FAO Rachel Clarke, Simon Mosley
Communications & Content Industries
Department for Business, Innovation and Skills
UG28-30
1 Victoria Street
London SW1H 0ET

4th September 2009

Dear Rachel and Simon,

Consultation on the Proposed Changes to Ofcom's duties

I am writing in response to the consultation document published on 13th August relating to proposed changes in Ofcom's duties.

<u>Requirement to consider investment as well as competition</u>

The CBI is supportive of the need for Ofcom to consider investment alongside competition as a means of delivering consumer benefit in the UK telecoms market. On a practical level we are not convinced that a formal change to the Communications Act is necessary given that Ofcom is already required, in section 3(4)(d), to have regard to "the desirability of encouraging efficient investment". But the overriding of objective of encouraging Ofcom to focus on competition and investment is something that we support.

Britain's future competitiveness will depend on its ability to develop strengths in knowledge-intensive, high value sectors. That in turn will require a world-class digital infrastructure that promotes the fast and easy flow of ideas and information. So encouraging private sector investment in our telecommunications infrastructure must be a key duty for Ofcom going forward. Notwithstanding this the UK has developed one of the most competitive telecoms markets in the world to the benefit of consumers, both business and residential consumers and this must be preserved.

Ultimately the regulatory framework must deliver on two key objectives:

1. It must achieve certainty in pricing to enable companies to make a return on investment. It is clear that the investments required in NGA are substantial and that a significant degree of risk is involved. It is right therefore that providers should be able to earn a fair return on this investment.

INVESTOR IN PEOPLE

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2. It must preserve competition by enabling open access and non discrimination in pricing.

The relationship between competition and investment is not straightforward, as recognised in the consultation document. Competition can encourage investment in cutting edge products and services as companies strive to stay ahead of the competition. However, the paper suggests that after a given point competition will start to erode profit margins and hence the incentive and ability to sustain further investment.

Despite the intense competition in the UK telecoms market the private sector has announced significant investment in next generation infrastructure. BT and Virgin Media have started to roll out next generation networks which will reach between 40% and 50% of the population by 2012. BT's announced investment plans total £1.5bn and follow similar developments in other EU countries.

However, this necessarily represents the most cost effective areas and the remaining investments required in our communications infrastructure over the next ten years are substantial – estimated to range from £5bn - £30bn. Page 21 of the consultation document also notes that net capital expenditure in the UK telecommunications industry has reduced in real terms since 2000 and the dot com collapse. This is a trend that will need to be reversed if the Digital Britain plans are to be realised.

It is therefore right that Ofcom is encouraged to take a long term view of the future benefits to consumers, both residential and consumers, of enhanced services that result from new investment as well as the shorter term imperative of lower prices.

In order to ensure that this balance is struck there are several principles that should be adhered to in future NGA regulation. Firstly, we have voiced concerns in the past that regulation at a European level cannot focus exclusively on infrastructure competition or risk sharing agreements that are not matched by non discrimination in pricing. It is important that Ofcom does not deviate from these important principles.

Furthermore Ofcom should be more ambitious and creative about how it views potential investment frameworks. Previous CBI submissions suggested that vertical investment partnerships in NGA between service providers and operators were often preferable to horizontal ones between operators. One of the advantages of vertical partnerships is that they would allow a much broader range of investors to enter the market, and a greater variability of services to be offered in differing geographic areas. For instance, in higher density areas joint venture partners might consist of a network operator and a media provider, in a medium density area between a network operator and a large retail outlet, and in a low density area between a network operator and a highway provider. This would facilitate stimulating investment in NGAs through a wide range of demand drivers and would maximise development of marginal pricing and thus optimise service development.

A potential drawback could be the degree of regulatory complexity that would arise in relation to risk-sharing arrangements and their competitive implications. For instance, a joint venture between a network provider and a media company would be likely to require different regulatory actions/measures - e.g. a possible need for constraints on exclusive content provision and pricing - from those that would be required for a joint venture between a network operator and a highway provider in a different area. But the range of regulatory complexity would possibly decrease over time as initial and short term entrants left and the market became established and more concentrated.

Ofcom should ensure that as part of any new duty to promote efficient investment that it gives greater consideration to how these new partnerships might emerge and how the regulatory principles may need to adapt to encourage innovation in this area.

Finally outside of the regulatory sphere the Government has a role to play in addressing the tension between investment and competition by taking action to stimulate the demand side. One of the key issues relating to future investment in NGA is the uncertainty over demand for high speed broadband and the CBI has set out some proposals in this area in its response to the Digital Britain report. This demand side stimulation will play an important role in unlocking private sector investment.

<u>Ofcom's duty to produce a communications market report</u>

A single document which provides an overview of the UK communication infrastructure would be useful for Government in order to assist long term planning and to identify potential problems with infrastructure provision at an early stage.

Conducting a review on this scale every two years could be an onerous responsibility for both Ofcom and business. Government should therefore ensure that the duty does not result in a substantial administrative burden for industry. Given the inherently long-term nature of infrastructure investment, a review every three or four years could be more appropriate.

It is also important to ensure that confidential and commercially / strategically sensitive information is protected from disclosure (e.g. under FOI requests or the Environmental Regulations) and is only used by Ofcom for the purpose of reporting to Government.

Finally we believe that network resilience reporting should be addressed by Government through the EC-RRG rather than through a duty on Ofcom. It would be costly and complex to provide such information to Ofcom who will then provide it to Government which such information is only available to a limited number of security cleared personnel.

I hope that these comments are useful.

Yours sincerely

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