

Extending the growth duty to Ofgem, Ofwat and Ofcom

CCUK response - August 2023

About CCUK

1. Comms Council UK is a membership-led organisation that both represents and supports telecommunications companies that provide services to business and residential customers in the UK. We keep Britain talking in its various guises by providing or reselling voice services over data networks (VoIP) as well as other “over the top” applications including instant messaging and video.
2. The membership is a mixture of network operators, service providers, resellers, suppliers and consultants involved in a sector that is diversifying rapidly. CCUK represents its members at a policy level, builds coalitions to collaborate on industry initiatives and provides a platform to help members prepare for change, learn about new trends and develop new relationships.
3. Our response to this Consultation pertains solely to the application of the Growth Duty to the Office of Communications, and we make points in two areas: (i) on the legal mechanisms required to create such a duty, and (ii) on the outcomes of creating such a duty. We trust that our submission is useful and we remain at your disposal to answer any questions arising.

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Changes to Primary Legislation are required to facilitate the Growth Duty

4. We are uncertain that secondary legislation can be simply amended in this way, as Article 8(1) of the EEC¹ (which is retained law under the Withdrawal Act 2018) requires the United Kingdom to guarantee the political independence of Ofcom. It states:

“Without prejudice to Article 10, national regulatory authorities shall act independently and objectively, including in the development of internal procedures and the organisation of staff, shall operate in a transparent and accountable manner in accordance with Union law, and shall not seek or take instructions from any other body in relation to the exercise of the tasks assigned to them under national law implementing Union law. This shall not prevent supervision in accordance with national constitutional law. Only appeal bodies set up in accordance with Article 31 shall have the power to suspend or overturn decisions of the national regulatory authorities.”

5. We also note that, as we said at the time, Section 2A of the Communications Act 2003 (as inserted by Section 98 of the Digital Economy Act 2017) breaches the predecessor provision to the EEC requiring an independent regulator.
6. While the EEC remains retained law, Ofcom’s duties in Annex C of the Consultation also need to represent the various outcomes that it is required to deliver under EEC Article 3. We are not aware of any update to (or audit or gap analysis of) Ofcom’s statutory duties in Section 3 of the Communications Act 2003 following the retention of the EEC. This is an important point, as the Consultation seeks to create an environment of regulatory certainty, and so creating any risk that a decision made pursuant to the Growth Duty could be found to be *ultra vires* or in conflict with other duties will have a negative effect on the environment of certainty that it attempts to create.
7. With this in mind, we consider that *primary* legislation is required to repeal at least² Article 8 of the EEC in order to allow the Growth Duty to be extended to Ofcom.

¹ Directive (EU) 2018/1972

² Other articles repeat some of the sentiment regarding impartiality, which may also need to be amended or repealed.

The Growth Duty

8. On the assumption that the Government is able to find a way to introduce the Growth Duty that overcomes the aforementioned issues, then we have the following comments.
9. Firstly, we believe that Ofcom needs to acquire additional skills to regulate the entire telecommunications market in this regard. We have been consistently of the belief that Ofcom is a consumer-focused organisation which needs to place a greater focus on business telecommunications. Business-focused providers, which make up the majority of the CCUK membership, are concerned about this issue in the current regulatory paradigm, without increasing Ofcom's powers or remit.
10. Further inadvertent attempts to homogenise business and residential telecommunications services – especially at the Small and Medium Enterprise end of the market – are likely to promote consolidation and reduce choice and competition. This would be to the detriment of innovation and productivity. Such a reduction in choice, competition, and innovation would be a bad outcome for the UK and its telecoms customers and, indeed, run contrary to Ofcom's existing statutory objectives in Section 3 of the CA2003. That said, the Statutory Guidance's focus requiring regulators to have a detailed understanding of their stakeholders – assuming this remains unchanged – would be a welcome condition for the reasons stated above.
11. Secondly, our members are concerned about what economic growth means in practice. Reducing 'red tape,' lowering barriers to entry, promoting competition, and fostering investment are all positive ways in which economic growth can be encouraged (and, in many cases, are already part of Ofcom's statutory duties). The United Kingdom has one of the most competitive and diverse telecommunications industries in the world, which is one of the primary reasons why UK consumers enjoy more choice at better value than consumers in many comparable countries. Anything that may interfere with this fragile ecosystem – which is already under stress with the PSTN closure, Telecommunications Security Act 2021 and systems and processes required by the EECC – is of clear concern to our members.
12. Any power which results in an entrenchment of a market with relatively few residential providers would not be a good outcome, even if it results in some economic growth. To that end, it is important that Ofcom's statutory remit be clear. Where there is any conflict, we suggest that the following order of precedence of duties should apply:
 - (i) the EECC
 - (ii) Section 3 of the CA2003
 - (iii) the Growth Duty.
13. Such a paradigm introduces the Growth Duty, but makes it lesser in cases of conflict to other conditions such as promoting competition, which we believe more strongly underpin the UK's success in developing a thriving industry. Noting that there is overlap between how the Growth Duty is presented in its statutory guidance and section 3 of the CA2003 (especially with respect to proportionality, which is repeated elsewhere in the statute too), we believe that major changes brought in without sufficient care would likely result in small benefits being outweighed by larger downsides.

ENDS