

## Vodafone's response to Ofcom's consultation on revised impact assessment guidance

### Summary

As an evidenced based independent regulator, Ofcom's reputation and credibility is dependent on its actions being transparent, accountable and justified, with a clear and robust evidential case for action. In the absence of this, Ofcom risks straying into undertaking knee-jerk decisions, driven by agendas generated elsewhere, including in political and journalistic circles.

While Ofcom has a duty to take account of the views of all stakeholders, including politicians and the media, its strength lies in its independence. Without this, it is a less capable and effective organisation. What is politically or journalistically popular in the short term, might not be compatible with the long-term interests of consumers, nor be aligned with Ofcom's statutory duties. Ofcom often has to take difficult decisions that will be unpopular with some groups of stakeholders and where those decisions are avoided or modified as a result of a short-term desire to appease what can often be the loudest voices, that ultimately compromises Ofcom's work and can act against the long-term interests of UK citizens. We fully appreciate that many of the complex issues that Ofcom has to deal with are seldom black and white that Ofcom often has to strike a balance, between competing objectives, but this makes it imperative that decisions are well founded in evidence and arrived at through independent decision making.

The Government's better regulation framework is a useful lens by which Ofcom's work should be viewed. Ofcom as an organisation is now nearly two decades old and is dealing with an expanded remit in a more complicated digital world, with a wider range of threats and challenges than ever before. It is therefore even more important that it strives to deliver better regulation, and that can only come through independent thought and decision making, based on a clear and transparent evidential base which has been opened to scrutiny and where all stakeholders and market participants have had the opportunity to contribute and where we all can have faith in the robustness of the impact assessments conducted.

In summary, we are of the view that:

- Ofcom should take the opportunity to align with the Government's approach to regulation in the Better Regulation Framework.
- Ofcom should draw a clearer distinction as to how it will apply its guidelines between the sectors it regulates.
- Impact assessments processes would benefit from both earlier and independent scrutiny.
- Ofcom should have a bias against intervention as its starting point.
- Prominent weighting needs to be given to the fact that regulatory intervention can disrupt commercial action which is also of benefit to consumers
- The provisioning of impact assessment summaries is essential for widespread accessibility, useability and transparency.
- It should be exceptional for Ofcom to not publish an IA.
- Where Ofcom issues guidance as to how it will interpret certain rules in the context of investigation, it must publish an impact assessment.
- We fully support the plans for post evaluation, a key criterion to achieving a Better Regulation regime.

## Introduction

We considered, in detail, the role of impact assessments in response to the BEIS “Reforming the framework for Better Regulation”<sup>1</sup> 2021 consultation. We commissioned Frontier Economics to conduct a review of Ofcom’s application of impact assessments, in order to provide best practice recommendations aligned with the Better Regulation principles. We submitted the Frontier report<sup>2</sup> to Ofcom as part of our submission to the Mobile Strategy Review. The Frontier report recommendations and BEIS consultation conclusions remain relevant to Ofcom’s proposals and inform Vodafone’s response to this consultation.

## Ofcom should draw a clearer distinction as to how it will apply its guidelines between the sectors it regulates

Since the original impact assessment guidance, Ofcom’s remit has grown significantly. Ofcom’s new powers in relation to VSPs and online safety are content driven, whereas in the sectors it has traditionally regulated, Ofcom has had economic and competition responsibilities.

Ofcom should think about whether it is appropriate to have one set of guidelines applying to such a wide range of sectors, powers and responsibilities. At the least, Ofcom should think more about how the use of these guidelines might vary across those sectors where it is an economic regulator and those where it is purely a content regulator.

## Bias against intervention

Ofcom has restated its bias against intervention. We consider where there is no legal requirement to intervene, Ofcom should hold itself to a high standard of benefits well above costs when undertaking the IA, ensuring that there is a strong evidence-based justification for intervention. Ofcom must give a high weighting to the consideration that any intervention is likely to result in a ripple effect impacting competition, investment and innovation elsewhere in the organisation subject to the intervention. The investment in capital and resources to deliver any intervention will, in most cases, be diverted away from other business plans which could have delivered equal or greater consumer benefit than the intervention proposed by Ofcom.

We consider that Ofcom’s recent consultation on broadband technology<sup>3</sup> descriptions show an instance in which Ofcom has sought to intervene despite presenting a weak argument in favour of that intervention. Ofcom has proposed guidelines on the basis that the intervention might help customers but has presented no strong evidence that customers will actually value this information. As we set out in our response to that consultation, we consider that there is both insufficient evidence of the consumer benefit will be delivered, and insufficient thought given to the relative impact that implementation will have against that benefit.

Going forward, we encourage Ofcom to adhere closely to its commitment to a bias against intervention.

## How Ofcom presents IAs

In the past, Ofcom has typically defaulted to an assertion that entirety of any given statement or consultation amounts to an impact assessment. It has restated in consultation that this remains a way it might present its IAs.

There is a perception that this has been at times a way to ensure that Ofcom meets its requirement to publish an IA,

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<sup>1</sup> [Reforming the framework for better regulation - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/reforming-the-framework-for-better-regulation)

<sup>2</sup> [Vodafone \(second Frontier Economics report\) \(ofcom.org.uk\)](https://www.ofcom.gov.uk/consult/condocs/2022/220301/220301.pdf)

<sup>3</sup> [Consultation: Improving broadband information for customers - Ofcom](https://www.ofcom.gov.uk/consult/condocs/2022/220301/220301.pdf)

without dedicating particular resource to undertaking an impact assessment. Beyond this, we are also concerned about the accessibility challenges this approach can pose.

Users of Ofcom documents who are not closely involved in detail of regulation means they are less able to understand a piecemeal IA that has been carried out throughout an Ofcom statement/consultation. The primary recommendation that Frontier makes to significantly improve the quality of impact assessments is the provision of a clear summary of the IA in a standard template.

*“There is no doubt that the decisions that regulators such as Ofcom make are complex. However, all these decisions ultimately require Ofcom to trade off costs and benefits of different options. Moreover, Ofcom has a duty to enable its stakeholders to be able to interrogate its decisions. However, in many cases, despite the voluminous analysis, it is not clear exactly how Ofcom approaches this trade off. Ofcom frequently includes a statement similar to: “the analysis presented in this document constitutes an impact assessment as defined in section 7 of the [Communications] Act”<sup>[1]</sup> along with “boilerplate” text about the importance of IAs in best practice policy making. This statement is not helpful to stakeholders who are attempting to understand how its decisions are reached. Annex A sets out a standard template that Ofcom should use to summarise the costs and benefits of the different options, cross referring to its wider analysis, and explaining how these costs and benefits support its decision. The Impact Assessment template is based on the template provided in the Better Regulation Framework, which government departments are required to use<sup>4</sup>.*

Frontier draws up a recommended draft template which we have replicated at end of this document. Having a standard template enables accessibility, usability and transparency to the decision-making process. Users will have a uniform overview which clearly sets out and summarises the quantitative analysis.

## **It should be exceptional for Ofcom to not publish an IA**

Ofcom has outlined from paragraph 3.3 of its IA consultation that is only required to publish an IA where the proposal is “important” and part of assessing whether an intervention is important is to consider the significance of the proposal.

As Frontier sets out

*“Policy decisions that impose significant costs require public bodies such as Ofcom to take care that the IA underlying the decisions are clear such that stakeholders can interrogate the rationale, reasoning and evidence for choosing a given option. These need to be clearly set out. Moreover, particularly in the case where costs fall on businesses, the public body should demonstrate that the chosen option is the best of the options available, and that industry led options have clearly been developed and given due consideration”*

It is clear that there will be times when Ofcom’s view of what is significant differs from those that will be impacted by the proposal. Industry typically views any intervention by Ofcom as significant, in that it can disrupt expected spending and strategy in a year. As such, we consider it impossible for Ofcom to undertake decisions without

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<sup>4</sup> <sup>[1]</sup> See Ofcom (2017) Consumer switching Proposals to reform switching of mobile communications services 2.46

<sup>[2]</sup> <https://www.gov.uk/government/publications/impact-assessment-template-for-government-policies>

publishing an IA.

### **Ofcom must clarify its proposal at paragraph 3.5(d)**

Ofcom has said it will not publish impact assessments when conducting investigations. Vodafone does not object to this.

However, it has also said that it will not publish an impact assessment

*“When publishing guidance relating to how we will undertake such investigations. Such guidance will generally just flesh out how we will fulfil obligations created following the carrying out of an impact assessment.”*

We consider that this should only be the case when publishing guidance related to the process through which it will investigate (e.g. Ofcom’s Enforcement Guidelines), although Vodafone considers it would still be best practice to publish an IA for this type of guidance.

However, where Ofcom issues guidance as to how it will interpret certain rules in the context of investigation, it must publish an impact assessment. This is because such guidance (e.g. recent broadband consultation) can expand on existing rules in ways that can have a clear impact on regulated entities. Furthermore, there is often scope of disagreement between Ofcom and companies about the extent to which such guidance is an appropriate interpretation of underlying rules.

Ofcom should therefore clarify its meaning and limit this exception to process guidance. However, we would also encourage Ofcom to publish IAs for process guidance, as processes can also have significant impact on company resources.

### **Post evaluation**

We thoroughly support the proposals for ex-post evaluations. This is a critical step in applying a Better Regulation approach. Having a robust end to end process of properly assessing the available options, their estimated costs, their estimated benefits, and their side effects must be paired with an equally robust evaluation of outcomes (the real costs and benefits). Regulatory decision making will consequently be held to a standard of accountability. We look forward to developing this area of the process with Ofcom to ensure that all parties will benefit from the insights a post-evaluation can offer.

Frontier notes that best practise guidelines highlight the importance of including a process of ongoing monitoring and review of policies both during and after implementation. They note the Green Book states

*“Monitoring and evaluation play an important role before, during and after implementation. The aim is to improve the design of policies, identify strategic objectives, to understand the mechanism of change and to support the management of implementation.”*

*The Green Book considers that such monitoring will be used to determine:*

- 1. “Is the intervention being delivered as intended?”*
- 2. Is the intervention working as intended?*
- 3. How well did the intervention meet its SMART objectives?*
- 4. Were there unexpected outputs and outcomes?*
- 5. Were costs benefits and delivery times as predicted at approval?*
- 6. Was delivery achieved as expected and were any changes needed?*



introduced only where absolutely necessary. It would also allow the department to take account of the ISB's comments during the remainder of the policy development process to ensure that the final IA is fit for purpose.

- The Govt consultation response showed there was strong general support for this approach.

draft template for summarising impact assessment decisions

<b>Summary: Intervention and Options</b>					
<b>Cost of Preferred (or more likely) Option</b> (in 20xx prices)					
<b>Total Present Value *</b>	<b>Net Social</b>	<b>Business Present Value**</b>	<b>Net</b>	<b>Net cost to business per year***</b>	
£m		£m		£m	
<b>What is the problem under consideration? Why is Ofcom action or intervention necessary?</b> <ul style="list-style-type: none"> <li>• What is the issue being addressed?</li> <li>• What are the current or future harms that is being tackled?</li> <li>• Why is Ofcom best placed to resolve the issue?</li> </ul> <p>Maximum of 7 lines</p>					

<b>What are the policy objectives of the action or intervention and the intended effects?</b> <ul style="list-style-type: none"> <li>• What are the intended outcomes of intervention?</li> <li>• Can these be described in a specific, measurable, achievable, realistic and time-limited (SMART), or similar, way?</li> <li>• What are the desired effects – what will change as a result of intervention?</li> <li>• What will the indicators of success be?</li> </ul> <p>Maximum of 7 lines</p>
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<b>What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)</b> <ul style="list-style-type: none"> <li>• Include a description of the “do nothing” option and non-regulatory options.</li> </ul> <p>Maximum of 10 lines</p>
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*\*Net Present Social Value is the net benefit to society and the economy as a whole (including businesses). It shows the present value of all benefits (including benefits to business and society at large) less the present value of all costs (to business and society at large).*

*\*\* Business Net Present Value is the net benefit to businesses. It shows the present value of all benefits to business less the present value of all costs to business.*

*\*\*\* Net cost to business per year is the cost to businesses in each year.*

**Summary: Analysis & Evidence Policy Option 1 (2, 3, ...)**

**Description:**

**FULL ECONOMIC ASSESSMENT**

Price Base Year 2019	PV Base Year 2020	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:

COSTS (£m)	Total (Constant Price)	Transition Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional		Optional	Optional
High	Optional		Optional	Optional
Best Estimate				

**Description and scale of key monetised costs by 'main affected groups'**  
Maximum of 5 lines

**Other key non-monetised costs by 'main affected groups'**  
Maximum of 5 lines

BENEFITS (£m)	Total (Constant Price)	Transition Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional		Optional	Optional
High	Optional		Optional	Optional
Best Estimate				

**Description and scale of key monetised benefits by 'main affected groups'**  
Maximum of 5 lines

**Other key non-monetised benefits by 'main affected groups'**  
Maximum of 5 lines

Key assumptions/sensitivities/risks **Discount rate (%)**

Maximum of 5 lines

**BUSINESS ASSESSMENT (Option 1)**



<b>Direct impact on business (Equivalent Annual) £m:</b>		
<b>Costs:</b>	<b>Benefits:</b>	<b>Net:</b>