



**Proposed measures to require
compliance with international
guidelines for limiting exposure to
electromagnetic fields (EMF)**

Response to Ofcom's consultation

June 2020

Executive Summary

Ofcom's consultation proposes to impose additional (and in Sky's view, unnecessary) burdens on operators of radio equipment (authorised under a Wireless Telegraphy Act licence or licence exemption regulations) which can transmit at powers above 10 Watts.

However, for the reasons set out in this response, Sky considers that Ofcom has:

- failed to provide adequate guidance to licensees covering compliance with the proposals (contrary to the requirement for "transparency" under sections 8(3B) and 9(7) of the Wireless Telegraphy Act 2006);
- failed to conduct appropriate impact assessments for the proposals (contrary to section 7 of the Communications Act 2006 (the "**Act**")); and
- failed to conduct a valid consultation process for the proposals (contrary to general principles of administrative law).

As a result, it would be inappropriate at this time for Ofcom to add to the industry's regulatory burden by proceeding with the proposals. Ofcom should therefore announce that it will not be proceeding with the proposals set out in the consultation.

In the alternative, if Ofcom wishes to further explore the proposals, then Ofcom should first:

- issue adequate guidance to cover all significant use cases for impacted licensees, including those identified by Sky;
- carry out and publish a proper impact assessment for the proposals;
- provide sufficient reasons for the proposals; and
- re-consult on the proposals and guidance.

Given the considerable volume of existing regulation, Ofcom should engage with industry to address any specific concerns before imposing further unnecessary regulation.

Sky would welcome the opportunity to meet with Ofcom to discuss, in particular, what additional guidance is required in order cover the networks and radio equipment that Sky relies on in order to carry out its operations.

1. Introduction

Ofcom's consultation proposes to impose additional burdens on operators of radio equipment (authorised under a Wireless Telegraphy Act licence or licence exemption regulations) which can transmit at powers above 10 Watts. In particular, Ofcom is proposing to require such operators to:

- comply with the relevant levels from the ICNIRP Guidelines; and
- keep records that demonstrate how they have complied with the ICNIRP Guidelines.

As acknowledged by Ofcom in the consultation, EMF exposure is already managed under product safety legislation, health and safety legislation and planning policy. Manufacturers, installers and operators of radio equipment are also already aware of the ICNIRP Guidelines and the need to take EMF exposure into account when conducting their business.

Furthermore, Ofcom's recent measurements near newly deployed 5G-enabled base stations are all well within the levels for general public exposure from the ICNIRP Guidelines (with the highest level measured only 1.5% of the levels identified in the ICNIRP Guidelines).

Given this context, it is unclear why Ofcom is now proposing to introduce additional and unnecessary burdens on operators, contrary to section 6(1)(a) of the Act.

2. Ofcom has failed to provide adequate guidance to licensees

Sections 8(3B) and 9(7) of the Wireless Telegraphy Act 2006 state that Ofcom can include conditions in spectrum authorisations only where it is satisfied that they are objectively justified, proportionate, non-discriminatory and transparent.

Ofcom states at paragraph 4.51 of the consultation that its proposals satisfy the "transparent" requirement because: *"It is clear on the face of the proposed licence condition what it is intended to achieve and further, we intend to issue guidance on the processes licensees, installers and users should have in place to ensure compliance with an EMF related condition and the circumstances in which Ofcom may take enforcement action for failing to comply."*

However, the conditions are not "transparent" at present because Ofcom's proposed guidance does not cover a number of important use cases for organisations such as Sky that rely on a number of different networks and a range of radio equipment in order to carry out their operations.

In addition to its use of third party systems requiring licences, such as Arqiva's broadcasting infrastructure, Sky holds its own licences in order to distribute its television services via satellite. These include its direct-to-home ('DTH') uplink systems, [REDACTED], and mobile satellite news gathering trucks, [REDACTED]. These licensed uses are essential to Sky's television and broadcasting businesses. Neither Ofcom's consultation, nor its

proposed guidance (which is drafted in the broadest and most generic terms) contemplate such use cases, nor do they explain how the new licence condition might reasonably be applied to such equipment and sites. Without such guidance, it is unclear what might be needed for this kind of installation to be tested and recorded as safe.

In light of the potentially severe consequences of breach of the relevant licence conditions, including withdrawal of the licence and criminal sanctions, it would be wholly disproportionate and unreasonable for Ofcom to impose the licence condition in the proposed form, and/or do so without providing additional information in the form of relevant guidance to licence holders.

Ofcom has therefore failed to satisfy the necessary conditions set out in sections 8(3B) and 9(7) of the Wireless Telegraphy Act 2006.

3. Ofcom has failed to conduct appropriate impact assessments for the proposed changes

Ofcom's duties and guidance

Ofcom has a duty under section 7 of the Act to carry out impact assessments for "important" proposals. As acknowledged by Ofcom at paragraph 6.11 of the consultation, the proposals set out in the consultation are "important for the purposes of section 7" of the Act.

Ofcom's guidance on Better Policy Making¹ states that:

- an impact assessment should be "a core part of the policymaking process, not a bureaucratic add-on" (1.6); and
- "a decision which is likely to have a wide-ranging impact and/or impose substantial costs on stakeholders will have a more comprehensive Impact Assessment than a decision which will have a less significant impact" (paragraph 1.7).

Section 7(5) of the Act provides that an impact assessment may take such form and relate to such matters as Ofcom considers appropriate. Ofcom's Better Policy Making guidance states more specifically that an impact assessment will generally:

- identify the impacts of each option on the interests of particular groups of stakeholders;
- identify any impacts which each option would have on competition;
- identify and, where possible, quantify the costs and benefits flowing from the impacts which each option would have; and
- assess the key risks associated with each option (paragraph 2.1).

¹ Ofcom, "Better policy making: Ofcom's approach to Impact Assessments", 21 July 2005.

Ofcom has failed to comply with its duties

Paragraph 6.22 of the consultation states that: *“This consultation as a whole, including its annexes, comprises an impact assessment as defined in Section 7 of the 2003 Act.”* However, the consultation clearly does not satisfy Ofcom’s statutory duty under section 7 of the Act.

Ofcom’s proposed new EMF conditions would place a positive duty on licensees such as Sky to ensure that radio equipment is established, installed, modified and used in such a way that it complies with the ICNIRP Guidelines, and be able to demonstrate compliance to Ofcom, in addition to Sky’s obligations under existing legislation. Complying with these conditions would involve additional costs for licensees such as Sky. However, Ofcom has made no attempt to identify or quantify these costs, as required by paragraph 2.1 of Ofcom’s Better Policy Making guidance.

In fact, as explained above, Ofcom’s proposed guidance does not even cover a number of important use cases (such as Sky’s satellite news gathering trucks or Sky’s DTH uplink systems). This omission further demonstrates that Ofcom has not adequately sought to identify and quantify the costs of its proposed new EMF conditions.

Ofcom is therefore in breach of its duty under section 7 of the Act to carry out an impact assessment for the proposals.

4. Ofcom has failed to conduct a valid consultation process

The lack of adequate guidance and the lack of an adequate impact assessment means that it is impossible for an organisation such as Sky to understand how it would be impacted by the proposals and to meaningfully comment on the impact of the consultation. As a result, Ofcom has not conducted a valid consultation process.

Furthermore, the general principles of administrative law are clear on what constitutes a fair and adequate process. In particular, the Gunning principles² provide that:

- the consultation must be made at a time when proposals are at a formative stage;
- sufficient reasons for the proposal must be given to allow intelligent consideration and response;
- adequate time must be given for response; and
- the product of the consultation must be conscientiously taken into account in finalising proposals.

In Sky’s view, Ofcom has not satisfied the requirement to provide “sufficient reasons for the proposal.” In particular, Sky notes that the benefits of Ofcom’s proposals are

² As put forward by Stephen Sedley QC in argument which were adopted by Hodgson J in *R v Brent London Borough Council, ex parte Gunning* (1985) 84 LGR 168, and endorsed by the Supreme Court in *R (Moseley) v London Borough of Haringey* [2014] UKSC 56.

not clearly spelt out in the consultation. Whilst the proposals represent an opportunity for Ofcom to check that internationally agreed power limits are being adhered to for the general public, Ofcom acknowledges, for example, that its own measurements around mobile base stations have shown power levels of no more than 1.5% of the limit. Ofcom has singularly failed to make any case for additional onerous obligations to be imposed on operators.

5. Ofcom should not proceed with the proposals set out in the consultation

It is unclear why Ofcom is now proposing to introduce additional and unnecessary burdens on operators, contrary to section 6(1)(a) of the Act.

Furthermore, for the reasons set out in this response, Sky considers that Ofcom has:

- failed to provide adequate guidance to licensees covering compliance with the proposals (contrary to the requirement for “transparency” under sections 8(3B) and 9(7) of the Wireless Telegraphy Act 2006);
- failed to conduct appropriate impact assessments for the proposals (contrary to section 7 of the Communications Act 2006 (the “**Act**”)); and
- failed to conduct a valid consultation process for the proposals (contrary to general principles of administrative law).

As a result, it would be inappropriate at this time for Ofcom to add to the industry’s regulatory burden by proceeding with the proposals. Ofcom should therefore announce that it will not be proceeding with the proposals set out in the consultation. To the extent that Ofcom believes that it is necessary to provide reassurance to the public on the matters covered by the consultation, a more reasonable and proportionate approach would be for Ofcom to assess and report on the efficacy of the existing rules and regulations, rather than simply adding to them.

In the alternative, if Ofcom wishes to further explore the proposals, then Ofcom should first:

- issue adequate guidance to cover all significant use cases for impacted licensees;
- carry out and publish a proper impact assessment for the proposals;
- provide sufficient reasons for the proposals; and
- re-consult on the proposals.

Given the considerable volume of existing regulation, Ofcom should engage with industry to address any specific concerns before imposing further unnecessary regulation.

Sky would welcome the opportunity to meet with Ofcom to discuss, in particular, what additional guidance is required in order cover the networks and radio equipment that Sky relies on in order to carry out its operations.

Sky

June 2020