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The regulation of telecommunication in the United Kingdom of Great Britain & Northern Ireland

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The regulation of telecommunications in the United Kingdom of Great Britain & Northern Ireland

Ewan Sutherland*

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I. Abstract

This paper reviews the application of national antitrust law and the implementation of the European Union's telecommunications directives to the markets in the United Kingdom, against the declared policy objective of raising national competitiveness. It illustrates the complexity of the systems that have been created over three decades, with complex and interlocking regulatory, self-regulatory, judicial and appellate bodies, interacting with the parliamentary systems to form a regulatory state. Where markets have failed, or thought likely to fail, the state at different levels (UK, national and municipal) has supported studies and subsidized the provision of broadband Internet access. The regulator, using its sectoral antitrust powers, agreed with British Telecom to "functional separation", transferring the enduring bottleneck of local access to a separate subsidiary. While the UK describes itself as a regulatory leader this is difficult to evaluate, given the number and the frequencies of changes, nonetheless the claim seems very difficult to substantiate.

Keywords: Governance, Competitiveness, Regulatory state, Great Britain, United Kingdom

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II. Introduction

In what now seems another age, the United Kingdom of Great Britain and Northern Ireland (UK) was one of the first countries to privatize its state provider of telecommunications and to open its market to competition.¹ Until the early 1980s there was almost no need for regulation, since everything was undertaken directly and exclusively by the state through the Post Office, under the responsibility of the Postmaster General (PMG), a government minister. Since then policies, statutes and regulations have evolved and expanded, have been reformed and refined, often in concert with the other member states (MSs) of the European Union (EU), drawing selectively on lessons from the United States of America (USA) and Japan. Economic rivals, including those same MSs, also revised their policies and many now perform broadly as well as the UK, in terms of the services delivered to consumers and to enterprises – making similar contributions to productivity improvements and to economic growth.

The most comprehensive international comparisons have been made by the European Commission (EC) in its annual implementation reports and by the OECD in its biennial *Communications Outlook*. Neither of these suggests that the UK is performing badly, but equally neither shows it to be doing especially well, with its position being solid but unremarkable. The OECD conducted a peer review of regulatory reform in 2001, which again suggested that UK performance was more than adequate.² The exception is the ranking by the European Competitive Telecommunications Association (ECTA) which until recently showed the UK to be the European leader. While this has been challenged as being a subjective judgement, its creators argue that it shows the UK as being consistently the most attractive market in the European Union in which to invest.

The UK is the archetypal regulatory state, with direct provision of a range of services having been replaced by a complex network of agencies, tribunals, service providers, business users, consumers and citizens. While formal ministerial responsibility lies with the Department for Culture, Media and Sport (DCMS), this is shared with other ministries in key areas of policy and strategy, notably with the Home Office on privacy and security, Department for Education on child protection and with both the Department for Business, Innovation and Skills (BIS) and HM Treasury on the economy and national competitiveness. Regulatory powers and some important aspects of policy were delegated to the regulator, the Office of Communications (Ofcom) which, in turn, delegated some of its powers to other, more obscure bodies. Devolution has given increasing roles to the three national assemblies and administrations. Consultations have become commonplace, even overwhelming.

Beyond the UK, DCMS and Ofcom, participate in discussions and decision making at:

- International Telecommunication Union (ITU);
- Organisation for Economic Cooperation and Development (OECD);
- European Union (EU); and
- Commonwealth.

The Department for International Development (DfID) supports some work on ICTs for development.³

No longer is a decision taken in isolation, rather it is the result of the consideration of a range of domestic and foreign interests, and in the knowledge of practices and precedents at home and overseas. It is now inconceivable for a decision to be arrived at without informal lobbying, a formal consultation, generation of an impact assessment and, frequently, review by the courts.

¹ See David Heald & David Steel, *The privatisation of UK public enterprises*, 52 *ANNALS OF PUBLIC AND COOPERATIVE ECONOMICS* 351 (1981), Stephen C Littlechild, *Ten steps to denationalisation*, 2 *ECONOMIC AFFAIRS* 11 (1981), Gareth Locksley, *London calling: A policy for telecommunications after privatization*, 8 *TELECOMMUNICATIONS POLICY* 178 (1984) and Michael E Beesley, *Liberalization of telecoms in the United Kingdom: Experiment or new direction?*, 5 *JURIMETRICS JOURNAL* 22 (1984).

² ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *REGULATORY REFORM IN UK: REGULATORY REFORM IN THE TELECOMMUNICATIONS INDUSTRY* (2002).

³ Mostly in association with the International Development Research Centre (IDRC) of Canada.

This paper considers first the various roles of central government. The interventions by the different levels of government to support telecommunication initiatives are then reviewed. Next, the role of OFCOM is analyzed. The plethora of other regulatory bodies is briefly described and their functions explained. The operational separation agreement between OFCOM and BT is then reviewed. The relative performance of the UK in broadband Internet access is analyzed. The position of the UK in European Union policy-making is then described. Finally, conclusions are drawn and issues for further research identified.

III. Her Majesty's Government

Telecommunications policy has suffered from a division of responsibilities within government and from a sequence of structural changes to one of the two ministries. To compound this there has been a string of, frequently transient, junior ministers.

The Blair administration, from taking office in 1997, identified the growth and application of Information and Communication Technologies (ICTs), the development of electronic services and the skills to use them as being crucial for the economy.⁴ The Department for Culture Media and Sport (DCMS) was created with a broad remit in the area of content, but only a secondary role in telecommunications. Responsibility lay with the Department of Trade and Industry (DTI), the mission of which included:

... long term objective of raising the rate of UK productivity growth over the economic cycle, improving competitiveness and narrowing the gap with our major industrial competitors.⁵

This was supported by economic research to measure the effects of the adoption of technology in raising productivity.⁶ The drivers of that productivity growth were held to be:

- Investment;
- Innovation;
- Skills;
- Enterprise; and
- Competition.

With the transition from the Blair to the Brown Administration in June 2007, DTI was rebranded the Department of Business, Enterprise and Regulatory Reform (BERR), retaining its lead role for telecommunications.⁷ The only significant alteration to its remit was the addition of the Better Regulation Executive (BRE), transferred from the Cabinet Office.⁸ Telecommunications was assigned as one of several portfolios to the minister of state for competitiveness.⁹

Competitiveness had been an element of government policy for some years. It is largely based on an approach developed at the Harvard Business School.¹⁰ This was subsequently adopted by the World Economic Forum (WEF) at Davos, which publishes annual assessments of the relative performance of nations (see Table 1).¹¹ After falling four positions in two years, the UK moved back up one place, with

⁴ DEPARTMENT OF TRADE AND INDUSTRY, OUR COMPETITIVE FUTURE: BUILDING THE KNOWLEDGE DRIVEN ECONOMY, 1998, Cm. 4176.

⁵ DEPARTMENT OF TRADE AND INDUSTRY, DEPARTMENTAL REPORT 2006, 2006, Cm. 6826, at 17.

⁶ DEPARTMENT OF TRADE AND INDUSTRY, RAISING UK PRODUCTIVITY, ECONOMICS PAPER NO. 8 (2004).

⁷ HMG, Press Release, 29 June 2007. Available at: <http://www.pm.gov.uk/output/Page12240.asp>

⁸ It saw, *inter alia*, the abolition of the venerable Board of Trade. In 1621 HM King James VI & I created the Committee of Privy Council for Trade and Foreign Plantations. Then on 23 August 1786 William Pitt put the Committee of Trade on a more formal basis by an Order in Council that remained in force until 2007.

⁹ At that time Stephen Timms, MP PC.

¹⁰ MICHAEL PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS (1990).

¹¹ THE GLOBAL COMPETITIVENESS REPORT 2007-2008 (AUGUSTO LOPEZ-CLAROS ET AL., EDS., 2007).

the WEF noting the efficiency of its labour market “standing in contrast to the rigidity of many other European countries” and the “sophisticated and innovative businesses that are highly adept at harnessing the latest technologies for productivity improvements”.

Table 1 Competitiveness ranking of the United Kingdom by the World Economic Forum¹²

Year	2007-08	2008-09	2009-10	2010-11
Rank	9	12	13	12
Score	-	5.30	5.19	5.25

In June 2009, Brown reshuffled his cabinet in an effort to revitalize his administration. He merged the Department for Innovation, Universities and Skills (DIUS) with the Department for Business, Enterprise and Regulatory Reform (BERR), creating the Department for Business, Innovation and Skills (BIS).¹³ It had a remarkably wide scope of responsibilities, with seven ministers, at the head of which stood the First Secretary of State, the Rt. Hon. The Lord Mandelson.

The Cameron Administration initially followed the example of its predecessors in appointing a junior minister with a wide range of responsibilities, including telecommunications, responsible to two cabinet ministers. In May 2010, Ed Vaizey MP was made Parliamentary Under-Secretary (Minister) for Culture, Communications and Creative Industries.¹⁴ He was jointly responsible to the secretaries of state in BIS and DCMS, one from each of the coalition partners.

In January 2011, the prime minister transferred from BIS to DCMS responsibility for competition and policy issues in media, broadcasting, the digital and telecommunications sectors.¹⁵ This followed some indiscreet remarks by the Secretary of State for BIS about a merger then under review in which he had a quasi-judicial role.¹⁶ The transfer resolved a somewhat awkward relationship over a number of years in which there had been joint responsibility of the business and culture ministries for a single converged regulator and an increasingly converged industry.

Reflecting its perceived lack of importance, telecommunications has been one of several areas of responsibility of a non-cabinet minister. For most of the last two decades this post has seen many short-term appointments with reporting split between two relatively busy cabinet ministers.

IV. Better regulation

Successive administrations have been keen to improve regulation and to reduce “red tape”, though the two are not synonymous, in order to encourage economic growth and job creation. This has been the responsibility of a number of units shuffled around government.

The Blair administration created the Better Regulation Task Force (BRTF) in 1997 as an independent advisory body:

... to ensure that regulation and its enforcement are proportionate, accountable, consistent, transparent and targeted.

¹² <http://www.weforum.org/issues/global-competitiveness>

¹³ *Changes to the machinery of Government*, Number 10 press release, June 5, 2009.

<http://webarchive.nationalarchives.gov.uk/+/number10.gov.uk/news/latest-news/2009/06/changes-to-the-machinery-of-government-19525>

¹⁴ *Vaizey is new broadband minister*, PUBLIC SERVICE, May 21, 2010.

http://www.publicservice.co.uk/news_story.asp?id=13021

¹⁵ *Transfer of responsibilities from BIS to DCMS*, DCMS, Press release. January 18, 2011

http://dcms.gov.uk/news/news_stories/7721.aspx

¹⁶ *Vince Cable: I have declared war on Rupert Murdoch*, DAILY TELEGRAPH, December 21, 2010.

<http://www.telegraph.co.uk/news/politics/liberaldemocrats/8217253/Vince-Cable-I-have-declared-war-on-Rupert-Murdoch.html>

It was rebranded in January 2006 as the Better Regulation Commission (BRC), to act as an independent advisory body.¹⁷ It identified five principles of good regulatory practice:¹⁸

- Proportionality;
- Accountability;
- Consistency;
- Transparency; and
- Targeting.

The BRC aimed to assist in the reduction of unnecessary regulatory and administrative burdens and ensure that regulation conforms to the five principles. It argued that a “consultation culture” was necessary in order to ensure competitiveness by taking into account the views of stakeholders.¹⁹

Following the adoption by HMG of its report “Public risk: the next frontier for better regulation”, the BRC was wound up.²⁰ It was replaced by the Risk and Regulation Advisory Council (RRAC) to ensure policy-making benefited from a fuller and more rounded consideration of public risk.²¹ It completed its work in April 2009 and also ceased.²²

That leaves the Better Regulation Executive (BRE) which presently sits within BIS, reporting to Mark Prisk MP, Minister of State for Business and Enterprise.²³ It had been transferred to BERR on its creation, from the Cabinet Office. Its aims are:

- To work with departments to improve the design of new regulations and how they are communicated;
- To work with departments and regulators to simplify and modernise existing regulations; and
- To work with regulators (including local authorities) and departments to change attitudes and approaches to regulation to become more risk-based.

Separately HMG commissioned a report on the administrative burden of regulation, focusing on the forms required to be filled by businesses and the inspections made of their operations and records.²⁴ It considered 674 regulatory bodies that employed 61,000 people and cost £4,000 million per annum. The report suggested ways in which the burden of regulation might be reduced, in particular by focusing on an assessment of the risk of non-compliance and ways in which regulators might share their experiences.

While government has aspired to improve regulation, this has had limited effect in the telecommunications sector. Despite occasional proposals for efforts to reassess the need for swathes of regulation, few have actually been removed.

V. Parliamentary oversight

Select committees of the House of Commons monitor the work of government departments, reconfiguring with the changes made by successive prime ministers to the structure of their administrations. Telecommunications is now under the Culture, Media & Sport Committee, having

¹⁷ <http://www.brc.gov.uk/>

¹⁸ <http://webarchive.nationalarchives.gov.uk/20100807034701/http://archive.cabinetoffice.gov.uk/brc/>

¹⁹ *Europe needs a ‘consultation culture’ to regulate better and be more competitive*, Better Regulation Commission, press release, September 22, 2005.

Available at: <http://www.brc.gov.uk/news/2005/euconsultation.aspx>

²⁰ BETTER REGULATION COMMISSION, PUBLIC RISK – THE NEXT FRONTIER FOR BETTER REGULATION (2008)

²¹ <http://webarchive.nationalarchives.gov.uk/20100807034701/http://www.berr.gov.uk/about/economics-statistics/rrac/index.html>

²² RISK AND REGULATION ADVISORY COUNCIL, RESPONSE WITH RESPONSIBILITY: POLICY-MAKING FOR PUBLIC RISK IN THE 21ST CENTURY (2009).

²³ <http://www.berr.gov.uk/bre/>

²⁴ PHILIP HAMPTON, REDUCING ADMINISTRATIVE BURDENS: EFFECTIVE INSPECTION AND ENFORCEMENT (2005).

previously been under BIS, BERR and Trade & Industry Committees (see Table 2).²⁵ Additionally, the Public Accounts Committee has a general oversight of government departments and recently reviewed the effectiveness of OFCOM.²⁶

Table 2 Parliamentary inquiries into telecommunications

<i>Session</i>	<i>Committee</i>	<i>Subject</i>	<i>Report</i>
2010-11	Culture, Media & Sport	Spectrum+	1258-i
2010-11	Culture, Media & Sport	DCMS annual review and minister's powers	458-i
2010-11	Culture, Media & Sport	The work of OFCOM*	956-i
2010-11	Culture, Media & Sport	Responsibilities of DCMS	915
2010-11	Public Accounts Committee	OFCOM: the effectiveness of converged regulation	688
2010-11	<i>Comptroller & Auditor General</i>	OFCOM: the effectiveness of converged regulation	490
2009-10	Culture, Media & Sport	OFCOM Annual Plan 2009-10	77
2009-10	Business, Innovation & Skills	Broadband	72 ²⁷
2009-10	Business, Innovation & Skills	The creation of the Department for Business, Innovation and Skills and the Departmental Annual Report 2008-09	160
2009-10	Business, Innovation & Skills	OFCOM Annual Plan 2009-10*	77
2008-09	Culture, Media & Sport (jointly with Business & Enterprise)	Pre-appointment hearing with the Chairman-elect of OFCOM, Dr Colette Bowe*	119
2008-09	Business & Enterprise	Digital Britain*	331-i
2007-08	Business & Enterprise	Annual Report and Scrutiny of the Department for Business, Enterprise and Regulatory Reform	1116
2007-08	Culture, Media & Sport	Harmful content on the Internet and in video games	353-I,II
2007-08	Business & Enterprise	OFCOM Annual Plan 2008-09	494
2007-08	Business & Enterprise	Departmental Annual Report and Accounts 2006-07*	108-i
2006-07	Trade & Industry (jointly with Culture, Media & Sport)	OFCOM Annual Plan 2007-08*	459-i
2005-06	<i>Comptroller & Auditor General</i>	The creation of OFCOM: wider lessons for public sector mergers of regulatory agencies	1175
2005-06	Culture, Media & Sport (jointly with Trade & Industry)	Ofcom Annual Plan 2006-07*	1083-i
2004-05	Trade & Industry	OFCOM's Strategic Review of Telecommunications	407-I,II
2004-05	Trade & Industry	Progress towards the Knowledge Driven Economy	432
2003-04	Trade & Industry	UK Broadband Market	321-I,II
2002-03	Trade & Industry	Radio Spectrum Management	128-I,II
2000-01	Trade & Industry	Local Loop Unbundling	90

* Oral evidence, no formal report.

+ Written evidence, no formal report.

There is no corresponding committee in the House of Lords, though several take an interest in different aspects, including:²⁸

- Communications Committee;
- Economic Affairs Committee; and
- Delegated Powers & Regulatory Reform Committee.

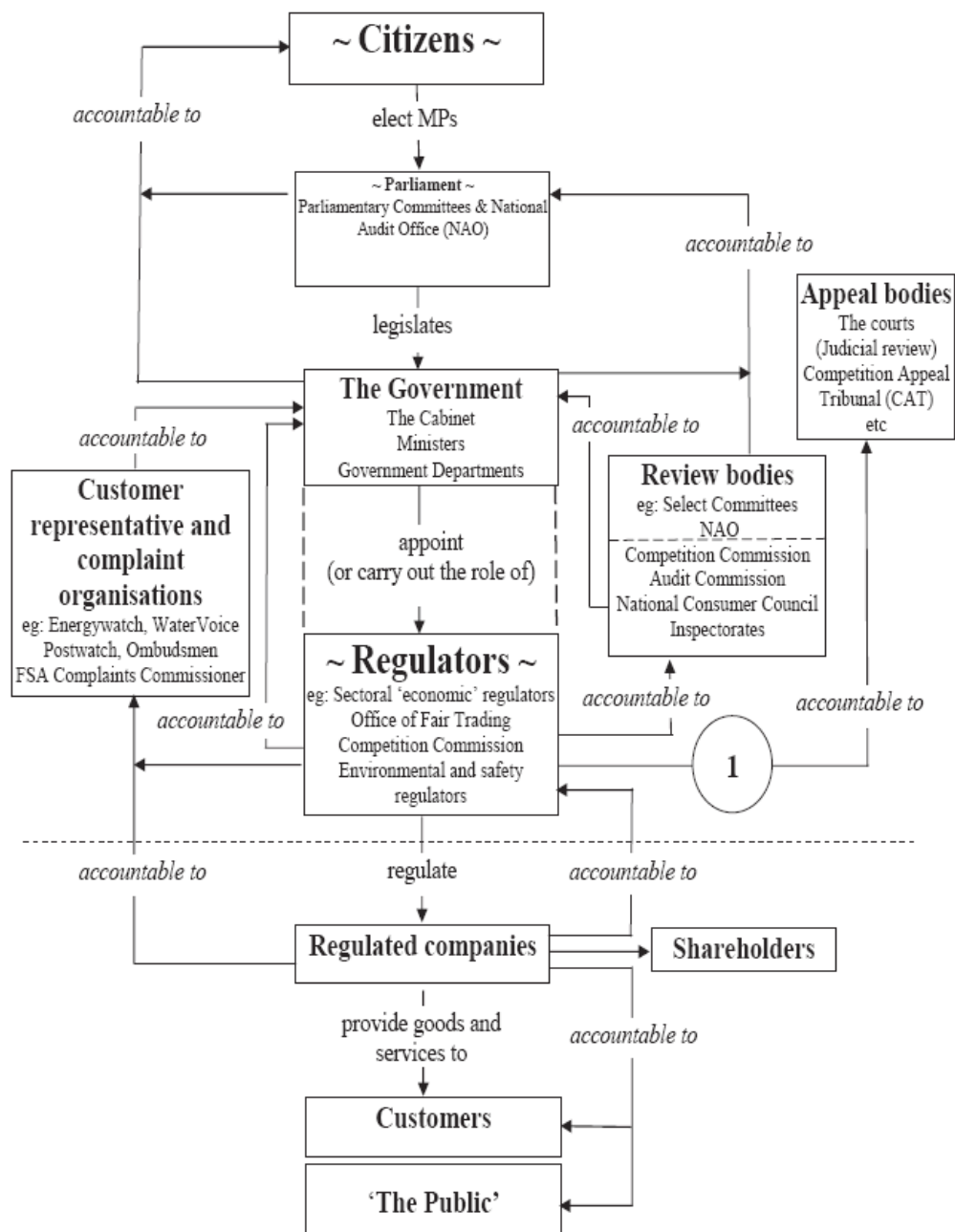
In 2003, a House of Lords committee reported on the regulatory state, describing the almost byzantine relationships that had been built up over many years (see figure 1).²⁹

²⁵ <http://www.parliament.uk/business/committees/committees-a-z/commons-select/culture-media-and-sport-committee/>

²⁶ HOUSE OF COMMONS PUBLIC ACCOUNTS COMMITTEE, 20TH REPORT - OFCOM: THE EFFECTIVENESS OF CONVERGED REGULATION, HC 688 (2011).

²⁷ HOUSE OF COMMONS BUSINESS, INNOVATION AND SKILLS COMMITTEE, BROADBAND: FOURTH REPORT OF SESSION 2009-10. HC 72.

²⁸ <http://www.parliament.uk/business/committees/committees-a-z/lords-select/>

Figure 1 *The regulatory state*³⁰

Following up on this, a committee examined the role of the various economic regulators, in particular their use of light-touch regulation and Impact Assessments (IAs).³¹ It concluded that there was a

²⁹ HOUSE OF LORDS SELECT COMMITTEE ON THE CONSTITUTION, THE REGULATORY STATE, 2003-04, HL 68.

³⁰ HOUSE OF LORDS, SELECT COMMITTEE ON THE CONSTITUTION, THE REGULATORY STATE, 2003-04, HL 68, Appendix 4.

³¹ HOUSE OF LORDS, SELECT COMMITTEE ON REGULATORS, UK ECONOMIC REGULATORS, 2006-07, HL 189.

See also: NATIONAL AUDIT OFFICE, A REVIEW OF ECONOMIC REGULATORS' IMPACT ASSESSMENTS (2007).

“crucial need for greater parliamentary oversight” of the various bodies. It called for a more formal Joint Regulators Group (JRG) to ensure improved sharing of best practice and for periodic reviews by the Competition Commission to scale back the work of the sectoral regulators.

This works seems to have ground to a halt, in terms of any systematic analysis of the possible reform of the institutions of governance.

The Cameron administration promised a “bonfire of the QUANGOs”, parts of which were embedded in individual decisions. The core was contained in the Public Bodies Bill, which was criticized by the Delegated Powers and Regulatory Reform Committee for giving too much power to ministers.³²

The House of Commons has a Europe Scrutiny Committee to consider all legislation and other documents from the EU, together with the positions being taken by HMG in the Council of Ministers.³³ However, the House of Lords is expected to carry the greater share of the work, with an EU Committee and seven sub-committees examining legislation in detail.³⁴ For example, it investigated the proposal from the EC in 2006 to regulate international mobile roaming charges.³⁵

It is very difficult even for a bicameral legislature to superintend the degrees of complexity found in the regulatory state. Inevitably, it focuses on the minister and a few major issues. Committees cannot go into the detail, unless it is structured in a way that makes it much more accessible with cascading reporting, almost like back-to-back service level agreements. It is too easy to hide large areas of activity by its complexity and by consultations of stakeholders.

VI. Digital strategies

The Prime Minister’s Strategy Unit and the DTI, with contributions from other ministries and some operators, set out a digital strategy for the UK in 2005.³⁶ It was to comprise the following actions:

1. Transform learning with ICT;
2. Set up a “Digital Challenge” for Local Authorities to achieve both excellence and equity in ICT;
3. Make the UK the safest place to use the Internet;
4. Promote the creation of innovative broadband content;
5. Set out a strategy for transformation of delivery of key public services;
6. OFCOM to set out a regulatory strategy;
7. Improve accessibility to technology for the digitally excluded and ease of use for the disabled; and
8. Review the digital divide in 2008.

None of these is very specific, with HMG failing to define any Key Performance Indicators (KPIs) which it might have used to measure its own achievements and those of OFCOM.

The direction to OFCOM to create a “regulatory strategy” can be considered a substitute for a policy, allowing it a very free hand within the broad terms of the Communications Act 2003. It stands in stark contrast to the simple target of 2.0 per cent for inflation set for the Bank of England.³⁷ Moreover, the Bank operates at a much higher level of transparency, publishing the minutes of the Monetary Policy Committee in making decisions about the achievement of its target and writing to the Chancellor when it fails to achieve that target.

³² Delegated Powers and Regulatory Reform Committee - Fifth Report - Public Bodies Bill.

<http://www.publications.parliament.uk/pa/ld201011/ldselect/lddelreg/57/5702.htm>

³³ http://www.parliament.uk/parliamentary_committees/european_scrutiny.cfm

³⁴ http://www.parliament.uk/parliamentary_committees/lords_eu_select_committee.cfm

³⁵ HOUSE OF LORDS, EUROPEAN UNION COMMITTEE, MOBILE PHONE CHARGES IN THE EU, 2006–07, HL 79.

³⁶ PRIME MINISTER’S STRATEGY UNIT AND DEPARTMENT OF TRADE AND INDUSTRY, CONNECTING THE UK: THE DIGITAL STRATEGY (2005).

³⁷ Letter from Chancellor of the Exchequer to Monetary Policy Committee, March 21, 2007.

The emphasis of planning moved to broadband, which has to fit within the general framework of the EU treaties and UK legislation, not least the EU state aid rules, based on TFEU Article 109. An important step was the Caio Report, which warned that many of the issues on next generation access (NGA) were remote from the concerns of the general public but argued that it would become an “essential digital utility”.³⁸ He rejected the case for short term intervention, arguing that over five to ten years HMG would have to ensure the availability of NGA. In response, the Brown Administration announced it was to modernise and upgrade the access networks and committed that by 2012 at least 2 Mbps would be available to every home over the existing copper lines.³⁹ Affordability was being addressed through a £300 million Home Access scheme and there was to be a plan for digital participation.

An inquiry by the Business Innovation and Skills Committee called for a full-time broadband minister and supported the proposal for a universal service commitment to 2 Mbps as “an appropriate and achievable ambition” for all users.⁴⁰ However, it considered the proposal to intervene in the NGA unwise in the absence of pent-up demand, while it rejected the proposal to fund the intervention by a £0.50 monthly levy on fixed telephone lines, as both regressive and poorly targeted. It argued that: “In times of great stringency in public expenditure, digital inclusion not Next Generation Access should be the priority for expenditure”.

In March 2010, HMG launched its National Plan for Digital Participation, with the intention that “everyone who wants to be online to get online, do more online and benefit from the advantages of being online”.⁴¹ It was estimated that the total economic benefits from getting everyone in the UK online was in excess of £22 billion.⁴²

The Cameron Administration assigned £530 million to BDUK in the spending review for 2010-15. Four rural market pilots were selected to improve understanding of how superfast broadband might be made commercially viable in rural communities. It sought to ensure the rapid rollout of “superfast broadband” in both urban and rural areas, ensuring the provision of an acceptable level those parts of the country that had been excluded.⁴³ The change in terminology appears to be more a reflection of the transition from Brown to Cameron, than any technical change. “In simple terms, the Government wanted the UK to have the best superfast broadband network in Europe by 2015.” It is far from clear what “best” means, a vagueness that must make its achievement less likely.

In mid-2011, HMG announced financial support for broadband.⁴⁴ It proposed to spend £294.8 million in English counties and £68.8 million in Scotland, from a total of £530 million intend to achieve 90 per cent of homes and businesses having access to superfast broadband and the guaranteed minimum of 2Mbps. English county councils and local enterprise partnerships leading broadband roll-out are expected to draw up a delivery plan and to match the HMG’s investment with European, their own or private funds.

Broadband adoption has continued to increase in the UK, with rural areas showing strong growth (see Figure 2).⁴⁵ Scotland is stagnating, while there is preliminary evidence of homes giving up broadband in parts of England and presumably in Scotland.

³⁸ FRANCESCO CAIO, *THE NEXT PHASE OF BROADBAND UK: ACTION NOW FOR LONG TERM COMPETITIVENESS* (2008).

³⁹ HMG, *DIGITAL BRITAIN: FINAL REPORT*, Cm 7650 (2009).

⁴⁰ BUSINESS, INNOVATION AND SKILLS COMMITTEE, *BROADBAND: FOURTH REPORT OF SESSION 2009-10 HC 72* (2009).

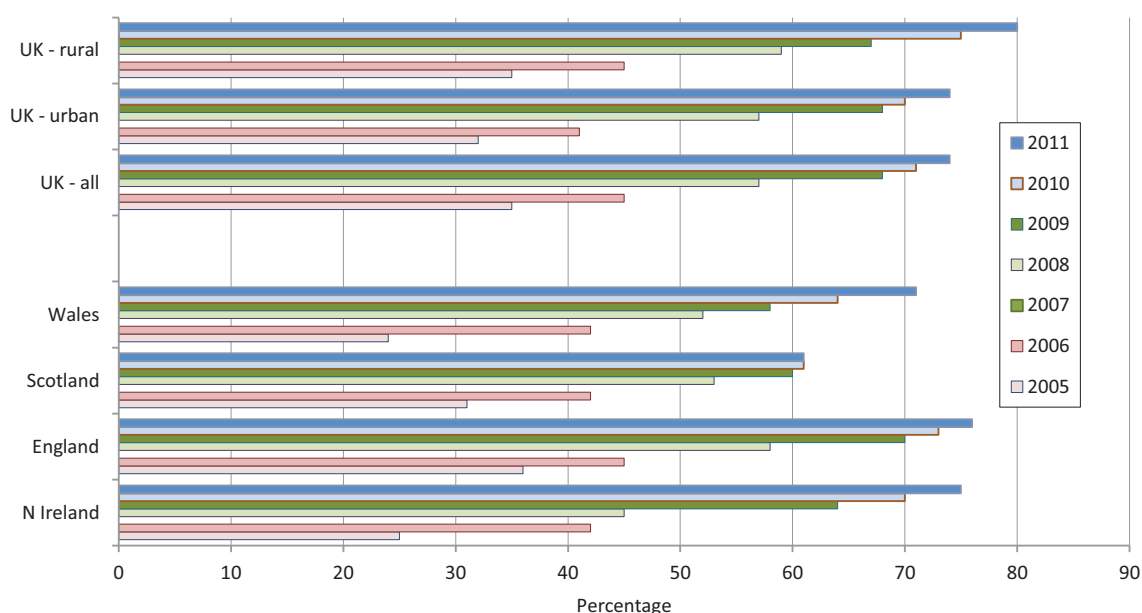
⁴¹ DEPARTMENT FOR BUSINESS, INNOVATION AND SKILLS, *NATIONAL PLAN FOR DIGITAL PARTICIPATION* (2010).

⁴² PWC, *CHAMPION FOR DIGITAL INCLUSION: THE ECONOMIC CASE FOR DIGITAL INCLUSION* (2009).

⁴³ DEPARTMENT FOR BUSINESS, INNOVATION AND SKILLS, *BRITAIN’S SUPERFAST BROADBAND FUTURE* (2010).

⁴⁴ Department for Culture, Media and Sport, *£363 million to ‘take broadband to all’ in England and Scotland*. http://www.culture.gov.uk/news/news_stories/8389.aspx

⁴⁵ Ewan Sutherland, *A Brief Note on Broadband Statistics in the United Kingdom*, SSRN (2011). <http://papers.ssrn.com/abstract=1789569>

Figure 2 Broadband in first quarter of year⁴⁶ (note: no data available for 2007)

HMG takes a strong interest in providing electronic services and information to citizens, though without much evidence of enthusiastic demand. An independent review into the “power of information” explored developments in the use of public information generated by citizens and the state. Government responded with three challenges for itself:⁴⁷

- Engaging in partnership with user-led online communities;
- Ensuring that it fully understands and responds appropriately to changes in the information market; and
- Advising civil servants on how best to participate in new media.

These issues were taken up by a Taskforce, which reported in early 2009.⁴⁸ It called for a capability within the public sector to work with both internal and external innovators, to improve the ways in which government consulted with the public and to build capacity in the public sector to take advantage of the opportunities from digital technologies. It also sought to ensure that public sector information was made as simple as possible for people to find and use and the freeing up of the mapping and address data for use in new services.

Government has a poor record in its use of ICTs, with projects running over budget, over schedule and failing.⁴⁹ It is not clear that it has performed any better with information.

⁴⁶ OFFICE OF COMMUNICATIONS, *THE COMMUNICATIONS MARKET* (2011).

⁴⁷ CABINET OFFICE, *THE GOVERNMENT’S RESPONSE TO THE POWER OF INFORMATION: AN INDEPENDENT REVIEW*, BY ED MAYO AND TOM STEINBERG, 2006-07, Cm. 7157.

⁴⁸ CABINET OFFICE, *POWER OF INFORMATION TASKFORCE REPORT* (2009).

<http://poit.cabinetoffice.gov.uk/poit/wp-content/uploads/2009/03/poit-report-final-pdf.pdf>

⁴⁹ See JUSTINE STEPHEN, JAMES PAGE, JERRETT MYERS, ADRIAN BROWN, DAVID WATSON & IAN MAGEE, *SYSTEM ERROR: FIXING THE FLAWS IN GOVERNMENT IT*, Institute for Government (2011), HOUSE OF COMMONS PUBLIC ACCOUNTS COMMITTEE, 45TH REPORT - *THE NATIONAL PROGRAMME FOR IT IN THE NHS: AN UPDATE ON THE DELIVERY OF DETAILED CARE RECORDS SYSTEMS*, HC 1070 (2011), HOUSE OF COMMONS PUBLIC ACCOUNTS COMMITTEE, 40TH REPORT - *INFORMATION AND COMMUNICATIONS TECHNOLOGY IN GOVERNMENT*, HC 1050 (2011), HOUSE OF COMMONS PUBLIC

The overall performance of the UK can be seen in the biennial OECD Communications Outlook and the STI Scoreboard which compares the thirty countries on a variety of indicators (see tables 3 and 4). Across a wide range of indicators performance inevitably varies but it would be hard to describe the UK as being especially good.

Table 3 *Ranking of the UK in OECD Communications Outlook*⁵⁰

	2007		2011	
Access line market share of new entrants	2nd	Table 2.2	Table 2.2	1st
Public telecoms investment per capita	3rd	Figure 4.15	Figure 3.10	17th
Monthly household expenditure	6th	Figure 2.3	Figure 8.7	14th
Telecoms access paths per 100 population	6th	Figure 4.4	Table 4.4	4th
Mobile high-user basket	7th	Figure 7.12	-	-
Residential fixed-line basket high usage	10th	Figure 7.6	-	-
Mobile low-user basket	10th	Figure 7.10	-	-
Residential fixed-line basket medium usage	11th	Figure 7.6	-	-
Fixed Internet access per 100 population	11th	Figure 5.7	Table 4.13	11th
Mobile medium-user basket	12th	Figure 7.11	-	-
Bot-infested machines per 100 population	12th	Figure 5.13	-	-
Residential fixed-line basket low usage	13th	Figure 7.5	-	-
Mobile share of total revenue	13th	Figure 3.6	Figure 3.6	33rd
Fastest broadband download speeds	16th	Figure 4.11	Figure 4.11	12 th
Yearly price of national leased lines basket 2Mbps	16th	Figure 7.19	Figure 7.6	5th
Mobile revenue per subscriber	17th	Figure 3.8	Figure 3.7	29th
Public telecoms revenue per communications access path	23rd	Figure 3.3	Figure 3.3	18th

Table 4 *Ranking of the UK in the OECD Science, Technology and Industry Scoreboard*⁵¹

	2007		2011	
Country share of ICT patents	4th	E.15		
Investment in ICT	4th	E.11		
Software investment	4th	E.13		
Growth in business sector services labour productivity	7th	I.4		
Internet use by business – have own website	9th	E.7		
Share of gross value-added high technology industries	10th	I.5		
ICT patents as percentage of national total	11th	E.15		
Individuals using the Internet – female	12th	E.6		
Internet use by business – have broadband	15th	E.7		
Individuals using the Internet – male	15th	E.6		

A number of new entrant operators proposed measures to evaluate regulation in terms of investment and market concentration in Europe which are presented in the ECTA scorecard (see Table 5).⁵² Although its score has varied quite widely, the UK consistently held first place, though its lead was been greatly reduced and finally lost to the Netherlands.

The ECTA Scorecard was devised as a means for new entrants to push regulators to impose tougher access conditions on incumbent operators. ETNO, representing the incumbent operators, has had a critique prepared, noting the subjective nature of the assessment of regulatory effectiveness and

ACCOUNTS COMMITTEE, 43RD REPORT - THE USE OF INFORMATION TO MANAGE THE DEFENCE LOGISTICS SUPPLY CHAIN, HC 1202 (2011).

⁵⁰ ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, COMMUNICATIONS OUTLOOK (2007).

⁵¹ ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, SCIENCE, TECHNOLOGY AND INDUSTRY SCOREBOARD: 2007 (2007).

⁵² <http://www.ectportal.com/>

complaining that ECTA equated more regulation with good regulation, without considering market conditions.⁵³

Table 5 *ECTA regulatory scorecard*⁵⁴

	2004	2005	2006	2007	2008	2009
Netherlands	270	296	344	381	362	376
UK	379	440	390	385	373	368
Denmark	309	398	356	350	344	354
Norway				319	360	341
France	255	349	345	304	322	321
Finland			266	263	300	306
Italy	291	311	300	285	302	303
Portugal		300	275	279	286	302
Ireland	317	327	290	261	302	317
Spain	257	291	295	276	266	294
Belgium	214	281	248	228	254	281
Sweden	276	311	306	285	265	277
Austria		339	266	257	282	271
Hungary		286	293	241	282	264
Germany	203	220	231	254	280	258
Greece		218	224	216	247	251
Poland		230	203	197	180	243
Slovenia				238	251	232
Turkey					140	213
Switzerland						209
Czech Republic			251	203	190	192
Bulgaria						165

There are a number of composite indices used to rank large and diverse groups of nations (see Table 6). In all of these the UK can be considered to have good or very good ratings.

Table 6 *The ranking of the UK in international comparisons*

Agency	Index	2005	Current
UN Development Programme	Human Development Index (HDI)		26 th (0.849)
ITU/UNCTAD	Digital Opportunity Index (DOI)		-
World Economic Forum	Network Readiness Index (NRI)		15 th (5.12)
Economist Intelligence Unit	Digital Economy Ranking	-	14 th (7.89)

The concerns of HMG are, on the one hand, helping UK businesses to be competitive and on the other making government services available to citizens. It delegated to OFCOM management of telecommunications markets on the assumption that properly regulated markets would deliver all the inputs to the UK economy required to achieve its overarching productivity and growth goals. In parallel to this has been the continuing evolution of regulation, regulatory structures and processes. Its own use of ICTs has been consistently weak for many years.

VII. Think tanks and lobby groups

There is a large set of professional and industry associations of varying degrees of formality and engagement with government:

⁵³ MELVYN WEEKS AND BRIAN WILLIAMSON, A SOUND BASIS FOR EVIDENCE BASED POLICY? A CRITIQUE OF THE ECTA REGULATORY SCORECARD AND SPC NETWORK PAPERS ON INVESTMENT AND BROADBAND: A REPORT FOR ETNO BY INDEPEN (2006).

⁵⁴ <http://www.ectaportal.com/en/REPORTS/Regulatory-Scorecards/Regulatory-Scorecard-Overview/>

- [Broadband Stakeholders Group](#) (BSG): the “UK government’s leading advisory group on broadband” comprising “organisations across the converging broadband value-chain” which discusses key policy, regulatory and commercial issues;⁵⁵
- [Intellect](#): the collective voice of more than 800 members from the technology industry, including software and IT services, telecommunications and electronics;
- [Parliamentary Information Technology Committee](#) (PITCOM): a 25 year-old associate parliamentary group bringing together politicians and the ICT industry;
- [EURIM](#) The Information Society Alliance: Politicians, officials and industry working to improve the quality of policy formation, consultation, scrutiny, implementation and monitoring in support of the creation of a globally competitive, socially inclusive and democratically accountable information society; and
- [Information Age Partnership](#) (IAP) operated between 1998 and 2010 as a policy forum including ministers, senior officials and the CEOs of leading firms in the ICT, communications and content industries.

There are commercial conference organizers such as Informa.⁵⁶ There are some that are closer to the political agenda, such as the Westminster eForum.⁵⁷

There are groupings of operators:

- [UK Competitive Telecommunications Association](#) (UKCTA) for new entrants;
- [Internet Service Providers Association](#) (ISPA);
- [Internet Telephony Services Providers’ Association](#);
- [Mobile Operators Association](#) (MOA); and
- [Mobile Broadband Group](#) (MBG).

The leading practitioner bodies are:

- British Computer Society (BCS);⁵⁸ and
- Institute of Engineering and Technology (IET).⁵⁹

A more conflicted organization is the Confederation of British Industry (CBI), with members that are both incumbent and new entrant operators, plus their corporate customers.⁶⁰

There are many opportunities for individuals from industry and, to a lesser extent, professional telecommunications managers to engage with government and regulators with a specific brief for consultation or a more general debate of issues. Participation is somewhat expensive in time, effort and money.

VIII. Academic research

Despite the relatively large size of the UK academic community there are few active centres engaged in telecommunications policy to differing extents (see Table 7). Many of these are focused on global issues, rather than on their application in the UK. This is driven by the need to support taught and research post-graduate students, drawn mainly from overseas. There are a small number of postgraduate degrees on management and legal aspects of telecommunications, such as the Master of

⁵⁵ Strangely, in June 2011 it continued to refer to BERR as one of the relevant govt ministries.

⁵⁶ <http://www.informatelecoms.com/>

⁵⁷ <http://www.westminsterforumprojects.co.uk/eforum/default.aspx>

⁵⁸ <http://www.bcs.org/>

⁵⁹ <http://www.theiet.org/>

⁶⁰ <http://www.cbi.org.uk/>

Communications Management (MCM) at the University of Strathclyde and the LLM in Computer and Communications Law at Queen Mary University.⁶¹

One of the most active researchers and consultants, to both operators and governments, has been Cave, now at Imperial College. He contributed the metaphor of the ladder of investment, something he has revised from time to time, though more recent contributions make only passing references to the UK.⁶² Access to unbundled loops, one of the rungs of the ladder, has been addressed, analysing the emergence from the OFCOM strategic review of the notion of equality of access and the establishment of Openreach within BT.⁶³ There has been some work on consumer adoption of broadband.^{64, 65}

Table 7 Research activity in UK universities⁶⁶

<i>Institution</i>	<i>Unit</i>
Imperial College (London)	Tanaka Business School
London School of Economics	Media@LSE
	Centre for Analysis of Risk and Regulation (CARR)
Queen Mary University	Institute of Computer and Communications Law
University of East Anglia (Norwich)	Centre for Competition Policy
University of Essex (Colchester)	Essex Centre for Comparative and European Law
University of Manchester	Centre for Development Informatics (CDI)
University of Oxford	Oxford Internet Institute (OII)
University of Strathclyde (Glasgow)	Department of Management Studies
Swansea University	School of Business and Economics

There are a variety of reasons for the low volume of publications. The institutional economic drivers favour overseas and especially non-EU students, meaning that UK material is of limited application in teaching or in doctoral research. Some UK work is undertaken for parties active in policy and regulatory debates, making publication of such material both difficult and unnecessary. Other contributions are to a more academic debate, not intended to influence public policy debates.

IX. Office of Communications

The Office of Telecommunications (OFTEL) had been created in 1984 as an independent, non-ministerial department to be the first regulator under Professor (later Sir) Bryan Carsberg.⁶⁷ It was replicated with the creation of a variety of other sectoral regulators.

The Communications Act of 2003 created a single “converged” regulator, the Office of Communications (OFCOM), by merging the following:

⁶¹ A similar programme is operated by Coventry University, apparently by external teachers, since there is no record of any research output. There was also a course at the University of Westminster.

⁶² Martin E Cave, *Snakes and ladders: Unbundling in a next generation world*, 34 TELECOMMUNICATIONS POLICY 80 (2010).

⁶³ Jason Whalley & Peter Curwen, *Equality of access and local loop unbundling in the UK broadband telecommunications market*, 25 TELEMATICS AND INFORMATICS 280 (2008).

⁶⁴ Yogesh K. Dwivedi, Banita Lal & Michael D. Williams, *Managing consumer adoption of broadband: Examining drivers and barriers*, 109 INDUSTRIAL MANAGEMENT & DATA SYSTEMS 357 (2009).

⁶⁵ Yogesh K. Dwivedi, Navonil Mustafee, Michael D. Williams & Banita Lal, *Developing a broadband adoption model in the UK context* pp. 192–208 in J. Pries-Heje et al. (Eds.): IS DESIGN SCIENCE RESEARCH, IFIP AICT 318 (2010).

⁶⁶ Additionally, two specialist units have recently closed: Centre for Regulated Industries (Bath) and Centre for Management under Regulation (Warwick).

⁶⁷ P. Gist, *The role of OfTel*, 14 TELECOMMUNICATIONS POLICY 26 (1990), Mark Thatcher, *Regulatory reform in Britain and France: Organizational structure and the extension of competition*, 1 JOURNAL OF EUROPEAN PUBLIC POLICY 441 (1994), ROBIN MANSELL, *THE NEW TELECOMMUNICATIONS: A POLITICAL ECONOMY OF NETWORK EVOLUTION* (1993). Jon Stern, *Regulatory forbearance: why did OfTel find it so hard?* 28 TELECOMMUNICATIONS POLICY 273.

- Office of Telecommunications (OFTEL);
- Broadcasting Standards Commission (BSC);
- Independent Television Commission (ITC);
- Radiocommunications Agency (RA); and
- Radio Authority.

The National Audit Office (NAO) identified lessons for mergers of regulatory authorities.⁶⁸

OFCOM combines the functions of the moral guardian for broadcasting, the competition authority for the sector, the protector of the citizen-consumer in communication markets, the sponsor of the sector and is both regulator and policymaker.

The 2003 Act was the means to implement the European Union 2002 Directives, sometimes known as the telecommunications regulatory package.⁶⁹

The UK legislative process began in 2000 with a white paper setting out the proposals of HMG.⁷⁰ The Culture Committee of the House of Commons then produced a report.⁷¹ In turn HMG responded to that report.⁷² Finally, the Bill was laid before Parliament, debated and given the Royal Assent on 17 July 2003, a few days before the EU implementation deadline.

In many countries competition law powers remain with a traditional horizontal authority with which the regulator is expected to collaborate. In the UK, the approach has been different, with concurrent powers given to the sectoral regulators (see figure 2). Thus the Office of Fair Trading (OFT) – the national competition authority – shares its jurisdiction with OFCOM concerning implementation of:

- Competition Act 1998;⁷³
- Enterprise Act 2002; and
- Articles 101 and 102 of the Treaty on the functioning of the European Union.

The EU framework was amended in 2009.⁷⁴ As this was being implemented, HMG launched a wide-ranging consultation, with a view to producing a green paper, to be followed by a white paper and bill, scheduled for 2013.⁷⁵

Appeals against decisions of both OFCOM and the CC are heard by the Competition Appeal Tribunal (CAT) and both can refer matters for further investigation to the Competition Commission.⁷⁶ The CAT can seek an opinion of the European Court of Justice (ECJ) if this is necessary.

The Competition Commission (CC) reviewed the appeals process for telecommunications.⁷⁷ This dealt with a relatively narrow class of cases in which, under s.193 of the Communications Act 2003, operators can appeal to the CAT against price control decisions made by OFCOM, which is then

⁶⁸ NATIONAL AUDIT OFFICE, THE CREATION OF OFCOM: WIDER LESSONS FOR PUBLIC SECTOR MERGERS OF REGULATORY AGENCIES, 2005-2006, HC 1175.

⁶⁹ PAUL NIHOUL & PETER RODFORD, EU ELECTRONIC COMMUNICATIONS LAW: COMPETITION AND REGULATION IN THE EUROPEAN TELECOMMUNICATIONS MARKET (2004).

⁷⁰ DEPARTMENT OF TRADE AND INDUSTRY AND DEPARTMENT FOR CULTURE, MEDIA AND SPORT, A NEW FUTURE FOR COMMUNICATIONS, 1999-2000, Cm. 5010.

⁷¹ HOUSE OF COMMONS, CULTURE, MEDIA AND SPORT COMMITTEE: COMMUNICATIONS, 2001-02, HC 539.

⁷² DEPARTMENT OF CULTURE, MEDIA AND SPORT, THE COMMUNICATIONS WHITE PAPER: GOVERNMENT RESPONSE TO THE SECOND REPORT FROM THE CULTURE, MEDIA AND SPORT SELECT COMMITTEE, 2000-2001, Cm. 5316.

⁷³ As amended by The Competition Act 1998 and Other Enactments (Amendment) Regulations, 2004, S.I. 2004/1261.

⁷⁴ EU Directive 2009/140/EC, 2009 O.J. (L 337) 37-69 implemented in the UK by The Electronic Communications and Wireless Telegraphy Regulations, 2011, SI 2011/1210.

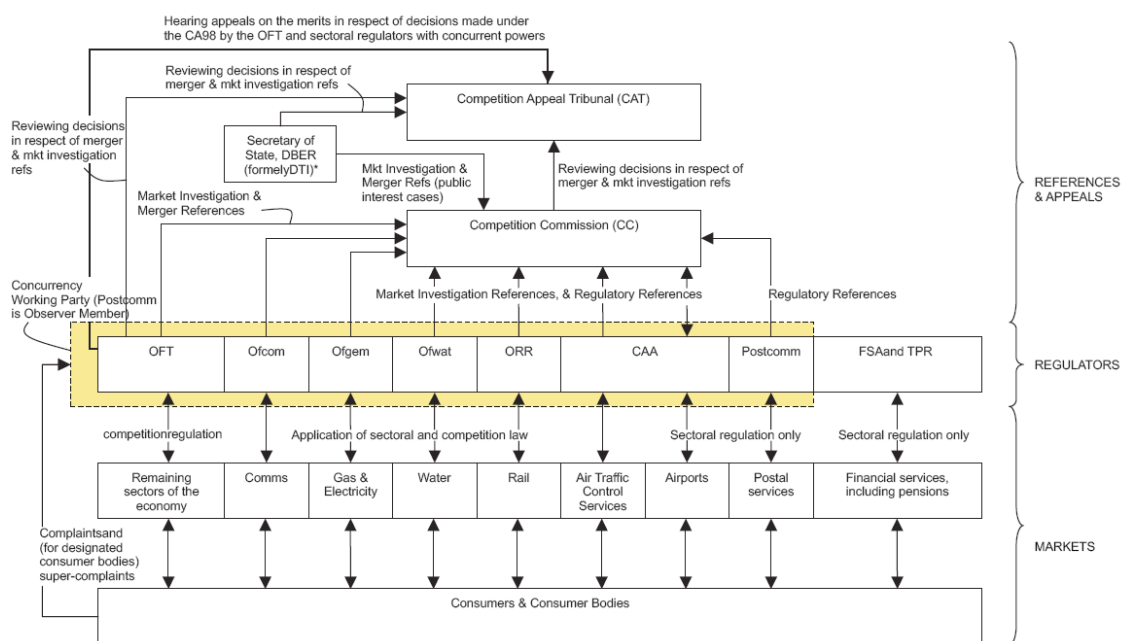
⁷⁵ http://www.culture.gov.uk/images/publications/commsreview-open-letter_160511.pdf

⁷⁶ The Competition Appeal Tribunal Rules, 2003, S.I. 2003/1372.

⁷⁷ http://www.competition-commission.org.uk/rep_pub/consultations/current/pdf/report_of_review.pdf

required to refer the matter to the CC if there is a dispute on pricing issues. The CC launched a consultation on proposed guidance.⁷⁸ It received five submissions, to which it indicated its responses.⁷⁹

Figure 3 *The antitrust system in the United Kingdom*⁸⁰



One of the characteristics of OFCOM has been its almost overwhelming enthusiasm for the consultation of “stakeholders”. It published over five thousand pages in 2006, excluding broadcasting. Several hundred additional pages were published in a variety of reports.

Despite the importance attached to consultations, there are relatively few responses, even on some relatively important topics (see Table 8). Most individuals and organizations are excluded by the obscurity of the topics and by the complexity of the issues. The scale of effort required to respond to a majority of the consultations is considerable and is only achieved by BT and, in their area, by the five mobile operators. In particular, the very small number of responses from the Consumer Association, the National Consumer Council (NCC) and the Communication Management Association (CMA) is noticeable, they carefully focus their resources on a few key issues.

⁷⁸ http://www.competition-commission.org.uk/rep_pub/consultations/current/pdf/guidance_on_telecoms_appeal_process.pdf

⁷⁹ http://www.competition-commission.org.uk/rep_pub/consultations/past/pdf/110427_summary_of_responses_on_telecoms_guidance_for_publication.pdf

⁸⁰ HOUSE OF LORDS, SELECT COMMITTEE ON REGULATORS, UK ECONOMIC REGULATORS, 2006-07, HL 189, App. 8.

Table 8 Responses to selected OFCOM consultation in 2007

	<i>VoIP-999</i>	<i>NP</i>	<i>MTR</i>	<i>numbers</i>	<i>payphones</i>	<i>mis-selling</i>	<i>charge-control</i>
BT	√	√	√	√	√	√	√
C&W	√	√	√	√			
3/HWL		√	√				√
O ₂		√	√			√	√
Orange		√					√
T-Mobile	√		√				√
Vodafone		√					√
UKCTA	√					√	
others	21	15	0	5	3	7	-

The Scottish and Welsh Administrations respond to some OFCOM consultations. This requires OFCOM to engage with democratically elected bodies other than the UK Parliament. It indicates of the complexity of the present constitutional arrangements.

Ministers have taken limited interest in telecommunications, leaving OFCOM not only to implement regulation, but also to develop policy:

The Department does not lead but is responsible for the regulatory framework and has an influence over Ofcom's review process, which will stimulate market activity even further.⁸¹

The "framework" is the legislation, both domestic and European, with "implementation" including significant measures of policy. OFCOM describes itself as a new breed of regulator, embracing areas of activity previously reserved for government.⁸²

OFCOM has two very general considerations:⁸³

It shall be the principal duty of OFCOM, in carrying out their functions—

- (a) to further the interests of citizens in relation to communications matters; and
- (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.

This formulation creates a gap, since there is no explicit reference to business customers, obliging OFCOM to extrapolate from these a rationale for considering their interests. The large businesses are unconvinced that they receive the level of attention from OFCOM that they deserve.

The CEO of OFCOM called for politically independent regulators in the European Union, criticizing other NRAs for being too close to state-owned operators.⁸⁴ This is despite his having served as a policy advisor to Gordon Brown and a senior policy advisor to Tony Blair before joining OFCOM, leading some to suggest that he is not very distant from Downing Street.⁸⁵ He argued that politicians should stay out of the detail, only setting long term goals and not "interfering". This is a very hard distinction to draw, especially in a fast moving sector where short term issues can be or quickly become strategic. It is highly unlikely that other countries will devolve policy to an unelected agency.

⁸¹ DEPARTMENT OF TRADE AND INDUSTRY, DEPARTMENTAL REPORT 2006, Cm. 6826, §2.163.

⁸² Peter Phillips, Unelected and Unaccountable? The role of the regulator in setting public policy, Presentation to the Institute of Economic Affairs, 4 July 2007.

⁸³ Communications Act, 2003, §3.

⁸⁴ Ed Richards, Speech on European Framework to the 8th Annual Telecoms Regulation and Competition Law Conference. 31 October 2007.

⁸⁵ Resumé available at: http://www.ofcom.org.uk/about/csg/ofcom_board/biogs/e_richards/

OFCOM annual plans have been presented to the House of Commons.⁸⁶ For day-to-day relations an OFCOM board member has responsibility, supported by a team, there are also teams in each of the four nations liaising with the devolved administrations and agencies.

The structure of OFCOM is of a board of up to ten persons, including non-executive members appointed by the Secretary of State for DCMS and members of the senior management team (the OFCOM Executive). There are several committees of the OFCOM board of which the following have delegated powers:

- Executive Committee;
- Policy Executive;
- Spectrum Clearance and Awards Programme Management Board (800 and 2600 MHz);
- Operations Board
- Content Board – regulation of television and radio quality and standards;
- Community Radio Fund Panel;⁸⁷
- Content Sanctions Committee: considers statutory sanctions in content or content-based cases in broadcasting recommended to it by the OFCOM Executive
- Radio Licensing Committee
- Fairness Committee: fairness and privacy complaints in broadcasting
- Election Committee: disputes about the allocation, scheduling or duration of Party Election Broadcasts on radio and television
- OFCOM & BBC Joint Steering Group⁸⁸

There are also conventional governance committees for audit, remuneration and nominations.

To assist OFCOM there are the following advisory committees:

- Consumer Panel;⁸⁹
- Older and Disabled Persons;
- Committees for the Nations:
 - England,
 - Northern Ireland,
 - Scotland,
 - Wales; and
- Spectrum Advisory Board.

The national committees continue a long tradition, dating back through OFTEL to the Post Office which had regional user committees.

OFCOM is a relatively costly agency for the UK, though this goes unnoticed by consumers, since they pay for it through their telephone bills in charges, levied by the operators. Its spending is limited by HM Treasury in regular negotiations. The regulator and the regulated engage each other in complex processes that again are unnoticed by consumers and citizens because of their obscure and arcane nature. In the absence of any goals set by government, political oversight has largely been lost.

X. Other regulatory and consultative bodies

In addition to OFCOM and the various national ministries, assemblies and parliaments, there is a host of other agencies (see Table 9). There are also non-telecommunications mechanisms for consumer protection, through local trading standards offices, the National Consumer Council and the small

⁸⁶ HOUSE OF COMMONS, OFCOM ANNUAL PLAN 2007-08, JOINT SESSION WITH CULTURE, MEDIA AND SPORT COMMITTEE. ORAL AND WRITTEN EVIDENCE GIVEN BY LORD CURRIE OF MARYLEBONE AND MR ED RICHARDS, 2006-07, HC 459-i.

⁸⁷ Fulfilling §359 of the Communications Act 2003.

⁸⁸ The Joint Steering Group (JSG) is based on the OFCOM-BBC Memorandum of Understanding. Its responsibilities in relation to Market Impact Assessments (MIAs) are set out in Annex 6 thereof.

⁸⁹ <http://www.ofcomconsumerpanel.org.uk/>

claims courts. Additionally, some complaints are made directly to Members of Parliament (MPs) and, for international mobile roaming, to Members of the European Parliament (MEPs). Each plays a role in the governance of telecommunications.

All advertising in the United Kingdom is under the control of the Advertising Standards Authority (ASA).⁹⁰ This states that it is an independent, self-regulatory body established by the advertising industry to adjudicate on two codes, one for broadcast and another for non-broadcast advertising (see Table 10).⁹¹ As with other regulatory bodies in the UK it publishes its codes, an annual statement or work plan and follows this up in an annual report. It also publishes adjudications on the many complaints it receives about specific advertisements. Behind the ASA stands a substantial protection for consumers in the form of EU directives and UK legislation.

Table 9 Ancillary regulatory bodies in the United Kingdom

<i>Body</i>	<i>Status</i>	<i>Scope</i>
Advertising Standards Authority (ASA)	Independent	Content of advertisements
Communications & Internet Services Adjudication Scheme (CISAS)	Independent*	Dispute settlement for consumers and SMEs
Consult 21	BT	Consultation with Communication Providers on BT's 21st Century Network (21CN)
Gambling Commission	Statutory	Powers under Gambling Act 2005 to regulate commercial gambling
Information Commissioner (ICO)	Statutory	To uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals
Internet Watch Foundation (IWF)	Self-regulatory	Internet Hotline for the public and IT professionals to report criminal online content in a secure and confidential way
Network Interoperability Consultative Committee (NICC)	Independent	A technical forum for the communications sector that develops interoperability standards for public communications networks and services
Next Generation Networks UK (NGNuk)	Independent*	A co-ordination forum for key investors in NGN infrastructure and services
Office of the Telecommunications Adjudicator (OTA ²)	Independent*	Assist Scheme Members to reach agreement on and, where necessary, make non-binding recommendations on appropriate product functionality, process specifications, change management, implementation plans and monitoring
Ombudsman Services: Communications	Independent*	Resolve complaints from consumers about companies which provide communications services to the public
Phonepay Plus	Independent*	Regulator of premium rate services

* OFCOM approved.

The engagements of the ASA with telecommunications are two-fold, advertisements for telecommunications services and advertisements carried to customers by means of telecommunications. For example, it has published guidance for adverts on interactive television.⁹² Among the complaints about telecommunications have been issues of the pricing of elements in multiple play bundles, where providers have sometimes been found to have broken the rules. Some

⁹⁰ <http://www.asa.org.uk/>

⁹¹ THE UK CODE OF NON-BROADCAST ADVERTISING, SALES PROMOTION AND DIRECT MARKETING (CAP CODE) and THE UK CODE OF BROADCAST ADVERTISING (BCAP CODE) are both available at: <http://www.asa.org.uk/Advertising-Codes.aspx>

⁹² ADVERTISING STANDARDS AUTHORITY, GUIDANCE TO BROADCASTERS ON THE REGULATION OF INTERACTIVE TELEVISION SERVICES (2004).

disputes had previously arisen over descriptions of the relative quality of the mobile networks. A similar problem arose over advertised claims about the available speed for broadband. In November 2007, the ASA held that Virgin Media had failed to make clear that speeds were “up to” 10 Mbps, though it noted that most users would get this speed most of the time.⁹³ The wider issue was then taken up by the OFCOM Consumer Panel and subsequently by OFCOM.⁹⁴

Table 10 Selected recent adjudications by the Advertising Standards Authority

Talk Talk Telecom (149509)	“We did not consider that that methodology was sufficiently robust to support a savings claim [of up to £140] because customers who had switched to TalkTalk were more likely to have done so if they were going to make a saving, and the survey results were therefore unlikely to include data for customers for whom a switch would result in either no saving at all or only a small saving.” <i>Misleading advertising, Substantiation, Exaggeration.</i>
Virgin Media (145732)	“We considered the ad went beyond highlighting the disparity Virgin believed existed between advertised broadband speeds compared to those that were delivered and that it implied other ISPs dealt with consumers dishonestly in relation to broadband speeds.” <i>Misleading advertising, Exaggeration, Comparisons with identifiable competitors, Substantiation, Imitation and denigration.</i>
Plusnet (143113)	“... we considered that the legibility of the small print was poor and consumers were unlikely to be able easily to read the qualifying criteria. We understood from the small print that broadband was only available at £6.49 if the customer lived in one of PlusNet's “low cost areas” and that the price was £12.99 from month four otherwise.” <i>Misleading advertising, Qualifications.</i>
Orange (105158)	“...we considered that the claim “The Orange 3G network covers more people in the UK than any other operator” was ambiguous in the context of a mobile broadband service because it did not make clear whether it was referring to Orange covering more people in the places where they lived than any other operator (population coverage), or more people in the UK, wherever they might be using their 3G mobile device (geographical coverage).” <i>Substantiation, Truthfulness, Other comparisons.</i>
Motorola (161483)	“...while we acknowledged the ad showed the phone being used with other associated accessories, we considered viewers would understand the claim ‘The world's most powerful smartphone’, along with a close-up of the phone, to mean the phone, in isolation, was the most powerful smartphone.” <i>Misleading advertising, Substantiation, Exaggeration, Comparisons.</i>

Sections 52 and 53 of the Communications Act give OFCOM the power to impose on operators and service providers procedures for resolving consumer complaints and disputes through the terms of the general authorization. This is to be carried out by means of codes of conduct which OFCOM has to approve – typically groups of providers adopt a shared code and implementation scheme. The CEO of OFCOM has suggested that too few people know about such schemes – an unsung success story – and that it took too long to invoke its procedures.⁹⁵

OTELo is the Office of the Telecommunications Ombudsman, its function is to “sort out disagreements between public communications providers and their customers” as a free and independent service, investigating complaints by listening to both sides of the story. It is approved by, but not controlled by OFCOM, as one means for customers to exercise their right under the Communications Act to obtain independent dispute resolution.

OTELo receives an average of 6,000 telephone calls and 2,000 letters per month. Many of these do not result in cases, but some 450 cases are closed in an average month usually within six weeks.

⁹³ Virgin Media Ltd, Advertising Standards Authority adjudication of 14 November 2007.

⁹⁴ Ofcom Consumer Panel asks ISP CEOs to address consumer concerns about advertised connection speeds and what they really get, press release, October 10, 2007.

⁹⁵ Ed Richards, Ofcom Annual Lecture - Citizens and Consumer in a Converged World, 16 October 2007.

The Communications & Internet Services Adjudication Scheme (CISAS) is also approved by OFCOM for individuals and small businesses to settle disputes with service providers.⁹⁶ It is primarily for members of the Internet Services Providers Association (ISPA) and Internet Telephony Services Providers Association (ITSPA). It is run by IDRS Ltd as a “free” service, with the costs being covered by the members. The scale of the applications made to CISAS is around two hundred per month, though many of these are outside the scope of the scheme.

Phonepay Plus, formerly the Independent Committee for the Supervision of Standards of Telephone Information Services (ICSTIS), is the body that regulates premium rate phone services through a code of practice for service providers.⁹⁷ Under OFTEL and continued under OFCOM, an obligation was imposed on certain classes of providers of premium services to join ICSTIS as a form of mandatory self-regulation with a code of conduct approved by OFCOM.

In December 2007, following a consultation, OFCOM brought Phonepay Plus under much tighter control in order to avoid surprises.⁹⁸ It appointed a senior official for liaison who attends board meetings of Phonepay Plus and created a reserve power allowing it to issue directions. With immediate effect, Phonepay Plus became a delegated agency.

Phonepay Plus is a member of the International Audiotex Regulators Network (IARN), a body which ICSTIS helped to create.⁹⁹ A growing number of complaints arise from international premium rate calls, with each European country having created its own system to address fraud and abuse.¹⁰⁰

The Office of the Telecommunications Adjudicator (OTA) is independent of both OFCOM and the operators.¹⁰¹ It was originally established to facilitate wholesale access for competitors to BT’s local loops. The system was reformulated as OTA2 following the introduction of the Openreach agreement to cover:

- Unbundled local loops (including backhaul);
- Wholesale Line Rental (WLR);
- Carrier Pre-Selection (CPS); and
- Geographic number portability.

The function of OTA² is to ensure swift implementation of processes, providing seamless migration between services for end users. It enables all service providers and thus end users to benefit by mediating problems so that issues can be resolved before they become formal disputes. At one time BT Openreach published forty indicators for OTA2 each week.

Perhaps surprisingly, BT Openreach also conducts consultations of its stakeholders, or at least customers. It sought views on the provision for “naked DSL” before concluding that there was insufficient demand to justify the development and launch of such a service.¹⁰²

The same person serves as Executive Chairman of both OTA2 and of Next Generation Network UK (NGNuk).¹⁰³ NGNuk arose from a policy adopted by OFCOM in early 2006, following a consultation, which identified a number of areas requiring collaboration amongst operators.¹⁰⁴ Its mission is:

... to act as a co-ordination forum in which key investors in NGN infrastructure and services will discuss, research, consider and, where possible, agree the direction for

⁹⁶ <http://www.cisas.org.uk/>

⁹⁷ <http://www.phonepayplus.org.uk/>

⁹⁸ OFFICE OF COMMUNICATIONS, FORMAL FRAMEWORK AGREEMENT BETWEEN OFCOM AND PHONEPAY PLUS (2007)

⁹⁹ <http://www.iarn.org/>

¹⁰⁰ CULLEN INTERNATIONAL SA & WIK CONSULT GMBH, FINAL REPORT FOR STUDY ON PAN-EUROPEAN MARKET FOR PREMIUM RATE SERVICES (2005).

¹⁰¹ <http://www.offta.org.uk/>

¹⁰² <http://www.openreach.co.uk/orpg/news/productbriefings/wlr/wlr06207.do>

¹⁰³ <http://www.ngnuk.org.uk/>

¹⁰⁴ OFFICE OF COMMUNICATIONS, NEXT GENERATION NETWORKS: DEVELOPING THE REGULATORY FRAMEWORK (2006).

NGNs in the UK and communicate such direction to other players in the telecommunications industry and the general public.

It is to set guiding principles, a vision and an implementation framework for future interconnection. In doing so it:

... has a two way relationship with other industry bodies, such as Consult 21 and the NICC taking input to enable its commercial work to succeed and providing policy output to enable them to undertake their functions.

The Network Interoperability Consultative Committee (NICC) is a forum in which operators, service providers, manufacturers and regulators can reach technical arrangements for interconnection and interoperability.¹⁰⁵ Whereas, Consult 21 is a process created by BT to address access issues on “21CN”, the brand name for its NGN.¹⁰⁶

The Internet Watch Foundation (IWF) is well respected partnership or hybrid organization with the objectives of fostering trust and confidence in the Internet among current and future fixed and mobile users.¹⁰⁷ The IWF provides a hotline for the public to report potentially illegal images of child sexual abuse hosted anywhere in the world and content that is criminally obscene or is an incitement to racial hatred hosted in the UK. It operates a notice and take-down service for such materials with UK service providers.

The IWF is registered under the Charities Act 2006 and is governed by a Board of Trustees, comprising an Independent Chair, six non-industry representatives and three industry representatives. It is funded primarily by voluntary contributions. It is a “relevant authority” in terms of a Memorandum of Understanding with the Crown Prosecution Service (CPS) and the Association of Chief Police Officers (ACPO) in terms of Section 46 of the Sexual Offences Act 2003.

In its consultation about its strategy for 2008-10 the IWF identified a need “to move on”, building on its success. The proposals included a research and policy development role, possible changes to the categories of materials covered and overseas work to promote its successful model.

The Gambling Commission is an independent regulator created by the Gambling Act, 2005.¹⁰⁸ Its aims are to keep crime out of gambling, to ensure that gambling is conducted fairly and openly and to protect children and other vulnerable people from being harmed or exploited by gambling. It also provides advice to HMG. In particular, the Gambling Commission regulates Internet gambling and thus is involved in contentious cross-border issues including the provision of services to players in countries where gambling may be forbidden.

The Information Commissioner is an independent official who is responsible for implementation of the:¹⁰⁹

- Data Protection Act 1998;
- Freedom of Information Act 2000;
- Environmental Information Regulations, 2004, S.I. 2004/3391; and
- Privacy and Electronic Communications Regulations, 2003, S.I. 2003/2426.

The Information Commissioner is a member of the Article 29 Working Group, which comprises the various national data protection authorities in the European Union.¹¹⁰

The array of often obscure offices and schemes created to support and to supplement the work of DCMS and OFCOM is complex to a point where few can or do understand it. While initiatives to

¹⁰⁵ <http://www.nicc.org.uk/>

¹⁰⁶ <http://www.btplc.com/21CN/Theroadto21CN/Consult21/Consult21.htm>

¹⁰⁷ <http://www.iwf.org.uk/>

¹⁰⁸ <http://www.gamblingcommission.gov.uk/>

¹⁰⁹ <http://www.ico.gov.uk/>

¹¹⁰ http://ec.europa.eu/justice_home/fsj/privacy/workinggroup/index_en.htm

improve specific aspects of the operation of the market and of regulation are generally to be commended, when they reach a point that even those working in the sector are uncertain of the various roles, then transparency has been lost. In different capacities OFCOM is responsible for oversight of many of these bodies, with the Home Office being responsible for the others, and in theory being held accountable to Parliament. There are no estimates available for the total costs or the benefits delivered by these organizations.

XI. Conclusion

The United Kingdom likes to present itself as a leader in telecommunications regulatory innovation and deregulation. Yet, its performance in terms of competitiveness and outputs – the services delivered to its businesses and citizens – is not significantly better than would be expected for an economy of its size and strength, indeed in some areas it is poorer. Other than in the assessment by ECTA, where it is now second to the Netherlands, the UK scores only moderately well. In particular, neither HMG nor OFCOM has produced indicators that would measure how British efforts at deregulation compare with rival economies, such as Germany, Japan or the USA.

The question of whether other countries follow a British lead is complex. OFCOM claims some success is promoting functional separation and spectrum trading, but neither of these is exclusively British, nor have they been demonstrated to have delivered significant benefits, even at home. In particular, the BT Openreach undertakings, although novel, are not an unqualified success with a very difficult transition from copper to fibre access networks. The legal basis and the enormous complexity of the whole scheme make its replicability difficult to achieve and the results inevitably different.

The UK regulatory system is one of mind-numbing complexity and somewhat Heath-Robinson construction. It is very doubtful that politicians and senior officials fully understand how it operates, with the effects of any changes being almost impossible to evaluate. While HMG talks of Joined-Up Government (JUG), it is not supposed to mean that everything is interlinked with such complexity that it avoids responsibility or blame ever being attributed.

There is a clear and present democratic deficit. As the House of Lords has conceded, greater oversight by Parliament is required, to hold ministers, OFCOM and the various other subsidiary regulators to account. Such oversight is not practicable in the short term, it would first require considerable streamlining and simplification. It is made more complex by the growing powers of the devolved administrations and assemblies, which must be included.

OFCOM is sometimes called the “the regulator” yet it is neither, being merely one, admittedly the leader, of a pack of regulators, while its scope has extended well into the arena of policy. Much of the activity of OFCOM is hidden in plain sight amongst the several thousands of pages of highly complex documents it produces each year and which very few people ever read or would have reason to read.

In the mid-2000s, cabinet ministers lost control of telecommunications policy. The technocrats at OFCOM had, through their “regulatory strategy” and innumerable consultation documents, set themselves up as a policy-maker. HMG gave only vague and general directions that OFCOM was left to interpret with the stakeholders – in reality a handful of the largest operators. The Cameron Administration appears to have begun bringing this back under ministerial control.

The UK is rightly used as an example of the “regulatory state” and there are certainly a goodly number of regulators. However, it could equally well be called a “consultative state” with its emphasis on formal and informal discussions with stakeholders, but while these are nominally open to the public they are not of the public. Citizens have little interest in such arcane subjects and, insofar as they are aware of them, assume parliament and government oversee them.

There is considerable scope for research, from governance to technical issues. At a generic level it could examine the evolution of the regulatory state, identifying techniques and measures that might be used to evaluate its performance. The question of the accountability of delegated or quasi-

autonomous agencies could be reviewed. It would be useful to build detailed models that would allow possible reforms to be tested before being applied.

Competition is stressed by HMG and OFCOM, but it needs to be measured and those measures tested (e.g., to explain the profusion of not-spots for fixed and mobile broadband, despite the supposed regulatory and competitive incentives to build networks). Government continues to view deregulation as beneficial, an hypothesis that ought to be tested, though it would first be necessary to devise measures of deregulation. The costs of the telecommunications regulatory state have never been calculated, so that an audit of the burden for customers should be undertaken. The question of leadership might be addressed in terms of diffusion of innovation, building models of how ideas and practices have spread.¹¹¹

¹¹¹ ERIC VON HIPPEL, *THE SOURCES OF INNOVATION* (1988).