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Non-confidential
Vodafone Response to Ofcom Consultation:
Ofcom's general policy on information gathering

Introduction

Ofcom's information gathering powers are of critical importance for ensuring effective regulation. Reliable and relevant data should form the evidence base for Ofcom's decision-making, support its analysis, and inform its impact assessments and ex-post evaluations. We welcome the decision to review the information gathering policy at this point in time. As Ofcom increases its analytical and monitoring role in the market, the need for accurate and timely data grows further. However, the sheer volume and frequency of those growing requests can jeopardise the data's ultimate quality.

Statutory requests for information are significant legal tools, designed to ensure a robust regulatory environment. Regulated companies like Vodafone take these requests for information very seriously, given the associated risks of financial penalties and even criminal proceedings if information is withheld or inaccurate. Compliance with information requests does not come without cost to operators. In addition to the cost of maintaining specific resource within our regulatory function to manage information gathering, there is also the cost of maintaining data systems that might otherwise not be used, and the cost of non-regulatory employees compiling and assuring data outside their BAU work.

This is why the Communications Act 2003 and the Wireless Telegraphy Act 2006[1] clearly define the restrictions for use of these powers, and the requirement to demonstrate proportionality and regulatory need with each use. The legislation recognises the gravity of using these powers, and as such it treats them as a form of regulatory intervention: needing to meet a high bar for implementation.

In the context of Ofcom's recently updated Impact Assessment guidance, it is important to build in the same principles applied to new regulations to all interventions in the market – including use of statutory instruments to request information. That is:
- **Minimising burden to industry:** Is this the least intrusive mechanism to achieve the policy objectives?
- **Proportionality of the request:** Do the benefits of receiving this information outweigh the costs to industry to produce it? How does Ofcom evaluate the usefulness of the information, and therefore the proportionality of its continued production (in the case of recurring information requests)?
- **Accountability and transparency:** How can Ofcom remain accountable as regards its statutory information gathering? Is there the correct level of transparency around how information is used?

Ofcom needs to recognise that information gathering is not a 'free' activity. Given that it diverts commercial budget and human resource away from commercial activity and towards regulatory compliance, it is an active regulatory intervention, and should be treated as such. We hope that this policy review is used as an opportunity to incorporate this mentality in its future approach to information gathering.

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[1] These are the main pieces of legislation granting Ofcom information gathering powers, though of course there are others such as the Enterprise Act 2002 and the Open Internet Access (EU) Regulations 2016, used recently.

A cross-Ofcom approach to information gathering

Information gathering underpins all of Ofcom's work. As such, given multiple projects will all need data within any given year, Ofcom decided to create **the Information Registry** to help coordinate information requests. Since its formation, the Information Registry has increased transparency of the information gathering process, by performing a 'front door' function. As the gatekeeper of information requests coming out of project teams, it was intended to ensure a reasonable distribution of requests and to weed out duplications. There have been successes here – in particular the ability for providers to engage quickly with a single port of call, in relation to deadlines and clarifications.

However, we believe that this function is not being utilised to its full potential. We had 18 deadlines falling between June and August this year (not including monthly recurring submissions), compared to 6 over the same period last year. In full knowledge that the summer months are unpredictable with staff absences, Ofcom planned its projects in such a way as to be requesting information in quick succession – and from the same overworked teams in the case of the Telecoms Access Review – over the holiday period. This is a failure of coordination and project-level planning. For a truly cross-Ofcom approach to information gathering, the **Information Registry needs to have earlier and more overarching oversight of the annual project planning process**, setting deadlines in a way that is proportionate and clear – even if that means changing the planned deadlines for publications and reports. Given how central information gathering is to the success of a project, the ability to gather that information should be the main input into how that project timeline is planned during the Annual Plan process. The Information Registry is perfectly placed to balance the needs of multiple Ofcom teams against the capacity of a single regulatory team within each operator.

This early planning process can then be supported throughout the year by assigning **each project team with an Information Registry representative from the start**, in the same way that it will be allocated a project manager, lawyers, economists etc. The representative will then be immersed in the project and able to understand the information needs, whilst at the same time being able to feed that back and coordinate on duplication with other members of the Information Registry function.

Minimising burden to industry

Ofcom's bias against regulation serves the purpose of minimising disruptions to the independent dynamics of the market. Although information gathering can seem like a lateral activity that does not fall into the category of regulation, it requires companies to hire and retain specialist regulatory resource, as well as requiring non-regulatory resource to pause commercial activities in order to compile data. [✂] Therefore, central to Ofcom's information gathering policy must be the imperative to consider whether a formal information request is the least intrusive way of gathering relevant information, and whether it places undue burden on industry.

We believe that there is scope for **greater use of informal information gathering powers** – particularly in the form of meetings and teach-ins. Such a format enables Ofcom and the regulated entity to discuss their respective approaches to a given policy problem, and to outline how data is captured and therefore what a sensible way of requesting it might be. Most importantly, it gives Ofcom the opportunity to explain the rationale behind its line of enquiry, meaning that the operator can consider useful additional or proxy information, where data is not captured in exactly the way that Ofcom is seeking. For example, extensive granular historical data may not be retained in operator systems – but we may be able to provide data on trends or in aggregate. A statutory information request is a rigid tool, which must be responded to in the requested format – even if that may not have been the most useful information. Informal, voluntary, and discursive information gathering activities can help bring nuance and add richness.

Whilst a related function is performed by Draft statutory information requests, **we do not consider that draft information requests serve the same purpose as informal pre-engagement**. Draft information requests are very valuable, as they give recipients time to review the questions, raise any immediate concerns, and start some preparatory work where possible. We agree with Ofcom's view that issuing draft requests should continue to be the standard procedure. Nonetheless, the short turnaround and the inevitability of a formal request at the end can mean that recipients cannot engage with a draft request in a meaningful way. This is particularly the case during periods of high statutory information request traffic, when time is scarce. Furthermore, we note that by the time a draft request has come through, the project team has typically determined the substantive form of the questions to be asked, and there is rarely much change between the draft and the final. If those questions have been compiled without pre-engagement, the risk of the questions being complex to address is higher and thus a meaningful response more difficult to return within two weeks.

We are also pleased to see the statement at A1.11 that "wherever possible, Ofcom will draw from existing information." This is critical to minimising the burden on industry and ensuring comparable and efficient use of data. However, we would like to see this rationale applied to **existing information that may be responsive but in a different format**. For example, if Ofcom were to issue a request for "the full list of customers who were active between April and June," then data covering only June or providing only the headline number of customers who were live (rather than a granular list) cannot be deemed compliant by an operator in receipt of a statutory information request, but it may serve Ofcom's purposes. Ofcom should take greater consideration of the data it already holds and whether it is responsive to its policy needs – rather than responsive to a particular question as phrased at a given point in time.

Relatedly, keeping a **central inventory of available data can help minimise new requests** as well as speeding up access to reliable data within Ofcom. We recognise that the legislation restricts the purposes that data can be used for to those specified in the formal notice, it is very rare that a company would refuse permission for re-use of data for alternative purposes. Having a central inventory that is kept up to date with accurate

descriptions of the kind of data already collected means that projects can assess whether it is easier to issue a new request or just to request permission to use existing data for a new purpose.

Proportionality

Ultimately, minimising the burden on industry is about ensuring that the costs and benefits of issuing a statutory information request have been weighed, and the costs of responding have been deemed proportionate to the expected benefits. Ofcom recognises the need to exercise its information gathering powers in a reasonable and proportionate way, in accordance with the relevant legislation.

As Ofcom notes in A1.15 of the draft policy, the decision-making process for exercising information gathering powers includes a proportionality test against each instance of requesting information. We believe that **the proportionality test is at risk of being neglected**, or at least its scope being so broadened as to render it meaningless. In the past few years, Vodafone has received statutory information requests that include questions that bear only tangential relevance to the stated purpose, and information requests whose stated purpose has still not materialised. [✂]

We believe that, to support the proportionality test, Ofcom should provide the recipient with the **justification for the inclusion of any given question** in a statutory request for information. In addition to the stated purpose of an information request in the preamble to the questions, we recommend including an annex with a table making the proportionality case for each question included in the request. This will give clarity to the recipient, boost industry trust in the reasonableness of Ofcom's use of its information gathering powers, and enhance accountability. It is also a useful input to lessons learnt exercises and ex-post evaluations, as project teams can review how they used different data inputs and consider whether they could streamline similar information requests in future.

Accountability and transparency

Accountability and transparency is particularly important when it comes to information gathering. We were happy to see the impact assessment in the consultation document, although we are keen to understand how this will be assessed ex-post. As already established, statutory information requests are regulatory interventions which need to go through a cost/benefit analysis before being issued. As with any other regulatory intervention, therefore, we are interested in understanding how Ofcom will **assess whether the new guidance improves the quality of information gathering** going forward. We would like Ofcom to publish a list of criteria that it will use to assess the success of the new general policy on information gathering, in line with its commitment to impact assessments and ex-post evaluations. Having a clear outline of measurable benefits of the renewed policy will mean that, when the policy is reviewed, it can be held up to scrutiny in the same way as

any other regulation. In parallel, we would value guidance on what evidence may be needed from operators (e.g. time spent servicing information requests over a given period) in order to conduct such an assessment.

Finally, a further transparency-improving measure would be to **publish anonymised question lists** on the Ofcom website. This enables stakeholders to see what questions are being asked of other industry players, and to contribute related information in support. It also provides a source of accountability, as it invites scrutiny of the proportionality of the quantity and content of the requests.