



## DIGITAL BRITAIN REPORT

### Consultation on the proposed new duties for Ofcom on resilience: Secondary Information

#### Response of British Sky Broadcasting Group Plc ('Sky')

#### 1. Introduction

- 1.1. On 13 August 2009 Government consulted on proposals to impose two new duties on Ofcom, including a duty to alert 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 to write to those Secretaries of State every two years giving an assessment of the UK's communications infrastructure (the 'reporting duty').
- 1.2. This present consultation concerns two of the "examples" of matters on which it was proposed that Ofcom would be required to report to the Secretaries of State, namely:
  - 1.2.1. *"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"*; and
  - 1.2.2. *"the availability of satisfactory risk assessments carried out by network operators on infrastructure resilience and emergency preparedness, including measures planned to mitigate those risks"*.
- 1.3. In the current consultation document, Government now proposes that Ofcom's reporting duty include additional powers to:
  - 1.3.1. require companies to report to Ofcom on risk assessments and emergency planning; and
  - 1.3.2. require companies to test emergency plans and participate where necessary in Government testing of national response plans for electronic communications (the 'Consultation Document').
- 1.4. This document provides Sky's response to the questions posed by the Consultation Document, however, Sky notes that:
  - 1.4.1. this consultation pre-judges the outcome of the previous BIS consultation, in particular in relation to the implementation of the reporting duty; and
  - 1.4.2. the Consultation Document provides little detail as to what kind of information might be required by Ofcom and the purpose to which that information might be put.
- 1.5. It is clearly less than satisfactory to be asked to comment on aspects of regulation without knowing whether Government intends to implement the overarching duty, nor how this will be achieved in practice.

**2. Question 1: Do you agree that Ofcom should have the power to require that electronic communications operators report to Ofcom on risk assessments carried out?**

- 2.1. To the extent that Ofcom does not already have the power to request such information, it may be appropriate for Ofcom to inform itself as to the nature of risk assessments carried out by network operators, and provide that information to Government in order to better direct policy.
- 2.2. However, based on the limited information provided in the Consultation Document, it is not clear on whom these new burdens would fall if implemented, and in particular whether Sky, as the operator of communications infrastructure, would be required to provide Ofcom with the relevant information. The consultation states that these powers will cover “*key providers of the UK’s communications infrastructure*”,<sup>1</sup> but the ‘Partial Impact Assessment’ refers more generally to “*network operators*” without the same qualification. BIS must clarify whether the intention is to allow Ofcom to request the relevant information from all providers of electronic communications networks or only those involved in providing networks of a particular nature, for example those relating to critical national infrastructure.
- 2.3. Any power of Ofcom to demand such information should be limited in frequency to that necessary for Ofcom to report to Government under the reporting duty (if implemented), i.e. only every two years. Were Ofcom to have the power to request such information at any time, there would be a significant risk of unnecessary and burdensome regulation.
- 2.4. The remainder of this response is premised on the basis that Sky would be caught by this proposed new power.

**3. Question 2: Do you consider that Ofcom should have the additional power to require that further risk assessments be undertaken by relevant companies if those supplied are deemed insufficient. If so, how should this assessment process take place?**

- 3.1. Sky does not consider it appropriate for Ofcom to have the power to require additional risk assessments to be undertaken by communications infrastructure operators in the event that Ofcom assesses that an operator’s own risk assessment is “*insufficient*”.
- 3.2. Sufficiency of risk assessment can only be carried out meaningfully by the network operator, according to the specific nature of the network and the purposes to which the relevant infrastructure is put. Furthermore, network resilience, and the sufficiency of any risk assessment, may form key commercial factors underlying the terms and conditions of supply of network services. Accordingly, it would be meaningless for Ofcom to carry out an assessment of the “sufficiency” of network operators’ risk assessments as it would inevitably be forced to rely, to a degree, on the subjective assessments of the operator. It would also be unduly burdensome on Ofcom to attempt to assess the sufficiency of each individual network provider’s risk assessment against the particular circumstances of the provider.
- 3.3. As an alternative to such an individualised assessment, it would be wholly inappropriate for Ofcom to attempt to apply a standard measure of risk assessment across all network providers, as clearly it is not the case that ‘one size fits all’ in this context.
- 3.4. In this regard, the premise for the proposals is flawed. The ‘Partial Impact Assessment’ states that a rationale (indeed, the only one provided by the Consultation Document) for

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<sup>1</sup> Paragraph 2.5 of the Consultation Document, on page 5, and paragraph 3.2.3 on page 7.

Government intervention is that “[i]n preparing risk assessments and emergency plans, network operators may not take into account the impact of problems with the communications infrastructure on other businesses, consumers and citizens. As a result, their risk assessments and emergency plans may be less adequate than society would like.”

- 3.5. First, no evidence has been provided in support of the contention that network operators do not take into account the impact on other businesses, consumers and citizens when preparing risk assessments and emergency plans. The basis for the proposals is therefore purely speculative, and their consideration should be appropriately circumscribed as a result.
- 3.6. Second, whilst society might *desire* a particular standard of network resilience, it is not the case that it is efficient or appropriate for all networks to meet the same standard. One standard might be sufficient for certain network tasks, such as residential broadband services, whilst a different standard of risk assessment would be appropriate for network services to the banking industry, or to critical national infrastructure, for example, supporting the Police service or the National Health Service. ‘Sufficiency’ of risk assessment in each of these contexts will mean different things, and is best determined by the network operator.
- 3.7. Even if Ofcom were limited to a power solely to request relevant information, it would not be prevented from providing guidance to network providers on how to carry out risk assessments and best practice. Such a role could make a valuable contribution to industry without requiring excessively burdensome powers.

#### **4. Question 3: Should risk assessments be based on existing Government processes?**

- 4.1. Whilst existing Government processes might inform best practice in this area, they should not form any kind of template for risk assessments to be applied by all network operators for the reasons provided in response to the previous question.

#### **5. Question 4: Do you agree there should be a duty on relevant companies to provide information to Ofcom on their emergency plans?**

- 5.1. For the reasons given in relation to Question 1, it may be appropriate for relevant companies to provide information on their emergency plans to Ofcom.

#### **6. Question 5: Do you agree that there should be a duty on such companies to a) test emergency plans and b) participate in Government exercises as and when necessary to ensure overall resilience?**

- 6.1. Emergency planning is part of good business practice. It is not clear how far a duty to test emergency plans or participate in Government exercises would deliver “*overall resilience*”. To the extent that “*overall resilience*” has any discernible meaning, it would appear to mean standardising both risk assessment and resilience across *all* networks involved. For the reasons provided in response to Questions 1 and 2, such an approach would be wholly inappropriate.
- 6.2. Any such duty should be limited to those which Government considers are critical national infrastructure, and should not be extended to all networks.

**7. Question 6: Are there any other issues concerning the resilience of networks that you believe should be addressed in legislation?**

7.1. Any legislation should be limited to the power to request information, subject to the issues raised above.

**8. Question 7: Do you think that the proposals in this consultation document are in line with the expected outcome of the Framework Review?**

8.1. It is not possible to predict the outcome of the Framework Review at this stage. It may be more appropriate to wait for the outcome of the review before adopting legislation in this area which might need to be amended further in due course.

**9. Question 8: What do you think the economic impacts of these proposals will be upon your business and do you have any comments on the impact assessment?**

9.1. The 'Partial Impact Assessment' attached to the Consultation Document is clearly deficient given the lack of detail as to the likely powers to be granted to Ofcom, the lack of clarity as to how the powers will be exercised (for example, which network operators will be covered), and the lack of any attempt to quantify the costs of the proposals.

9.2. Government must carry out a more detailed impact assessment if it decides to implement any of the proposals contained in the Consultation Document.

**10. Question 9: Are there any other points you wish to make in relation to the issues covered in this consultation?**

10.1. None at present.

Sky

October 2009