780/3705/1784
Email: rachel.clark@bis.gsi.gov.uk or john.brumwell@bis.gsi.gov.uk or simon.moseley@bis.gsi.gov.uk

2.4 A list of consultation questions can be found at **Annex D**

2.5 A list of those organisations and individuals consulted is in **Annex B**. We would welcome suggestions of others who may wish to be involved in this consultation process.

3. Additional copies

3.1 You may make copies of this document without seeking permission. Further printed copies of the consultation document can be obtained from:

BIS Publications Orderline
ADMAIL 528
London SW1W 8YT
Tel: 0845-015 0010
Fax: 0845-015 0020
Minicom: 0845-015 0030
www.bis.gov.uk/publications

3.2 An electronic version can be found at:

<http://www.berr.gov.uk/files/file52538.pdf>

3.3 Other versions of the document in Braille, other languages or audio-cassette are available on request.

4. Confidentiality & Data Protection

4.1 Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

4.2 In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

5. Help with queries

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

Name: Rachel Clark/John Brumwell/Simon Moseley
Department of Business, Innovation and Skills
Communications & Content Industries
Department for Business, Innovation and Skills
UG28-30
1 Victoria Street
London
SW1H 0ET
Tel: 02072151780/3705/1784
Email: rachel.clark@bis.gsi.gov.uk or john.brumwell@bis.gsi.gov.uk or simon.moseley@bis.gsi.gov.uk

5.2 A copy of the Code of Practice on Consultation is in **Annex A**.

6. What happens next?

6.1 The consultation period opens on the 13 August 2009 and closes on 25 Sept 2009. Government will publish the Response Document by 16 October 2009.

Annex A: The Consultation Code of Practice Criteria

1. Formal consultation should take place at a stage when there is scope to influence policy outcome.
2. Consultation should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. Consultation exercise should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

Comments or complaints

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Tunde Idowu,
BIS Consultation Co-ordinator,
1 Victoria Street,
London
SW1H 0ET

Telephone Tunde on 020 7215 0412
or e-mail to: Babatunde.Idowu@bis.gsi.gov.uk

Annex B: List of Organisations consulted

Attach a list of all those who are being consulted. We would welcome suggestions of others who may wish to be involved in this consultation process.

Alcatel Lucent	Microsoft
Atvod	Mayer Brown
ABFL Group – Intellex	Motorola
AOL	National Consumer Council
ACE	National Consumer Federation
BSkyB	Noonline
BSG	Nortel
BT	Nokia
BBC	Northern Ireland Office
COI	National Computing Centre
CBI	Nokia Siemens Networks
CMA	Orange
CISCO Systems	Onslow Group
Cable & Wireless	Ofcom Consumer Panel
Carphone Warehouse	Ofcom
Centre for the Protection of National Infrastructure	O2
Citizens online	Olswang
Corning inc	OFT
Cabinet Office	Political – Intellegence
Colt	Point – Topic
Childnet International	Pipex
Discovery – Europe	PCCW
Demon	Qualcomm
DCMS	RIM
DCA	Radio Regulatory Associates
Ericsson	RNIB
Eurim	RNID
EMEA	Reuters
ENPAA	Radar
Five.TV	Skype
Federation of Communications Services	Spamhaus
FCS Business Radio Group and Air – Radio	Sense
Global Crossing	Scottish Government
Google	Time Warner
Huawei Technologies	Telcoconsulting
Hearing Concern	T Mobile
HTA	Tiscali
Ironport	Towerhouse Consulting
Interforum	Timico
ITV	UKCTA
	UK Broadband
	Virgin Media
	Vodafone

ISPA
ICSTIS
Inmarsat
Intellect
Information Commissioners Office
KCom
Merula
Message Labs

Verizon Business
Welsh Assembly
Yahoo
Z Group
3

Annex C: Impact Assessment

Department /Agency: Department of Business, Innovation and Skills (BIS)	Title: Impact Assessment of proposals to amend Ofcom's statutory duties under the 2003 Communications Act (Promoting investment in infrastructure)	
Stage: Consultation	Version:	Date: 13 th August 2009
Related Publications:		

Available to view or download at:

<http://www.>

Contact for enquiries: Tim Hogan

Telephone: 020 7215 1628

What is the problem under consideration? Why is government intervention necessary?

It is argued that there may be a trade-off between the promotion of competition and investment through price regulation. This is because regulations which serve to lower the prices charged by network operators might weaken the incentives to invest in infrastructure since it reduces the potential return on investment.

The Government seeks to address a concern in the community that the promotion of competition has been at the expense of the promotion of investment in infrastructure. This is of particular concern as the UK Government at this time as it has set out ambitious goals in the Digital Britain Final Report to upgrade and extend the existing communication infrastructure, achievement of which will require significant new investment.

What are the policy objectives and the intended effects?

The UK Government is proposing to 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 will sit alongside the existing duty to further the interests of citizens in relation to communication matters.

The intended effect of these changes to Ofcom's duties is that it will serve to increase and accelerate future investment in the UK communications infrastructure by strengthening the incentives for network operators to invest.

What policy options have been considered? Please justify any preferred option.

Two policy options are being considered:

1. Do nothing
2. Amend Ofcom's statutory duties to include the promotion of efficient investment in infrastructure under Section 3(1) of the Communications Act 2003

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? An updated impact assessment containing a more detailed discussion of the costs and benefits will be published alongside the Digital Economy Bill this Autumn.

Ministerial Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

Lord YoungDate: 13 August 2009

Summary: Analysis & Evidence

Policy Option:	Description:
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COSTS	ANNUAL COSTS	Description and scale of key monetised costs by 'main affected groups'
	One-off (Transition) Yrs	
	£	
	Average Annual Cost (excluding one-off)	
£	Total Cost (PV)	£
<p>Other key non-monetised costs by 'main affected groups' Consumers may experience higher retail prices in the short-term, for example if Ofcom were to allow prices at the infrastructure level to rise to help fund new investment. It is possible that competition may also weaken in the longer-term although this is by no means certain.</p>		

BENEFITS	ANNUAL BENEFITS	Description and scale of key monetised benefits by 'main affected groups'
	One-off Yrs	
	£	
	Average Annual Benefit (excluding one-off)	
£	Total Benefit (PV)	£
<p>Other key non-monetised benefits by 'main affected groups' It is possible that consumers may experience the benefits of an effective and modern communication infrastructure relatively earlier if these proposals lead to greater and accelerated investment</p>		

Key Assumptions/Sensitivities/Risks It is unclear the extent to which changes in Ofcom's duties will alter the incentives to invest (e.g. in infrastructure) and innovate (e.g. develop new products). It is also extremely difficult to assess what the potential impact could be on consumers and businesses as well as the wider economy and society and the level of competition, particularly in the short-term.

Price Base Year	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £
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What is the geographic coverage of the policy/option?	UK
On what date will the policy be implemented?	
Which organisation(s) will enforce the policy?	Ofcom
What is the total annual cost of enforcement for these organisations?	£
Does enforcement comply with Hampton principles?	Yes
Will implementation go beyond minimum EU requirements?	N/A
What is the value of the proposed offsetting measure per year?	£
What is the value of changes in greenhouse gas emissions?	£
Will the proposal have a significant impact on competition?	Unknown
Annual cost (£-£) per organisation (excluding one-off)	Micro Small Medium Large
Are any of these organisations exempt?	Yes/No Yes/No N/A N/A

Impact on Admin Burdens Baseline (2005 Prices)		(Increase - Decrease)
Increase of £	Decrease of £	Net Impact £

Key:

Annual costs and benefits: Constant Prices (Net) Present Value

Evidence Base (for summary sheets)

Background

The Office for Communications (Ofcom) is an independent regulatory body with responsibility, among others, for promoting competition and consumer interests in the UK broadcasting, telecommunications and wireless communications sectors. It was established under the Communications Act 2003 and inherited the responsibilities previously held by the Office of Telecommunications (Ofotel), the Broadcasting Standards Commission, the Independent Television Commission, the Radio Authority and the Radiocommunications Agency.

Its legal duties are set out under section 3(1) of the 2003 Communications Act which states:

" 3(1) It shall be the principal duty of Ofcom, in carrying out their functions;

(a) to further the interests of citizens in relation to communication matters; and

(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition

The 2009 Budget stated that 'in advance of the Digital Britain Final Report, the Government will review the powers and duties of Ofcom to ensure that it can strike the right balance between delivering competition and encouraging investment in the communications infrastructure.'

In the Digital Britain Final Report, the Government concluded that there is a case for broadening what is referred to as Ofcom's principal duty and set out its intention to put the promotion of investment in infrastructure alongside the promotion of competition as the means by which Ofcom should, where appropriate, further the interests of consumers in communications markets when exercising its functions.

Rationale for government intervention

Historically, government intervention in telecommunications has been necessary because the sector is characterised by high barriers to market entry and expansion which can serve to significantly reduce competition and, as a result, prevent the market functioning efficiently. These are:

- the costs of rolling-out new infrastructure which are higher for potential new entrants than incumbent operators⁴
- the existence of economies of scale whereby the larger operators have a significant cost advantage over smaller operators⁵

⁴ More particularly, there are significant sunk costs (costs which cannot be recouped upon exit) associated with rolling out communications infrastructure. These can act as an effective deterrent to entry if new entrants believe that the post-entry profits which they earn are insufficient to recoup these high sunk costs.

⁵ The high cost of deploying communications infrastructure falls as the number of lines connected to each telephone exchange increases. By moving first, the incumbent operator is able to exploit these economies of scale. This can serve to deter competing network operators by making it much more difficult for them to reach the scale needed to operate efficiently.

- the existence of network effects whereby the value to customers of a network operated by one provider increases as more customers join

Regulation of the telecommunications industry is extremely complex and we only describe the very high-level principles and objectives in this impact assessment⁶. Put very simply, Ofcom seeks to promote competition and the interests of citizens at the infrastructure level by regulating the prices charged by network operators in a way which encourages them to further reduce costs while at the same time strengthening the incentives to invest in new additional communications infrastructure.

It is argued that there may be a trade-off between these two objectives. This is because regulations which serve the lower the prices charged by network operators weaken the incentives to invest in infrastructure since it reduces the potential return on investment.

It is therefore crucial that the appropriate balance between the promotion of competition and investment is struck. This may vary from sector to sector. In dynamic, high-technology intensive sectors such as telecommunications which are characterised by high levels of investment and innovation, including R&D, it may be more appropriate to give greater emphasis to investment than would perhaps be necessary in lower technology intensive sectors.

By amending Ofcom's duties to give greater importance to investment, this may serve to help the UK Government deliver its ambitious aims to upgrade and extend the existing communications infrastructure. These include the delivery of universal broadband of 2Mb/s by 2012 and next generation access super-fast broadband to 90% of homes and businesses by 2017. To achieve these aims will require significant new investment.

From an economic perspective, changing Ofcom's duties in this may serve to raise the total level of benefits to consumers and businesses in the economy⁷. This could happen if as a result of changes to Ofcom's duties the level and pace of investment in communications infrastructure increases delivering new benefits which offset any potential associated reduction in competition. Although uncertain and yet to be realised, next generation access super fast broadband for example offers the possibility of significant benefits in the form of new and innovative services and improved delivery of public services in more rural and remote parts of the UK.

It is worth noting that changing Ofcom's duties in a way which could help strengthen the incentives for investment is particularly important in the context of the *New Industry, New Jobs* Agenda where increased investment in infrastructure is seen as playing a key role in helping the UK emerge from recession and place itself in a strong position in the global economy, able to exploit the new business and market opportunities which emerge⁸.

Investment in the UK Telecommunications Sector: Recent Trends

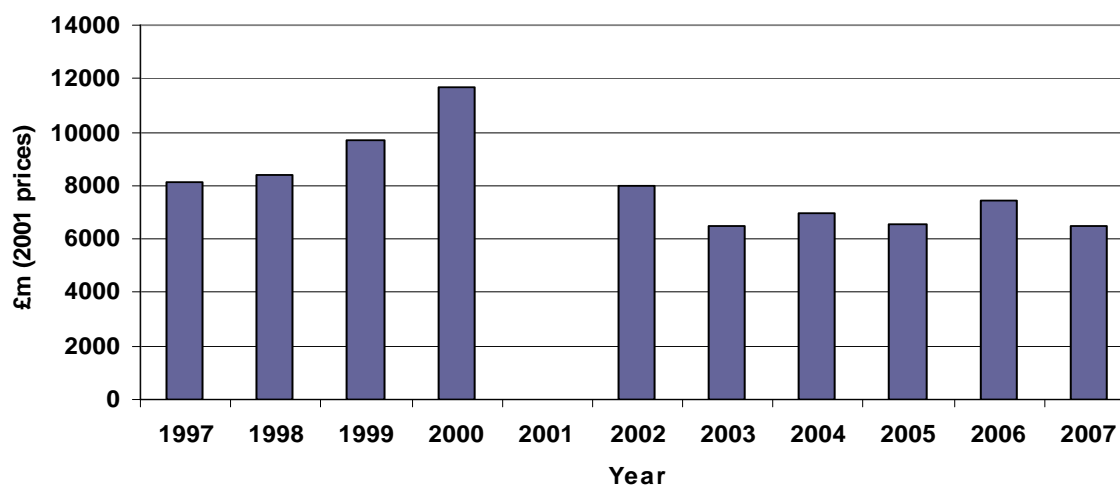
⁶ See Ofcom (2004) Strategic Review of Telecommunications Consultation Phase 1. This can be accessed at http://www.ofcom.org.uk/consult/condocs/telecoms_review1/telecoms_review/

⁷ See de Bilj (2004) *Competition, innovation and future-proof policy* for a more detailed discussion. The paper can be found at: <http://www.tilburguniversity.nl/tilec/publications/report/policy.pdf>

⁸ The *New Industry, New Jobs* policy statement an effective modern infrastructure has crucial to the competitiveness of the UK economy and British business. The paper can be found at: <http://www.berr.gov.uk/files/file51023.pdf>

The level of investment – in terms of net capital expenditure – increased in real terms after the mid 1990s, reaching a peak of over £11bn in 2000, representing around 10% of total UK capital expenditure (see Figure 1 overleaf)⁹.

Figure 1: Net capital expenditure in the UK telecommunications industry (SIC 64.2)



Source: Office for National Statistics, ABI data, BIS estimates
Data for 2001 not published for disclosive reasons

The levels of investment, in real terms, have fallen back since the peak in 2000 following the collapse in the dot.com bubble. This is borne-out in a study by London Economics in association with PricewaterhouseCoopers for the European Commission¹⁰ which indicates that investment levels declined upto 2004 (see Table 1 below). Unfortunately, we do not have data showing the level of investment in these sub-sectors since 2004.

Figure 1: Total gross investment in the e-communications sector and sub-sectors in the UK
(£m, 2001 prices)

	2001	2002	2003	2004
Fixed telephony	3773	3542	2351	2417
Mobile telephony	4049	3564	2525	2504
Cable TV	651	565	326	228
Broadcasting	301	156	142	64
Total e-communications	8773	7827	5344	5213

Source: London Economics (2006)

Policy options

⁹ This trend was driven by a number of factors including investment in infrastructure to support 2G mobile telephony, investment by BT regards roll-out of its digital network infrastructure, investment by new entrants into the fixed telephony market due to local loop unbundling. The peak in investment also coincided with the auction of 3G mobile telephony licenses. This is discussed in more detail in Ofcom's Strategic Review of Telecommunications.

¹⁰ London Economics in association with PricewaterhouseCoopers (2006) *An assessment of the regulatory framework for electronic communications – growth and investment in the EU e-communications sector*. This report can be found at: http://ec.europa.eu/information_society/policy/ecom/doc/library/ext_studies/assessmt_growth_invst/investment.pdf

Option 1: Do nothing

Under this option, there would be no change in Ofcom's statutory duties. Since the incentives to investment and innovate have not been altered in any way, we would not expect to see a marked step change in the pace and level of investment carried out by network providers which would continue to be driven, in the main, by commercial factors.

Option 2: Amend Ofcom's statutory duties

Under this option, the Government would amend Ofcom's duties under the Communications Act to promote efficient investment in infrastructure.

There is considerable uncertainty as to what the potential impact on consumers and businesses is likely to be. This may depend in part on the extent to which Ofcom's approach to regulating the telecommunications sectors changes as a result of these proposals.

There is unlikely to be any impact on network operators and service providers since these proposals would not impose any further requirements on them which could lead to them incurring additional costs. Decisions whether or not to invest would continue to be made on a commercial basis.

As for consumers, a distinction should perhaps be made between the short-term and long-term effects. For example, consumers may experience higher retail prices in the shorter-term if Ofcom were to allow network operators to raise the prices they charge at the infrastructure level in order to fund further investment. In the longer-term, consumers may experience changes in competition. Competition may increase if, as a result of changes to Ofcom's duties, the return on investment increases encouraging the market entry and expansion of competing network operators. Alternatively, it may decrease, if they confer a greater first mover advantage on the incumbent operator which enables them to potentially hamper (in the absence of remedial action) further competition at the infrastructure level.

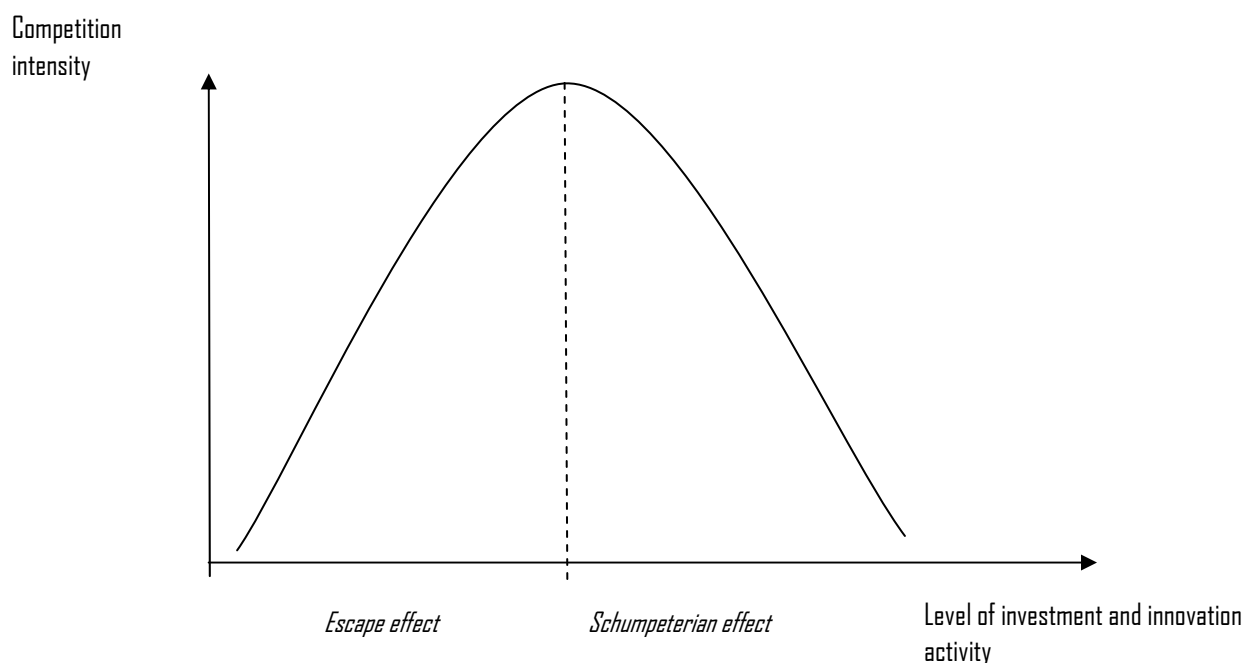
In the longer-term however, consumers could benefit from greater and accelerated investment in infrastructure brought about by changes to Ofcom's statutory duties. For example, consumers in more rural and remote areas may be able to benefit from faster and more reliable broadband services earlier than would otherwise have been the case. These would potentially offset the negative impact of any reduction in competition at the infrastructure level.

Competition assessment

The relationship between competition on the one hand and investment and innovation is not straightforward and there remains a degree of uncertainty as to precise characteristics. Many commentators have argued the relationship can be depicted as an inverse U-shaped curve such as that shown in Figure 2 below. However this is not universally accepted and has been more commonly used to describe the relationship between competition intensity and innovation rather than investment. It is used here – with a degree of caution – to help inform our preliminary analysis of the potential impact on competition of proposals to amend Ofcom's statutory duties to promote investment.

The general theory is that at relatively low levels of competition intensity an increase in competition can lead to higher levels of investment and innovation activity. This is because firms invest and innovate in order to stay ahead of their competitors. They may do this by investing in more efficient business process and lower-cost technologies which enable them to become more productive and competitive or by bring to market new more innovative products and services which are not being offered by their rivals. This effect is referred to in the literature as the '*escape effect*'. After a certain level of competition intensity has been reached however, further increases in competition may serve to reduce the level of investment and innovation activity. This is because fierce competition erodes away the returns from investment, in terms of monopoly rents earned from new products and services, reducing the incentive to invest and innovate. This effect is referred to in the literature as the '*Schumpeterian effect*'.¹¹

Figure 2: A relationship between competition and investment:



In the current context, there is significant uncertainty as to where the tipping point could be. Accordingly, it is possible that if, as a result of changing Ofcom's duties, investment does increase, the level of competition could potentially increase as well as decrease. As noted above competition could increase if, as a result of changes to Ofcom's duties, the return on investment increases encouraging the market entry and expansion of competing network operators. Alternatively, it may decrease, if they confer a greater first mover advantage on the incumbent operator which enables them to potentially hamper (in the absence of remedial action) further competition at the infrastructure level. A more detailed discussion of the potential impact on competition will be included in an updated impact assessment which be published alongside the Digital Economy Bill this Autumn.

Other specific tests

¹¹ For a useful review of the literature on the relationship between competition, regulation and investment in the telecommunications sector see de Bijl (2004) *Competition, innovation and future proof policy* at <http://www.tilburguniversity.nl/tilec/publications/report/policy.pdf>; and Friederiszick et al. (2008) *Analysing the relationship between regulation and investment in the Telecom sector* at <http://www.econ.upf.edu/docs/seminars/grajek.pdf>

We have considered a number of other specific tests including Small Firms Impact Test, Legal Aid, Sustainable Development, Carbon Assessment, Other Environment, Health Impact Assessment, Race Equality, Disability Equality, Gender Equality, Human Rights and Rural Proofing.

After an initial screening, it has been deemed that no significant impact is anticipated in any case. Nevertheless, a more detailed analysis will be presented in an updated impact assessment which will be published alongside the Digital Economy Bill.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	No	No
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	No	No
Disability Equality	No	No
Gender Equality	No	No
Human Rights	No	No
Rural Proofing	No	No

Annex C (continued)

Department /Agency: Department of Business, Innovation and Skills (BIS)	Title: Impact Assessment of proposals to amend Ofcom's statutory duties under the 2003 Communications Act (Reporting Duties)	
Stage: Consultation	Version:	Date: 13 th August 2009
Related Publications:		

Available to view or download at:

<http://www.>

Contact for enquiries: Tim Hogan

Telephone: 020 7215 1628

What is the problem under consideration? Why is government intervention necessary?

The UK communications market is characterised by high levels of innovation and technological change. Ongoing monitoring of the overall communications infrastructure is crucial as delays in detecting and correcting any problems with the infrastructure and the market can impose significant costs on consumers, citizens and businesses. This is because the communications infrastructure is of major economic and strategic importance and plays a vital role in helping the UK Government promote social inclusion and deliver vital public services to more rural areas. It is also indispensable for the emergency services.

What are the policy objectives and the intended effects?

The Digital Britain Final Report set out the UK Government's commitment to give Ofcom a statutory obligation to monitor and report on the overall communications infrastructure in the UK on an ongoing basis. This should serve to help the Government and the regulator detect and take prompt action to address those needs of the nation which may not be being met.

What policy options have been considered? Please justify any preferred option.

The UK Government has considered the following options:

1. Do nothing
2. Impose an additional statutory duty on Ofcom to:
 - Report every two years to the Secretaries of State at BIS and DCMS giving an assessment of the UK's communication infrastructure
 - Write as necessary alerting the Secretaries of State at BIS and DCMS to any matters of high concern regarding the developments affecting the communications infrastructure

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? An updated impact assessment containing a more detailed discussion of the costs and benefits will be published alongside the Digital Economy Bill this Autumn.

Ministerial Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

Lord YoungDate: 13 August 2009

Summary: Analysis & Evidence

Policy Option:	Description:
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COSTS	ANNUAL COSTS	Description and scale of key monetised costs by 'main affected groups' Costs to network operators and service providers who are required to supply additional information which Ofcom needs to produce their report. Costs to Ofcom who must devote additional resources to gathering the necessary intelligence and producing their report.		
	One-off (Transition) Yrs			
	Average Annual Cost (excluding one-off)			
	Total Cost (PV)		£	
Other key non-monetised costs by 'main affected groups'				

BENEFITS	ANNUAL BENEFITS	Description and scale of key monetised benefits by 'main affected groups' Any problems associated with the communications infrastructure and market may be detected and corrected more quickly reducing the negative impact on consumers and businesses as well as the wider economy and society.		
	One-off Yrs			
	Average Annual Benefit (excluding one-off)			
	Total Benefit (PV)		£	
Other key non-monetised benefits by 'main affected groups'				

Key Assumptions/Sensitivities/Risks

Price Base Year	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £
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What is the geographic coverage of the policy/option?	UK
On what date will the policy be implemented?	
Which organisation(s) will enforce the policy?	Ofcom
What is the total annual cost of enforcement for these organisations?	£
Does enforcement comply with Hampton principles?	Yes
Will implementation go beyond minimum EU requirements?	N/A
What is the value of the proposed offsetting measure per year?	£
What is the value of changes in greenhouse gas emissions?	£
Will the proposal have a significant impact on competition?	Yes/No
Annual cost (£-£) per organisation (excluding one-off)	Micro Small Medium Large
Are any of these organisations exempt?	Yes/No Yes/No N/A N/A

Impact on Admin Burdens Baseline (2005 Prices)		(Increase - Decrease)
Increase of £	Decrease of £	Net Impact £

Key: Annual costs and benefits: Constant Prices (Net) Present Value

Evidence Base (for summary sheets)

Background

The Office for Communications (Ofcom) is an independent regulatory body with responsibility, among others, for promoting competition and consumer interests in the UK broadcasting, telecommunications and wireless communications sectors. It was established under the Communications Act 2003 and inherited the responsibilities previously held by the Office of Telecommunications (Ofotel), the Broadcasting Standards Commission, the Independent Television Commission, the Radio Authority and the Radiocommunications Agency.

The Digital Britain Final Report 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. In it, the Government announced its intention to give Ofcom a statutory duty to monitor and report on the overall communications infrastructure in the UK on an ongoing basis.

Rationale for Government Intervention

Ongoing monitoring of the overall communications infrastructure is crucial for two reasons:

Equity considerations

Problems with the communications infrastructure can hamper the UK Government's ability to deliver equity objectives such as social inclusion and the delivery of public services to rural and remote areas.

Market failure considerations

For different reasons, the telecommunications market may not function properly generating economic inefficiencies which can reduce the total level of benefits to businesses, consumers and citizens.

For example, the high-cost of rolling-out infrastructure may act as a barrier to competition by deterring the entry of new network providers. This would serve to maintain prices at level higher than would be expected in more competitive markets and possibly limit consumer choice in terms of the number of providers and products available to consumers and businesses.

There may also be regulatory failure which could arise if the regulatory framework fails to keep pace with the rapid rate of technological progress and changes in market structure to the point that it is no longer fit for purpose¹².

If these problems are not detected and corrected promptly, these can have a potentially significant negative impact on UK society and the economy. There are several reasons for this:

¹² These issues are discussed further in BERR Economics Paper No 4 'Regulation and innovation: evidence and policy implications' which can be accessed at:

http://www.dius.gov.uk/innovation/demanding_innovation/~media/publications/F/file49519

Large number of users of telecommunications

Nearly every individual and business is connected to each other via one telecommunications platform or another. Consequently, any problem with the communications infrastructure or the ability of the market to function efficiently has the potential to affect a very large number of people.

The ICT sector is of major economic importance to the UK economy

The information and communication technology (ICT) sector is of major economic importance, forming the backbone of the UK economy. In 2007, it generated some £96 billion in gross value added and employed some 1.2 million people. This represents around 8% of total UK GDP and 4% of total UK employment¹³. ICT is also a powerful driver of productivity and thus makes a positive contribution to the competitiveness of a large number of sectors many of which the UK enjoys a significant comparative advantage (e.g. business services, financial services, computer and IT services and the content and creative industries).

Emergency services

A high speed and reliable communications infrastructure is crucial to the delivery of emergency services. A failure to contact the emergency services promptly because of problems with the communications infrastructure can contribute to a loss of life as people in urgent need of medical attention do not receive it in time.

Delivery of public services

A well functioning telecommunications infrastructure also has an important role to play in helping the UK Government achieve wider objectives such as greater social inclusion and the provision of high quality public services in more rural and remote areas of the country. The existence of technical problems with the infrastructure may hamper the ability of the UK Government to achieve these goals.

Wider strategic importance

Telecommunications makes a significant contribution to the wider infrastructure and strategic interests of the UK. For example, radar, broadband and Global Positioning Systems (GPS) all play a vital role in air traffic control and military and defence systems.

Policy options

Option 1: Do nothing

¹³ See page 4 of the impact assessment produced alongside the Digital Britain Final Report which can be accessed at: http://www.culture.gov.uk/images/publications/digitalbritain_impactassessment.pdf

Under this option, there would be no additional obligations on Ofcom to monitor and report on the overall communications infrastructure in the UK. Market intelligence on the telecommunications industry would continue to be published in the usual way (e.g. annual Communication Market Reports, consultation documents, ad hoc academic research etc)

Option 2: Impose additional reporting requirements on Ofcom

Under this option, Ofcom would be given additional statutory obligations to:

- report every two years to the Secretaries of State at BIS and DCMS giving an assessment of the UK's communications infrastructure
- write as necessary alerting the Secretaries of State at BIS and DCMS to any matters of high concern regarding the developments affecting the communications infrastructure

Examples of the areas which the UK Government will require Ofcom to keep under review and report on are:

- a) availability/coverage of the major communications platforms, to include fixed telecoms, cable, mobile, broadcasting and other platforms including core, backhaul, spectrum usage and access network capability
- b) an assessment of the mitigating actions taken to improve resilience and, where this does not concern critical national infrastructure, emergency preparedness to ensure the availability of networks
- c) the availability of satisfactory risk assessments carried out by network operators on infrastructure resilience and emergency preparedness, including measures planned to mitigate those risks taking into account the report of the Electronic Communications Resilience and Response Group (EC-RRG)
- d) services on offer over each platform, including details of wholesale arrangements and service competition
- e) an assessment of the international competitiveness index of UK network infrastructure

As part of these proposals, Ofcom will be given the power to require information from network operators to enable them to compile this report. Any information provided for this purpose will be fully exempt from disclosure under freedom of information legislation.

Costs

There are likely to be costs to network operators who are required to supply the additional information which the regulator may need to produce their report. As a result, the administrative burdens for these companies could increase. There may also be costs to the regulator Ofcom who must now devote additional resources to gathering the necessary information and producing these additional reports. These costs have not been quantified at this time.

Benefits

Any problems with the communications infrastructure and market may be detected and corrected more quickly reducing the negative impact on consumers and businesses as well as the wider economy and society.

Competition Assessment

After initial screening, it has been deemed that these proposals would not have a significant impact on competition. It is unlikely to directly or indirectly limit the number of network operators and internet service providers, limit their ability to compete or the incentives to do so.

Small Firms Impact Test

The communications infrastructure in the UK is dominated by the two main network operators, BT and Virgin Media. It is possible that there may be an impact on the smaller network operators who may incur disproportionately higher costs associated with submitting the required information than the larger network operators.

Other specific tests

Other specific tests have been considered including Legal Aid, Sustainable Development, Carbon Assessment, Other Environment, Health Impact Assessment, Race Equality, Disability Equality, Gender Equality, Human Rights and Rural Proofing.

After an initial screening, it has been deemed that no significant impact is anticipated in any case. Nevertheless, a more detailed analysis will be presented in an updated impact assessment which will be published alongside the Digital Economy Bill.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

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Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	No	No
Disability Equality	No	No
Gender Equality	No	No
Human Rights	No	No
Rural Proofing	no	No

Annex D:

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 to the Secretaries of State and to alert those Secretaries of State to any matters of high concern regarding developments affecting the communications infrastructure.

Summary of Questions

Duty to promote efficient investment in infrastructure

Question 1 Can you identify any specific benefits, or risks, arising from the new duty to promote efficient investment in infrastructure ?

Question 2 Are the proposed limitations on the new duty, such as the reference to 'efficient' investment appropriate, and can you identify others ?

Question 3 It is possible that the new duty will lead in some circumstances to conflicts with other duties. If so do you agree that the framework in the Communications Act provides sufficient flexibility for Ofcom to be able to resolve these?

Question 4 How might the new investment duty influence the investment decisions your business takes?

Duty to Report

Question 5 Can you identify any specific benefits, or risks, arising from the new duty for a biennial report?

Question 6 Are the general areas (coverage, quality, resilience, competitiveness) covered by the reporting duty appropriate? Would you add or remove any ?

Question 7 Do you agree with the proposal that the specific measures to be reported on should be the subject of further consultation between Ofcom and industry ?

Question 8 Are there any specific measures which you can identify at this stage and which should be considered as part of this process ?

Question 9 Do you agree with the proposed frequency of the report, and the proposal that a non-confidential version of the headline conclusions only should be made public ?

Question 10 Government are proposing to give Ofcom power to require information from operators to enable them to compile this report. Any information provided for this purpose will be fully exempt from disclosure

under freedom of information legislation. Are there any risks or concerns with this approach?

In relation to both duties described here

Question 11 What is your estimate of the economic impact to consumers and business on the proposed changes to Ofcoms duties?

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