

# OFCOM'S APPROACH TO IMPACT ASSESSMENTS

A report for Vodafone

09 DECEMBER 2021

# CONTENTS

1	Executive summary	3
2	Introduction	5
3	Best practice guidance on conducting IAs	6
3.1	The 2020 Treasury Green Book	6
3.2	The Better Regulation Framework guidance	7
3.3	Ofcom's guidelines on better policy making	8
3.4	Best practice for conducting an IA	8
3.5	Summary of best practice	13
4	Ofcom's approach	14
4.1	Consumer switching for fixed services	14
4.2	Consumer switching for mobile services	16
4.3	Simplifying Non-Geographic Numbers	19
4.4	Open Communications: Enabling people to share data with innovative services	21
5	Conclusion	24
5.1	Summary of findings	24
5.2	Recommendations	26
	Annex A - a draft template for summarising impact assessment decisions	29

## 1 EXECUTIVE SUMMARY

- 1 Impact assessments (IAs) are an essential part of evidence based policy making. In order to take decisions public bodies need to appraise the costs, benefits and risks of different options. Transparency in IAs allows stakeholders to contribute to better policy making by providing information and understanding of the likely impacts of decisions. In the case of Ofcom, better decision making should result in better outcomes for consumers.
- 2 BEIS has consulted on a review of the framework for regulation.<sup>1</sup> The consultation contained proposals for streamlining Impact Assessments and was specifically consulting on a “common law approach” to regulation<sup>2</sup>, the role of regulators, revising the process and requirements of better regulation, scrutiny of regulatory proposals, measuring the impact of regulation and regulatory offsetting.
- 3 This report is undertaken in light of the BEIS consultation and reviews the approach to IAs for a sample of recent decisions and consultations (focusing on consumer policy decisions) made by Ofcom.
- 4 Ofcom is an independent regulator with its duties, including with respect to IA set out by statute. The rationale for creating regulators that are independent from government is that this provides a credible commitment to a consistent approach to decision making over time, reducing the political risk faced by companies and investors. This commitment is bolstered by statutory requirements to formally consult on key decisions, to assess the impact of its decisions and in some areas by the ability of stakeholders to appeal the merits of decisions. For this statutory framework to work effectively Ofcom should act in a way that not just meets, but potentially exceeds, best practice from central government in relation to its decision making.
- 5 This therefore implies that:
  - a) the IA underlying Ofcom’s decisions should be as transparent and clearly set out as possible in order to allow stakeholders to fully engage during consultations and understand the rationale behind the decisions;
  - b) the thoroughness of Ofcom’s approach to decision making is proportionate to the magnitude of the impact of the decision (including the costs imposed on stakeholders), and that it should use a similar approach to government, such that where “proportionality” thresholds are exceeded it adopts a higher standard (with a greater degree of thoroughness and rigour to the analysis, and external scrutiny of the approach to the IA);
  - c) its *approach* to impact assessments is subject to the same degree of external independent scrutiny;

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<sup>1</sup> BEIS (2021) Reforming the Framework for Better Regulation. See: <https://www.gov.uk/government/consultations/reforming-the-framework-for-better-regulation>

<sup>2</sup> A “common law approach” to regulation means delegating more power and discretion to the UK’s regulatory bodies, removing many of the detailed rules in the existing statutory frameworks to make them less prescriptive (replacing them with outcomes to be achieved), and allowing the regulatory regime to be shaped more by case law.

- d) Ofcom periodically reviews its approach to IA, in consultation with stakeholders, to ensure it remains consistent with best practice; and
- e) that Ofcom reviews and monitors the impacts that its decisions have in aggregate, including ex post assessment of costs and benefits.

6 However, while there is a statutory duty for Ofcom to carry out impact assessments, Ofcom has wide discretion on the form of these assessments and whether individual decisions are sufficiently important to require impact assessment. We compare a small sample of Ofcom's IA's with best practice guidance from central Government in assessing the relative costs and benefits of policy interventions and assess whether this guidance was applied thoroughly in reaching the decision. Ofcom's decisions considered in this report all imposed (or could impose) significant costs on industry stakeholders. Where additional costs are incurred by industry they will either be passed on to consumers through higher prices or will reduce profits, which could affect incentives to invest. The best practice guidance issued by Government and by Ofcom are clear that policy decisions that impose significant costs require public bodies such as Ofcom to take care that the IA underlying its decisions are clear. This enables stakeholders to interrogate the rationale, reasoning and evidence for choosing a given option.

7 Based on the decisions reviewed it appears that Ofcom met some, though not all, of the standards required. For example: Ofcom consults on its decisions; in many cases Ofcom has attempted to estimate the costs of its options, and to identify and where possible quantify the benefits; its analysis is proportionate to the impacts.

8 However, the analysis of this sample of decisions suggests that in some respects Ofcom has not followed best practice:

- the choice of options that are explicitly considered is sometimes a limited subset of all potential options;
- the options considered in many cases do not include industry led options;
- the IA generally does not enable stakeholders to easily compare and assess the relative costs and benefits of the different options
- it is not clear how sensitivity testing of its uncertain assumptions affects its decisions.

9 There also examples where it can appear that IA has not been fully integrated into the decision making process:

- in the early stage of policy development it can appear that the focus is on finding harms to support a potential policy solution, rather than focusing on identifying whether there is a particular policy problem that needs to be addressed;
- the quantitative assessment does not always support the decision made; and,
- in some cases Ofcom has not quantified some seemingly important costs and benefits.

10 Based on the assessment set out in this report and summarised above we believe that there are a number of changes that Ofcom should adopt to its IAs that would significantly improve the quality of the IA on which Ofcom bases its decisions. This would bring its approach into line with Government Guidance for conducting IAs such as the Better Regulation Framework.

- 11 These changes are not costly to implement and would not add significant time to the process for decision making, but they would bring clear benefits. They would increase transparency of Ofcom’s consultations and decisions and hence make Ofcom’s decisions more accountable to its stakeholders. These changes would lower the regulatory burden on stakeholders by making decisions and evidence used clearer. Ultimately these changes will support Ofcom in making better decisions which will bring clear benefits to the citizens and of users of services regulated by Ofcom.
- 12 We recommend:
- Ofcom should include a full range of options when consulting, including industry led options;
  - Ofcom should include a clear summary of the IA in all decisions using standard template (based on the template that Government departments are required to use in their IAs).
  - The template should clearly summarise the quantitative analysis of costs and benefits in a way that different options that were considered in the consultation process can be clearly compared.
  - Ofcom should seek external review of the IA where costs are significant and exceed the threshold set by government for triggering external scrutiny of government IAs.
  - Ofcom should review and monitor implementation of its decisions in a systematic way.
  - Ofcom should periodically publish cumulative impacts of its decisions.
- 13 These recommendations are consistent with the existing statutory framework. However, Ofcom has wide regulatory discretion in implementing its duty to conduct impact assessment which means that, absent to changes in the framework, Ofcom could continue to implement impact assessments which fell below the standards of current best practice.

## 2 INTRODUCTION

- 14 There are a number of complementary sources of guidance on how public bodies should conduct their IAs<sup>3</sup>.
- a) Treasury Green Book<sup>4</sup>, first published in 2003, sets out the government’s overarching approach to evaluating and appraising policy initiatives. It was last updated in 2020.
  - b) The UK Department for Business, Energy and Industrial Strategy (BEIS) publishes its approach for Regulatory IAs and particularly to consider the impact on businesses in its Better Regulation Framework.<sup>5</sup> The approach to Regulatory IAs sits alongside and is consistent with the Green book.

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<sup>3</sup> The CMA has also published guidance on how to conduct competition IAs in relation to competition investigations. CMA (2015) Competition impact assessment: guidelines for policymakers. See: <https://www.gov.uk/government/publications/competition-impact-assessment-guidelines-for-policymakers>

<sup>4</sup> HM Treasury (2018) The Green Book. See: <https://www.gov.uk/government/publications/the-green-book-appraisal-and-evaluation-in-central-government>

<sup>5</sup> BEIS (2020) Better Regulation Framework. See: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/916918/better-regulation-guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/916918/better-regulation-guidance.pdf)

15 While, as an independent regulator, the Better Regulation Guidelines do not formally apply to Ofcom, it is reasonable to expect that Ofcom’s approach to policy making should at least meet, if not exceed, the same standards as apply to other public bodies.

16 Ofcom last consulted on its approach to IAs in 2005 and published the Guidelines which it will apply to its own decision making<sup>6</sup>. These guidelines were informed by the 2004 recommendations of the Better Regulation task force.<sup>7</sup>

17 The purpose of this report is to consider the extent to which Ofcom’s practice in conducting IA’s meets is consistent with its own guidelines as set out in 2005 or the more recent guidance set out by Government. This report does not seek to assess the merits of each decision but simply to assess the process and transparency of the IA in the light of the guidance on best practice.

18 The report is structured as follows.

- Section 3 summarises best practice in conducting IAs.
- Section 4 summarises Ofcom’s approach in conducting IAs in four decisions it made in relation to consumer policy.
- Section 5 concludes.

### 3 BEST PRACTICE GUIDANCE ON CONDUCTING IAs

19 This section summarises the key recommendations of the Treasury Green Book, BEIS’s Better Regulation Framework Guidance, and Ofcom’s existing Guidelines On Better Policy Making, in how to conduct IAs as set out in the various guidance published. All three documents offer similar and overlapping advice, though tailored to the specific purpose and audience. This includes recommendation on:

- conducting IAs with clearly identified and transparent options;
- ensuring the approach is proportionate to the costs and benefits involved;
- comparing options against a clearly defined counterfactual of no change;
- ensuring that where possible the IA is based on quantitative analysis, which is clearly and transparently presented, and that assumptions are properly sensitivity tested;
- the impacts on specific groups of interest is clearly identified and considered in the IA; and,
- decisions are monitored and reviewed.

#### 3.1 THE 2020 TREASURY GREEN BOOK

20 The 2020 Treasury Green Book is guidance issued by HM Treasury on how public bodies should appraise policies, programmes and projects. It provides guidance on how proper project appraisal should be applied to the whole project life cycle, and embedded in wider government decision

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<sup>6</sup> Ofcom (2005) Better Policy Making. See: [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0026/57194/better\\_policy\\_making.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0026/57194/better_policy_making.pdf)

<sup>7</sup> UK Parliament (2004) Select Committee on Constitution Sixth Report, CHAPTER 8: Improving the framework of regulation. See: <https://publications.parliament.uk/pa/ld200304/ldselect/ldconst/68/6810.htm>

making and the role that project appraisal has in the design and use of monitoring and evaluation before, during and after policy implementation.

21 It highlights the essential role that IAs have in policy making. It notes that *“Appraisal of alternative policy options is an inseparable part of detailed policy development and design.”*<sup>8</sup>

### 3.2 THE BETTER REGULATION FRAMEWORK GUIDANCE

22 The current Better Regulation Framework<sup>9</sup> provides a framework for objective analysis and decision making within government interventions. It is intended for government departments and applied to IAs which consider regulatory measures. “Regulatory measures” are defined in statute<sup>10</sup> and relate to provisions and measures that impose or amend requirements, restrictions or conditions, or ensure compliance with standards of conditions **in relation to business activity**. It is therefore a specific subcategory of policy making that affects businesses, as distinct from wider policy making which may affect different groups.

23 It highlights the role of IAs in policy making by stating that *“where government intervention requires a legislative or policy change to be made, departments are expected to analyse and assess the impact of the change on the different groups affected - which should generally take the form of an impact assessment.”*<sup>11</sup>

24 The framework imposes obligations on public bodies to conduct a higher standard of IA, and additional external scrutiny of the decision by the Regulatory Policy Committee (RPC), where there is an equivalent annual net direct cost to business (EANDCB) of greater than £5m per year. Where the EANDCB is less than £5m per year a “proportionate” analysis is required, and there is still an option for external review of the decision.

25 Regulatory Policy Committee (RPC) which scrutinises government impact assessments does not consider the merits of IAs, rather they consider whether the evidence and analysis supports the decisions made. In particular the RPC notes that: *“RPC opinions focus on the evidence presented in the impact assessment. The opinion is not, in any way, a comment on the merits of the policy proposal. Thus a red-rated ‘not-fit-for-purpose’ opinion does not mean the policy is flawed, but that the evidence or analysis as presented in the impact assessment is lacking.”*<sup>12</sup>

26 The Guidance includes a template<sup>13</sup> to be used by officials to summarise the IA. It clearly sets out the format and contents of the IA in a way that can be easily appraised by stakeholders. It is

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<sup>8</sup> HM Treasury, The Green Book, 1.1

<sup>9</sup> BEIS (2020) Better Regulation Framework.

<sup>10</sup> Small Business, Enterprise, and Employment Act 2015, section 22 (3)

<sup>11</sup> BEIS, Better Regulation Framework, p5

<sup>12</sup> Guidance The Regulatory Policy Committee scrutiny process. See <https://www.gov.uk/guidance/the-regulatory-policy-committee-scrutiny-process>

<sup>13</sup> BEIS, Regulatory impact assessment template for government policies. See: <https://www.gov.uk/government/publications/impact-assessment-template-for-government-policies>

supplemented by an ‘impact assessment calculator’<sup>14</sup> to give a more technical guidance on the IA process.

### 3.3 OFCOM’S GUIDELINES ON BETTER POLICY MAKING

27 Ofcom’s existing Guidelines on Better Policy Making explains Ofcom’s rationale in conducting IAs. Ofcom recognises that its decisions “*may impose significant costs on our stakeholders and it is important for [Ofcom] to think very carefully before adding to the burden of regulation*”.<sup>15</sup>

28 Ofcom therefore use the Guidelines to set out its overall framework for policy making: “*One of our key regulatory principles is that we have a bias against intervention. This means that a high hurdle must be overcome before we regulate. If intervention is justified, we aim to choose the least intrusive means of achieving our objectives, recognising the potential for regulation to reduce competition. These guidelines explain how Impact Assessments will be used to help us apply these principles in a transparent and justifiable way.*”

29 The Guidelines explains how IAs fit into Ofcom’s policy making process. For example, they stress that “*impact assessments form a key part of best practice policy making (...). They provide a way of considering different options for regulation and then selecting the best option. In selecting and analysing options, the need to further the interests of citizens and consumers is of paramount importance.*”<sup>16</sup>

30 They explain that IAs are necessary “*where [...Ofcom is] proposing to do anything related to the carrying out of (...its) functions and it appears to [...Ofcom] that the proposal is important, unless it appears to Ofcom that the urgency of the matter makes it impracticable or inappropriate for [...Ofcom] to comply.*”<sup>17</sup>

31 The Annex to the Guidelines states an IA process checklist which Ofcom will use to conduct the impact assessment.

### 3.4 BEST PRACTICE FOR CONDUCTING AN IA

32 The best practice requirements for IAs in the guidelines mentioned above share common characteristics. These are summarised below:

- Choice of options is driven by the problem identified
- A proportional approach to the analysis in the IA
- Identifying the counterfactual
- Quantitative assessment
- Impact on specific groups
- Post evaluation monitoring

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<sup>14</sup> BEIS (2013) Impact assessment calculator. See: <https://www.gov.uk/government/publications/impact-assessment-calculator--3>

<sup>15</sup> Ofcom, Better Policy Making 1.1

<sup>16</sup> Ofcom, Better Policy Making 1.2

<sup>17</sup> Ofcom, Better Policy Making 4.2



### 3.4.1 CHOICE OF OPTIONS IS DRIVEN BY THE PROBLEM IDENTIFIED

33 The best practice requirements explain that the choice of options which are assessed should be derived from an assessment of the current situation and analysis of any existing shortcomings. In particular the various best practice Guidance is clear that an IA should not start with a policy solution to which the IA is then applied.

34 For example, the Green Book states:

*“Proposals should initially be considered from the perspective of the service needed to deliver the required policy outcome and not from the perspective of a preconceived solution or asset creation. This guards against thinking too narrowly or being trapped by preconceptions into missing optimum solutions.”*<sup>18</sup>

35 The Better Regulation Framework notes that the IA should take place following an analysis of the problem under consideration and a rationale for intervention. The Framework’s template notes that policy makers should:

- *“describe the problem under consideration and address the following questions*
  - a *What is the issue being addressed (i.e. is there a market failure or a government objective)?*
  - b *What are the current or future harms that is being tackled?*
  - c *What sectors / markets / stakeholders will be affected, and how, if the government does intervene?*
  - d *Why is government best placed to resolve the issue? Could the issue be resolved without intervention (e.g. through the market, innovation or other stakeholder led change)?”*<sup>19</sup>

36 Similarly, Ofcom notes that: *“The first stage is to define the issue we need to consider and to assess how the interests of citizens or consumers (or particular groups of citizens or consumers) are affected, including the scale of the problem. ... Having identified the relevant issue and identified the citizen or consumer interest, we need to define clearly the policy objective or objectives we are seeking to achieve i.e. the outcome we are seeking.”*<sup>20</sup>

### 3.4.2 A PROPORTIONAL APPROACH TO THE ANALYSIS IN THE IA

37 While a quantitative assessment is required, all the best-practice guidance recognise that in some cases that it may not be possible to reasonably undertake a quantitative assessment of some aspects of the costs and benefits. Furthermore, that the analysis should be proportionate to the impact in question. Where impacts are widespread and higher, then a more rigorous IA will be required.

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<sup>18</sup> HM Treasury, The Green Book, 2.11

<sup>19</sup> BEIS (2011) Regulatory impact assessment template for government policies, p3

<sup>20</sup> Ofcom, Better Policy Making, 5.9 & 5.10

38 For example, the Green Book provides advice on how costs or benefits that cannot be quantified are factored into the analysis:

*“Social Cost Benefit Analysis (CBA) assesses the impact of different options on social welfare. All relevant costs and benefits are valued in monetary terms, unless it is not proportionate or possible to do so. ... The priority costs and benefits to quantify are those likely to be decisive in determining the differences between alternative options.”*<sup>21</sup>

39 The Better Regulation Framework states that:

*“The level of analysis should be proportionate to the problem it is addressing and reflect the scale or impact of the measure.”*<sup>22</sup>

40 According to the framework a policy which does not meet the EANDCB threshold of £5m may not be required to use the Framework Template.

41 Ofcom’s Guidance notes: *“It is also important to apply the principle of proportionality and ensure that the depth of analysis is proportionate to the potential impact of the options under consideration.”*<sup>23</sup> It further notes, *“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.”*<sup>24</sup>

### 3.4.3 IDENTIFYING THE COUNTERFACTUAL

42 All options should be assessed against a counterfactual of doing nothing.

43 The Green Book states that it is important *“to provide a quantitative benchmark, as the ‘counterfactual’ against which all proposals for change will be compared.”*<sup>25</sup> and *“A clear quantitative understanding of “Business As Usual” (BAU) is essential to understanding the current situation, and to identifying and planning the changes that may be required. The purpose is to provide a quantitative benchmark, as the “counterfactual” against which all proposals for change will be compared.”*<sup>26</sup>

44 Ofcom notes that: *“The “no new intervention” [option] will be the benchmark or base case against which other options will be judged i.e. what costs and benefits would be incurred additional to those which would be incurred if there were no new intervention”*<sup>27</sup>

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<sup>21</sup> HM Treasury, The Green Book, 5.2 & 5.7

<sup>22</sup> BEIS, Better Regulation Framework, 1.2.6

<sup>23</sup> Ofcom, Better Policy Making, B.7

<sup>24</sup> Ibid, 1.7

<sup>25</sup> HM Treasury, The Green Book, 4.8

<sup>26</sup> HM Treasury, The Green Book, 4.7

<sup>27</sup> Ofcom, Better Policy Making, 5.13

45 The Better Regulation Template notes that all options should “include a description of the “do nothing” option and non-regulatory options”.<sup>28</sup>

#### 3.4.4 QUANTITATIVE ASSESSMENT

46 It is axiomatic that an IA requires a proper assessment of costs and benefits of the different options under consideration. These costs and benefits should be quantified to the degree possible. For example the Green Book states:

*“Costs or benefits of options should be valued and monetised where possible in order to provide a common metric.”*<sup>29</sup>

47 The Better Regulation framework states that policy makers should:

- *“Summarise the expected costs and benefits of the proposed approach.*
- *Give monetised values where possible.*
- *Summarise how values align with findings received from consultations.*
- *Include appropriate sensitivity analysis and/or other analytical approaches to risk and uncertainty.”*<sup>30</sup>

48 Ofcom notes that: *“Choosing the best option will involve an assessment of the costs and benefits which would flow from the options selected. ... [however] it will often be difficult to quantify all the costs and benefits, in which case, it may be hard to identify which option has the highest net benefit and choose an option solely on that basis. Nevertheless, every impact of the chosen option would result in costs and/or benefits. If such costs and benefits cannot be quantified (or it is not proportionate to quantify them) they should still be described and taken into account in making our decision.”*<sup>31</sup>

#### 3.4.5 IMPACT ON SPECIFIC GROUPS

49 The best-practice states that the IA should clearly set out where the impacts disproportionately fall on certain groups.

50 For example, the Green Book states that:

*“Assessing costs and benefits across all affected groups or places matters because even a proposal with a relatively low public sector cost such as a new regulation, may have significant effects on specific groups in society, places or businesses.”*<sup>32</sup>

51 Given that the Better Regulation Framework is aimed at best practice for regulatory IAs that are directed at businesses, it goes further, requiring public bodies to report the impacts on businesses

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<sup>28</sup> BEIS, Regulatory impact assessment template for government policies, p4

<sup>29</sup> HM Treasury, The Green Book, 2.16

<sup>30</sup> BEIS, Regulatory impact assessment template for government policies, p4

<sup>31</sup> Ofcom, Better Policy Making 5.25.

<sup>32</sup> HM Treasury, The Green Book, 2.16

of policies that exceed the EANDCB (equivalent, annual net direct cost to business) threshold. This is so that government can identify the aggregate impacts of all government's activities with a view to meeting a target to reduce the regulation on business (Business Impact Target<sup>33</sup>). But any Regulatory IA regardless of the EANDCB threshold will have to report the impact on businesses<sup>34</sup>.

52 If there are significant distributive effects Ofcom's Guidance notes that the "*distributional impacts which the different options would have should also be taken into account and, where possible, quantified.*"<sup>35</sup> Ofcom's Guidance also notes that its IAs will assess the impact on specific individual groups including "*small businesses; large business users; broadcasters; telecoms operators, both incumbents and suppliers of alternative networks; telecoms service providers; equipment manufacturers; transmission companies.*"

### 3.4.6 MONITOR AND REVIEW

53 Though not formally part of the impact assessment process the best practice guidelines highlight the importance of including a process of ongoing monitoring and review of the policies both during and after implementation.

54 For example the Green Book notes that:

*"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."*<sup>36</sup>

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

- *"Is the intervention being delivered as intended?"*
- *Is the intervention working as intended?"*
- *How well did the intervention meet its SMART objectives?"*
- *Were there unexpected outputs and outcomes?"*
- *Were costs benefits and delivery times as predicted at approval?"*
- *Was delivery achieved as expected and were any changes needed?"*
- *What can be learnt for future interventions?"*<sup>37</sup>

56 The Better Regulation Framework sets out the requirements to conduct post-implementation reviews. These may be statutory or may be conducted for another reason consistent with "*the government's overall objective that regulations with significant regulatory impact (over +/- £5 million net impacts annualised) on business should remain in force only where:*

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<sup>33</sup> UK Government (2020) Business impact target (BIT) assessments. See: <https://www.gov.uk/government/publications/environment-agency-business-impact-target/environment-agency-business-impact-target-assessments>

<sup>34</sup> BEIS, Better Regulation Framework, 1.2.11

<sup>35</sup> Ibid, 5.34

<sup>36</sup> HM Treasury, The Green Book, 3.8

<sup>37</sup> Ibid 8.5

- (a) *they are deemed necessary,*
- (b) *they are having the intended effect, and*
- (c) *any associated costs to business are appropriate.*<sup>38</sup>

57 The post implementation reviews require government departments to assess “*if the objectives of the regulation have been achieved, if the objectives are still valid and relevant, and if they could be achieved in a less burdensome way.*”<sup>39</sup>

### 3.5 SUMMARY OF BEST PRACTICE

58 The following table shows the common properties associated with best practice IAs across the different documents described above. All the best practice guides require the same level of assessment.

**TABLE 1 SPECIFICS OF AN IA**

DESIGN OF AN IA	NOTES
<b>General requirements:</b>	
Clearly identified and transparent options	Stakeholders can clearly see how the costs and benefits of different options are appraised leading to the decision
Proportionality in approach	Be proportional to the impact of the regulation and to the stakes for the relevant affected parties
Counterfactual	Assess costs and benefits of action compared to a counterfactual of what would happen without intervention and regulation should be withdrawn whenever possible
<b>Quantitative analysis:</b>	
Clear quantification of the costs and benefits	
Discount future cash flows	Where there are inter-temporal differences between the costs and benefits use discounting to assess costs and benefits
Sensitivity test results	Consider whether the results are particularly sensitive to specific assumptions
Distributional assessment	Include a distributional analysis if there are significant distributive effects or assess whether specific groups are disproportionately affected
IA supports final decision	Review and assess the outcomes to ensure that they are in line with the findings at the IA

Source: Frontier Economics based on *The Green Book, Ofcom's Better Policy Making, Better Regulation Framework*

<sup>38</sup> BEIS Statutory Guidance under s.31 of the Small Business, Enterprise and Employment Act Determining whether it is appropriate to make provision for review (Post-Implementation Review Guidance) 6 See: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/674755/small-business-act-s31-statutory-review-requirements.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/674755/small-business-act-s31-statutory-review-requirements.pdf)

<sup>39</sup> BEIS, Better Regulation Framework 1.7

## 4 OFCOM'S APPROACH

59 In order to assess Ofcom's approach to IAs and its consistency with best practice four consultations and decisions by Ofcom are analysed. These consultations relate to a number of consultations and decisions in relation to Ofcom's activities in policy for consumer protection. This section summarises at a high level the approach taken to the IA in each document and considers how Ofcom's approach reflected best practice. The four documents assessed are:

- Consumer switching - A statement and consultation on the processes for switching fixed voice and broadband providers on the Openreach copper network<sup>40</sup> from 2013;
- Consumer switching - Proposals to reform switching of mobile communications services<sup>41</sup> from 2017
- Simplifying non-geographic numbers<sup>42</sup> from 2015; and
- Open communications: Enabling people to share data with innovative services<sup>43</sup> from 2020.

### 4.1 CONSUMER SWITCHING FOR FIXED SERVICES

60 In 2013 Ofcom published a statement and consultation on the processes for switching fixed voice and broadband providers on the Openreach copper network.<sup>44</sup> Ofcom identified multiple problems faced by customers associated with switching processes. As a result, it made a decision to harmonise to a single switching process as the maintenance of separate processes was not seen to in itself generate material benefits for consumers.

61 The final decision was that all switches for fixed voice and/or broadband services over the Openreach network would be harmonised to a single "Gaining Provider Led" (GPL) model using the existing "Notification of Transfer" (NoT) process.<sup>45</sup>

#### 4.1.1 OFCOM'S IA

1. Ofcom's approach to its IA was as follows.

- a. Step 1: Ofcom defined the problem. It started its IA by outlining the current switching levels and processes and detailing the problems faced by customers. They found these problems

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<sup>40</sup> Ofcom (2013) Consumer Switching: A statement and consultation on the processes for switching fixed voice and broadband providers on the Openreach copper network. See: [https://www.ofcom.org.uk/\\_\\_\\_data/assets/pdf\\_file/0033/76569/consumer\\_switching.pdf](https://www.ofcom.org.uk/___data/assets/pdf_file/0033/76569/consumer_switching.pdf)

<sup>41</sup> Ofcom (2017) Consumer Switching: Proposals to reform switching of mobile communications services. See: [https://www.ofcom.org.uk/\\_\\_\\_data/assets/pdf\\_file/0013/102037/Proposals-to-reform-switching-of-mobile-communications-services.pdf](https://www.ofcom.org.uk/___data/assets/pdf_file/0013/102037/Proposals-to-reform-switching-of-mobile-communications-services.pdf)

<sup>42</sup> Ofcom (2010) Simplifying Non-Geographic Numbers. See: [https://www.ofcom.org.uk/\\_\\_\\_data/assets/pdf\\_file/0020/63380/non-geo.pdf](https://www.ofcom.org.uk/___data/assets/pdf_file/0020/63380/non-geo.pdf)

<sup>43</sup> Ofcom (2020) Open Communications: Enabling people to share data with innovative services. See: [https://www.ofcom.org.uk/\\_\\_\\_data/assets/pdf\\_file/0030/199146/consultation-open-communications.pdf](https://www.ofcom.org.uk/___data/assets/pdf_file/0030/199146/consultation-open-communications.pdf)

<sup>44</sup> Ofcom (2013) Consumer switching fixed services

<sup>45</sup> Ofcom (2013) Statement on the processes for switching fixed voice and broadband providers on the Openreach copper network. See: <https://www.ofcom.org.uk/consultations-and-statements/category-2/consumer-switching-review>

were multiple processes for switching the same service/bundle of services, difficulty in switching and unnecessary switching costs, lack of awareness of the implications of switching, insufficient customer consent, erroneous transfers, loss of service, a lack of platform neutrality and reactive save activity.<sup>46</sup>

- Step 2: Ofcom described long list / short list options. Ofcom then outlined eight different options to overcome these issues and explained their specific requirements.<sup>47</sup> A counterfactual was the current situation including all issues that consumers currently face.<sup>48</sup>
- Step 3: Ofcom detailed how each different option would address each of the problems identified previously and if so how.
- Step 4: Ofcom estimated potential benefits. The potential benefits of each option were described and quantified in net present value terms<sup>49</sup>.
- Step 5: Ofcom quantitatively estimated the costs (relying on externally commissioned analysis<sup>50</sup>) for each option in net present value terms when compared to the counterfactual of no intervention.
- Step 6: Decision. Ofcom concluded on its preferred option. Ofcom attempted to “weight” the different problems that it considers it had found and used this weighting to inform its decisions on which options were preferable. However, it is not clear how this weighting was applied, other than Ofcom’s judgement, while sometimes relying on Ofcom’s legal duties to define whether “Ofcom attach significant weight” to a particular problem. It was not clear how Ofcom’s assessment of costs and benefits supported its conclusions. In this sense there was no clear criteria for reviewing Ofcom’s judgement.

62 The following table compares the IA undertaken with the best practice policy outlined above:

**TABLE 2 ANALYSIS OF THE IA FOR FIXED CONSUMER SWITCHING**

DESIGN	JUDGMENT ANALYSIS	NOTES
<b>General requirements:</b>		
Clearly identified and transparent options	Yes	It specifically listed eight distinct options, classified under three main categories.
Proportionality in approach	Yes	As it supposedly had a big impact, the analysis was extensive.
Counterfactual	Yes	The consultation started by outlining the current issues that consumers are facing, which was the scenario of no further intervention.
<b>Quantitative analysis:</b>		

<sup>46</sup> Ofcom (2013) Consumer switching fixed services, 4.1ff

<sup>47</sup> Ibid, 7.5ff

<sup>48</sup> Ibid, 7.5

<sup>49</sup> Ibid, Annex 8

<sup>50</sup> Ibid, Annex 10

DESIGN	JUDGMENT ANALYSIS	NOTES
Clear quantification of the costs and benefits	Partially	The consultation stressed the benefits of the proposed regulation for consumers quantitatively and made tables showing comparisons of the quantitative costs and benefits of the options. The analysis limited as several costs and benefits could not be quantified.
Discount future cash flows	Yes	It showed costs and benefits in net present value terms.
Sensitivity test results	Yes	The consultation included a sensitivity analysis on the most important parameters.
Distributional assessment	Partially	A distributional assessment was not done though the impact on telecommunications operators was estimated.
IA supports final decision	Yes	The outcome of the IA was summarized, and the conclusion was based on it.

Source: Frontier Economics based on Ofcom (2013) *Consumer switching fixed services*

- 63 In conclusion Ofcom broadly followed many aspects of best practice.
- 64 The decision imposed significant costs to industry (and ultimately consumers). Ofcom therefore was detailed in its description of options, and the costing of these options and the assessment of benefits and costs.
- 65 Nevertheless, it is hard to assess how the estimated benefits and costs informed Ofcom’s final decision. While it seems that Ofcom put a lot of resource into its analysis which was proportionate given that the costs to industry ran to tens of millions of pounds, it is difficult to understand how the final decision was made and how the specific factors were weighted.

## 4.2 CONSUMER SWITCHING FOR MOBILE SERVICES

- 66 In its consultation “Consumer switching Proposals to reform switching of mobile communications services”<sup>51</sup> from 2017 Ofcom consulted on ways to make mobile switching quicker and easier. The final decision was to introduce a new and simplified way to switch (‘Auto-Switch’), to ban notice period charges after the switching date and to provide clear information to consumers.<sup>52</sup> This analysis considers the 2017 consultation and the subsequent 2017 statement.

### 4.2.1 OFCOM’S IA

- 67 Ofcom’s approach to its IA was as follows.
- Step 1: Ofcom defined the problem. It outlined consumer harm under the current switching processes. The main issues it found for consumers were difficulties in and unnecessary time commitments for progressing the switch, a loss of service while

<sup>51</sup> Ofcom (2017) *Consumer switching mobile services*. This decision followed previous consultations on the same topic from March and July 2016. Ofcom (03/2016) *Consumer Switching: Proposals to reform switching of mobile communications services* Ofcom (07/2016) *Consumer switching: Further proposals to reform switching of mobile services*

<sup>52</sup> Ofcom (2017) *Consumer switching: Decision on reforming the switching of mobile communication services*. See: [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0023/108941/Consumer-switching-statement.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0023/108941/Consumer-switching-statement.pdf)



switching provider, difficulties in co-ordinating the switch to minimise double payments and unwanted double payments.<sup>53</sup>

- Step 2: In its decision Ofcom then outlined one potential option to overcome these issues: the introduction of Auto-Switch<sup>54</sup>. Ofcom had previously consulted on an alternative option: Gaining Provider Led (GPL)<sup>55</sup>, though this was discounted in its March 2017 consultation since it found that the costs of Gaining Provider Led approach were significant (and its estimate of costs had increased)<sup>56</sup>.

This option was planned to be accompanied by a requirement for providers not to charge notice beyond the date on which a consumer switches and a centrally coordinated switching process, called end-to-end management.

These options were narrowed down from a longer list of options which were consulted on in an earlier consultation<sup>57</sup>.

Ofcom also considered but rejected an industry led option including a voluntary code, though it did not consider the costs and benefits of this option in any detail as it considered that this option would not mitigate its concerns<sup>58</sup>. While it welcomed operators voluntarily changing their processes in line with the code, it did not consider this as an option in place of regulatory intervention.

- Step 3: Ofcom detailed how its option would address each of the problems identified previously, and if so how.
- Step 4: Ofcom estimated the potential benefits of its option. The explanations in the main text were based on a supporting model which it published with clearly quantified benefits in net present value terms.<sup>59</sup>
- Step 5: Ofcom quantitatively estimated the costs for its option in net present value terms when compared to the counterfactual of no intervention in its supporting model.<sup>60</sup>
- Step 6: Decision. Ofcom then concluded on its decision. It considered the costs and benefits of its option relative to its counterfactual. It found that when its proposals were considered together the quantified benefits (£115m) outweighed costs (£58m).<sup>61</sup> However, when considered as stand-alone options the costs of the Autoswitch option (£48m) were in excess of the benefits of this option (£46m).<sup>62</sup> However, this narrow negative NPV was discounted as: Ofcom believed that the options should be considered as a package; that it

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<sup>53</sup> Ofcom (2017) Consumer switching mobile services, Section 3

<sup>54</sup> Ibid, 4.22ff

<sup>55</sup> Ofcom (03/2016) Consumer Switching: Proposals to reform switching of mobile communications services, 5.10ff

<sup>56</sup> Ofcom (2017) Consumer switching mobile services, 2.20

<sup>57</sup> Ofcom (03/2016) Consumer Switching: Proposals to reform switching of mobile communications services

<sup>58</sup> Ofcom (2017) Consumer switching mobile services, 4.17-4.22.

<sup>59</sup> Ofcom (2017) Supporting calculations – benefits to switchers. See: <https://www.ofcom.org.uk/consultations-and-statements/category-1/consumer-switching-mobile>

<sup>60</sup> Ofcom (2017) Supporting calculations – costs to industry. See: <https://www.ofcom.org.uk/consultations-and-statements/category-1/consumer-switching-mobile>

<sup>61</sup> Ofcom (2017) Consumer switching: Decision on reforming the switching of mobile communications services, 5.35

<sup>62</sup> Ibid, 5.44

claimed its assumptions were conservative; and there were a range of unquantified benefits.<sup>63</sup>

68 The following table compares the IA undertaken with the best practice policy outlined above:

**TABLE 3 ANALYSIS OF THE IA FOR MOBILE CONSUMER SWITCHING**

DESIGN	JUDGMENT ANALYSIS	NOTES
<b>General requirements:</b>		
Clearly identified and transparent options	No	Ofcom only set out one option in its decision (though considered and rejected alternatives in earlier consultations)
Proportionality in approach	Yes	Proportionality was specifically mentioned as a reason for the extensive analysis.
Counterfactual	No	The consultation did not define a clear counterfactual from which to compare its options. It can only be assumed that benefits and costs were assessed against a counterfactual of no intervention.
<b>Quantitative analysis:</b>		
Clear quantification of the costs and benefits	Yes	It detailed the cost and benefits quantitatively in the consultation. The precise values were based on calculations in supporting documents.
Discount future cash flows	Yes	Values were given in net present value terms.
Sensitivity test results	Partially	Ofcom gave ranges for potential benefits and costs. However, it did not mention the confidence of the estimates.
Distributional assessment	Partially	The benefits and costs were analysed on how they accrue to various stakeholders. However, the analysis could have been more extensive.
IA supports final decision	No	Ofcom found that one plank of its proposals were not cost effective yet concluded that its proposals should be considered as a package.

Source: Frontier Economics based on Ofcom (2017) *Consumer switching mobile services*

69 In conclusion Ofcom broadly followed best practice with regards to some elements. The decision only considered one option (auto-switch) and had discounted further options. Ofcom dismissed alternative industry led options.

70 Ofcom produced a detailed model of the costs and benefits. However, its reliance on this was partial as it dismissed its own finding that the quantified costs of an Auto Switch option exceeded quantified benefits when considered on its own.

<sup>63</sup> Ibid, 5.45

## 4.3 SIMPLIFYING NON-GEOGRAPHIC NUMBERS

71 “Simplifying non-geographic numbers”<sup>64</sup> was a consultation undertaken by Ofcom in 2010 to consult on its suggested changes on non-geographic which, in its opinion, were not working well for consumers. It proposed to simplify numbering ranges and to standardise charges.<sup>65</sup>

### 4.3.1 OFCOM'S IA

72 Ofcom’s approach to its IA was as follows.

- Step 1: Ofcom described the functioning of the market. It outlined the UK market for non-geographic call services, detailing how the market is currently structured, the flow of funds, providers of retail services, transit networks or the role of retail consumers.<sup>66</sup>
- Step 2: Ofcom defined the problem. It summarised the consumer experience<sup>67</sup> and the network and service providers’ experience<sup>68</sup> to give a background for the consultation. Ofcom concluded in these sections that there were three market failures in the market for non-geographic call services:
  - a Poor consumer price awareness;
  - b Price setting behaviour that neither supported the interests of callers nor of service providers; and
  - c Limited incentives to protect the reputation of both individual number ranges and the non-geographic numbers as a whole and a general reduction in confidence and understanding of the non-geographic number system.<sup>69</sup>
- Step 3: Ofcom then outlined four broad potential policy options:
  - a Deregulation – removal of ex ante regulation governing the supply and pricing of non-geographic calls with the aim of allowing the market for such calls to achieve a natural equilibrium;
  - b Improved price awareness measures – mechanisms that provide more effective point of use price information, such as pre-call announcements;
  - c Maximum prices – maximum limits to the prices that can be charged for calls in each number range, the charges varying by number range; and

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<sup>64</sup> Ofcom (2010) Simplifying Non-Geographic Numbers

<sup>65</sup> The final decision in 2013 was to make 080 and 16 free-to-caller for consumers from all telephones and to introduce an unbundled tariff for calls made by consumers to the 084, 087, 09 and 118 number ranges. Ofcom (2013) Simplifying non-geographic numbers: Final statement on the unbundled tariff and making the 080 and 116 ranges free-to-caller. See: [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0017/72116/final-statement.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0017/72116/final-statement.pdf)

<sup>66</sup> Ofcom (2010) Simplifying Non-Geographic Numbers, 3.3ff

<sup>67</sup> Ibid, Section 4

<sup>68</sup> Ibid, Section 5

<sup>69</sup> Ibid, 4.37

- d Unbundled tariffs – separation of the retail price of a non-geographic option call into two elements of service, one from the service provider and the other from the phone company.<sup>70</sup>

It dedicated a section in the Annex to precise number ranges and the potential options for them.<sup>71</sup>

- Step 4: Ofcom explained how each option would help to correct the market failures and that there were many potential variations of each broad option.<sup>72</sup> Its main assessment criteria in assessing the efficacy of the options were transparency and consumer price awareness, price, service variety and innovation, access to socially important services and implementation costs.<sup>73</sup>
- Step 5: Ofcom estimated benefits and costs of the separate options.<sup>74</sup> It described the costs and benefits in detail but lacked a coherent structure while doing so.<sup>75</sup> It supported its analysis both by qualitative surveys<sup>76 77</sup> and external quantitative research.<sup>78 79</sup>
- Step 6: Decision. Ofcom then concluded that unbundled tariffs was the policy option.<sup>80</sup> The conclusion seems to have been made already before analysing the options against the main assessment criteria as the potential benefits of an unbundled tariff were regularly specifically mentioned.

73 The following table compares the IA undertaken with the best practice policy outlined above:

**TABLE 4 ANALYSIS OF THE IA FOR NON-GEOGRAPHIC NUMBERS**

DESIGN	JUDGMENT ANALYSIS	NOTES
<b>General requirements:</b>		
Clearly identified and transparent options	Yes	There were four clearly identified options.
Proportionality in approach	Partially	The whole analysis was extensive and detailed. However, its unclearly how it used its analysis to inform its assessment.

<sup>70</sup> Ibid, 6.23

<sup>71</sup> Ibid, Annex 7

<sup>72</sup> Ibid, 6.24

<sup>73</sup> Ibid, 6.50ff

<sup>74</sup> Ibid, Section 6

<sup>75</sup> Ibid, Annex 4-8

<sup>76</sup> Ofcom/Futuresight (2010) Non-Geographic Call Services. See: [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0025/59317/nts.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0025/59317/nts.pdf)

<sup>77</sup> Analysys Mason (2010) Survey of Service Providers.

<sup>78</sup> Analysys Mason (2010) Flow of Funds study.

<sup>79</sup> Analysys Mason (2010) Implementation Feasibility study.

<sup>80</sup> Ofcom (2010) Simplifying Non-Geographic Numbers, 6.99

DESIGN	JUDGMENT ANALYSIS	NOTES
Counterfactual	Yes	A “do nothing” approach and its effects on the market were mentioned in the main text and analysed in the Annex. It was assessed against different criteria.
<b>Quantitative analysis:</b>		
Clear quantification of the costs and benefits	No	Ofcom made a significant analysis of costs and benefits and identified incremental costs and benefits. Nevertheless, it is unclear how this analysis informed Ofcom’s decision. There was limited analysis on a comparison of the quantified costs or benefits of the different options and in the end a high level assumption on the potential benefits was used to justify costs incurred. Even when the likely costs were specifically considered, in some cases the analysis lacked precise estimates. <sup>81</sup> The estimates were supported by external studies on the flow of funds for non-geographic numbering markets <sup>82</sup> and on implementation costs of different tariffing and billing options <sup>83</sup> as well as qualitative surveys. <sup>84 85</sup>
Discount future cash flows	No	Prices were not discounted.
Sensitivity test results	No	Certain prices were given as conservative estimates, which can be seen as a lower bound for a potential range. Nevertheless, the confidence of these bounds was not given.
Distributional assessment	Yes	It was explained how the different options would benefit different stakeholders.
IA supports final decision	Partially	Despite the fact that there was significant analysis of costs and benefits it is not clear how this informed its decisions.

Source: Frontier Economics based on Ofcom (2010) *Simplifying Non-Geographic Numbers*

74 In conclusion Ofcom did not fully follow best practice. While it laid out four options initially it only seriously considered two of them in significant detail and its analysis of other options was more limited. It seemed biased to the unbundled tariffs and maximum price options. A counterfactual was outlined but not analysed in detail.

#### 4.4 OPEN COMMUNICATIONS: ENABLING PEOPLE TO SHARE DATA WITH INNOVATIVE SERVICES

75 Ofcom recently consulted on its proposal of a design of a new data sharing framework. It set out challenges people and businesses experience when they navigate the communications market and lined out strategies to overcome them. According to Ofcom better ‘data mobility’ would help people to engage with the communications market and facilitate their online experience.

<sup>81</sup> Ibid, A5.192ff

<sup>82</sup> Analysys Mason (2010) Flow of Funds study.

<sup>83</sup> Analysys Mason (2010) Implementation Feasibility study.

<sup>84</sup> Ofcom/Futuresight (2010) Non-Geographic Call Services.

<sup>85</sup> Analysys Mason (2010) Survey of Service Providers.

Requirements for a better ‘data mobility’ would be for providers to share data about customers with any accredited third party (including other providers) and standardisation of data from providers.

76 Ofcom subsequently issued an “Update on Open Communications: Enabling people to share data with innovative services” in July 2021<sup>86</sup> to present its position after reviewing the consultation responses it received. It stated that the final decision would depend on the UK government’s decision on introducing legislation that would enable the launch of Smart Data initiatives in different sectors. If such a legislation gave Ofcom specific powers to implement data mobility, it would use its consultation and the received responses to decide whether and how data mobility should be introduced in the telecoms and pay TV markets.

#### 4.4.1 OFCOM’S IA

77 Ofcom’s approach to its IA was as follows.

- Step 1: Ofcom articulated concerns around switching which related to the fact that a proportion of consumers (40% of broadband consumers and 11% of mobile consumers) were outside their minimum contract period.<sup>87</sup> Ofcom then posited a range of reasons for its claim that some people struggle to get a good deal. These ranged from: people lack understanding of their own needs<sup>88</sup>; the complexity of the packages available (100 dual-play and 170 triple-play packages) and terminology made switching complex<sup>89</sup>; the perceived hassle of looking; people actively choose the wrong deal<sup>90</sup>; and concerns around vulnerable users. In addition, there were concerns specific to SMEs which for simple and moderately complex SMEs were similar to residential customers.
- Step 2: Ofcom articulated problems with the current system. It pointed out that though existing switching tools were (price comparison sites) available and supported by Ofcom (e.g. though its accreditation scheme) there were deficiencies (third parties cannot access tariffs, or directly switch end users). By comparison Ofcom favourably contrasted the benefits of greater switching in the energy sector where third parties were able use automatic switching which made it easier for consumers to appraise the benefits of switching providers.
- Step 3: Ofcom described the policy solution (Open Data) in other sectors. It noted that technology advances in storing processing and sharing data meant that there were driving innovation including digital comparison tools, which operate in many sectors. It noted that Open Data was being explored as a policy solution by the government and the CMA had recommended that Ofcom explore remedies. It explained how third parties might use open communications data, based on various use cases and specific workshop done by the Open

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<sup>86</sup> Ofcom (2021) Update on Open Communications: Enabling people to share data with innovative services. See: [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0018/221571/statement-open-communications.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0018/221571/statement-open-communications.pdf)

<sup>87</sup> Ofcom (2020) Open Communications, 3.6

<sup>88</sup> Ibid, 3.9

<sup>89</sup> Ibid, 3.13-3.19

<sup>90</sup> Ibid, 3.23

Data Institute.<sup>91</sup> A counterfactual was set out as the current situation including all claimed issues that consumers face.

- Step 4: Ofcom set out the benefits of the policy solution. For most of the claimed benefits Ofcom did not attempt to quantify or estimate the potential scale of the benefits (the number of users affected and the impact etc). Instead, it illustrated the benefits by quoting statements collected during focus groups.
- Step 5: Ofcom set out the costs. It described the types of costs though made no attempt to quantify them.

78 The following table compares the IA undertaken with the best practice policy outlined above:

**TABLE 5 ANALYSIS OF THE IA FOR OPEN COMMUNICATIONS**

DESIGN	JUDGMENT ANALYSIS	NOTES
<b>General requirements:</b>		
Clearly identified and transparent options	No	Options were not presented. The consultation only dealt with the benefits of open communications.
Proportionality in approach	No	Due to the potentially high costs associated with the regulation, a more rigorous cost benefit analysis would have been in order.
Counterfactual	Yes	The counterfactual as the current situation was outlined and changes in regulation were based on the counterfactual of no regulation. Costs and benefits took the no-intervention approach as a basis. Nevertheless, Ofcom did not provide clear estimates of both costs and benefits.
<b>Quantitative analysis:</b>		
Clear quantification of the costs and benefits	No	Neither costs nor benefits were quantified.
Discount future cash flows	No	Did not mention prices explicitly, did not include discounting future cash flows.
Sensitivity test results	No	Results were not analysed on their sensitivity.
Distributional assessment	No	It mentioned that the distribution of the cost and benefits was hard to predict at this stage.
IA supports final decision	Yes	The final decision was based directly on the findings in the IA with respect to Open Communications.

Source: Frontier Economics based on Ofcom (2020) Open Communications

79 There are clearly deficiencies with Ofcom’s approach as an IA.

- a There was no assessment of options to compare and appraise. There is a risk that the consultation could be interpreted as Ofcom using the IA to inform of its intended policy

<sup>91</sup> ODI (2020) Open communications: an open trustworthy data ecosystem for the telecommunications sector. See: <https://theodi.org/article/open-communications-an-open-trustworthy-data-ecosystem-for-the-telecommunications-sector-report/>

while a comprehensive data assessment was of secondary importance and remained incomplete.

- b There was no consideration of industry led options.
- c Both the potential benefits and the potential costs that Ofcom mentioned were theoretical and lacked any precise numbers when comparing them to the counterfactual of no intervention. Potential costs of the intervention were equally theoretical and classified into costs from generating and sharing Open Communications data and costs from enabling and providing services using Open Communications data.

80 In conclusion Ofcom did not follow best practice with regards to the analysis. It considered open communications as the only option, did not quantify neither costs nor benefits and therefore did not analyse the results on their sensitivity.

## 5 CONCLUSION

81 The examples of Ofcom's decisions considered in this report all imposed (or could lead to the imposition of) significant costs on stakeholders. Such costs ultimately have an impact on economic welfare and as such should only be imposed where there is a clear rationale. The best practice guidance issued by Government and by Ofcom are clear on the standards required in such cases.

82 Policy decisions that impose significant costs require public bodies such as Ofcom to take care that the IA underlying its 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 been clearly developed and given due consideration.

### 5.1 SUMMARY OF FINDINGS

83 Based on the decisions reviewed it appears that Ofcom met some, though not all, of the standards required. For example,

- Ofcom consults on its decisions, often with multiple rounds of consultations as its decisions are developed and refined.
- In many cases Ofcom has attempted to estimate the costs of its options, and to identify and where possible quantify the benefits. It has used the standard techniques to estimate costs (discounting where relevant).
- In some cases Ofcom's approach to the analysis has been proportionate to the impacts. In many cases there are many hundreds of pages of analysis to support its decisions.

84 However, the analysis of this sample of decisions suggests that in some ways Ofcom has not followed best practice.

- a) **The choice of options is limited.** While in some cases Ofcom considers a range of options when making its decisions in many cases it does not. Ofcom's consultation on non-geographic numbers (2010) considered a range of options. This consultation included an option for deregulation. Whereas in other cases it considers only a limited range of



options. In its consultation on Consumer switching for mobile services<sup>92</sup> Ofcom only gave two options. In its decision statement it had already eliminated one (the option that it had preferred at consultation stage). This meant that its decision was effectively of one option (in this case “Auto-switch” and the counterfactual of do nothing).

- b) The options considered in many cases do not include industry led options.** All policy makers face information asymmetries with the industries that they regulate (which the process of consultation attempts to partially mitigate). Policy makers have limited information on the costs, benefits, risks, and likelihood of success of different outcomes. Partly for this reason Ofcom professes a bias against intervention: policy interventions can be more costly than planned, and benefits may be lower than planned. The best practice guidance (Better Regulation Framework) suggests that policy makers consider an industry led solution to the problems identified as this can overcome some of the issues resulting from information asymmetries. While incentives of regulators and regulated firms may not always be perfectly aligned, regulated firms may be motivated to offer industry led options during a consultation process to influence outcomes in an efficient way that is aligned with regulators’ objectives. Industry led solutions are much more likely to be designed in a cost-effective way, by the operators who understand their costs and their customers, in a way that has industry buy-in and support. However, in many cases Ofcom does not include industry led options or properly consider options that are put to it. In the case of mobile switching Ofcom rejected an industry led proposal without fully considering the balance of trade-offs between costs and benefits.
- c) The assessment does not enable stakeholders to easily compare and assess the relative costs and benefits of the different options.** The Better Regulation Framework for IAs that have a significant impact on business sets out the clear template that policy makers should follow. In this template which policy makers are required to use, there is space for policy makers to record the estimate quantified costs and benefits of each option, and any other unquantified costs and benefits, so that decisions can be properly scrutinised. As noted above, in some of the decisions examined Ofcom has gone to great length to identify and quantify the costs and benefits. However, this analysis is then frequently relegated to an annex. These assessments are presented in a way that makes comparing options difficult, if not impossible.
- d) The role of sensitivity testing should play a bigger role in its IAs.** Given the uncertainties of the impacts of future policies, the best practice guidance recommends using standard tools to sensitivity test costs and benefit given the uncertainties inherent in forecasting the impact of policies. Where Ofcom conducts sensitivity testing of its assumptions it is not clear how these results support its decisions. The purpose of sensitivity testing is to understand whether the conclusion of the IA is sensitive to assumptions used in the analysis. Where sensitivity testing reveals that the cost effectiveness of decisions are sensitive to the uncertain assumptions chosen, there should be a bias against costly regulation, and instead a focus on assessing less costly, or industry led options. However, Ofcom’s approach of choosing a narrow set of options, and

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<sup>92</sup> Ofcom (2017) Consumer switching: Proposals to reform switching of mobile communications services.

sensitivity testing a narrow set of assumptions, prevents it from fully understanding the range of potential outcomes and where necessary considering alternatives.

85 There are also examples where it can appear that the IA has not been fully integrated into the decision.

- a) **In some cases it can appear that a policy solution is driving a search for harms rather than the other way round.** This can mean the choice of options was limited and can therefore be perceived as if the IA was driven by the availability of the option, rather than from an examination of the problems identified. For example Ofcom's Open Communications Consultation leads by noting the benefits and opportunities that open communications can bring, and its observation that it has improved outcomes in other markets, such as energy, by increasing consumer switching. Its examination of the "problem" was cursory: it identified a minority of end users that remained on their tariff out of contract.
- b) **The quantitative assessment does not always support the decision made.** Ofcom's decision often gives limited weight to its quantitative analysis, and it instead rests on a wider unquantified assessment relying on Ofcom's judgement. In mobile switching decision, Ofcom found that the costs of its preferred option (auto-switching) marginally *exceeded* the benefits, though Ofcom relied on a set of other assumptions to determine that it was nonetheless more cost effective than the counterfactual of do nothing (it claimed its assumptions were conservative, that the unquantified costs and benefits would support a positive NPV and that its proposal could not be considered in isolation and instead should be considered along with its other (more cost effective) proposals i.e. that there should be a degree of cross subsidy between proposals with large net benefit and proposals that have negative benefits).
- c) **In some cases Ofcom has not attempted to estimate costs and benefits.** In its Open Communications consultation Ofcom consulted on the case for Open Communications. Ofcom stated that "*enabling customers to share data held by their communications provider with third-party firms, easily and securely, could help unlock further benefits of data-driven innovation for people and businesses*". While Ofcom noted that the consultation was to inform its "*initial thinking to further understand the potential uses and benefits of Open Communications, how it could best work for people and businesses and the associated costs*", there was no attempt to quantify any of the costs or benefits. Furthermore, it is sometimes not clear how Ofcom integrates longer term wider impacts (for example impacts on competition or on investment) and cumulative impacts of its decisions in its IAs.

## 5.2 RECOMMENDATIONS

86 Based on the assessment set out in this report and summarised above we believe that there are a number of changes that Ofcom could adopt to its IAs that would significantly improve the quality of the IA on which Ofcom bases its decisions, and would bring its approach into line with Government Guidance for conducting IAs such as the Better Regulation Framework.

- a) **A clear summary of the IA in a standard template.** Perhaps the simplest and most important change would be for Ofcom to provide a simple, clear summary of its IA in a

standard template format. 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>93</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>94</sup>.

- b) **Clearly set out and summarise the quantitative analysis.** The quantitative estimates of costs and benefits should form the basis of Ofcom’s decisions. While it is understandable that not all costs or benefits can be quantified, decisions which are known to impose significant costs on certain groups should be justified with well evidenced net benefits. In many cases Ofcom devotes significant resource to attempting to quantify the different costs and benefits of its different options. However, this analysis is sometimes relegated to annexes, and instead the decision is based on a mix of qualitative evidence and judgement. Where the quantitative analysis reveals that costs exceed benefits or net benefits are marginal<sup>95</sup>, there should be a presumption that the option is not cost effective, and only very strong and evidenced unquantified benefits would be sufficient to overturn this presumption.
- c) **Include a full range of options in its decisions.** In some cases Ofcom only includes a limited range of options in its assessment. This is sometimes as its decision comes after a series of consultations where alternative options are iteratively rejected (mobile switching) or because it has alighted on a policy solution and is looking for a policy problem to be apply this to (Open Communications). In each case it is difficult for stakeholders to be able to appraise that its chosen approach is better than the next available option.
- d) **Include industry led options.** In many cases Ofcom does not include an Industry led option in its analysis. However, all else equal, industry led options are more likely to succeed and be cost effective. The industry will have a clear idea of its own costs, and risks associated with policies created by them. By definition, they are much more likely to have sector buy-in. While industry’s incentives may not perfectly align with Ofcom’s objectives at all times, sector participants are motivated to offer solutions which meet Ofcom’s objectives, but which are founded a detailed understanding of benefits, costs and

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<sup>93</sup> See Ofcom (2017) Consumer switching Proposals to reform switching of mobile communications services 2.46

<sup>94</sup> <https://www.gov.uk/government/publications/impact-assessment-template-for-government-policies>

<sup>95</sup> See Ofcom (2017) Consumer switching mobile services: In this decision Ofcom found that, as a stand-alone option, the costs of the analysed Autoswitch option were in excess of the benefits. Nevertheless, this negative NPV was discounted as Ofcom believed that the options should be considered as a package, its assumptions were conservative, and there were a range of unquantified benefits.

risks. Ofcom should therefore pro actively seek and consider industry options as part of its consultation process. While the balance of costs and benefits of an industry led option may not always exceed that of a costly new regulation, it should feature in the analysis, and certainly should not be dismissed out of hand.<sup>96</sup>

- e) **Seek external review of the IA where costs are significant.** The Better Regulation Framework requires government departments to seek external review of their IAs where decisions impose significant costs on businesses. Ofcom should also submit its IAs to an external scrutiny prior to making a decision where the decision imposes significant costs on businesses (for example using the same threshold as applies in the Better Regulation Framework). The purpose of this scrutiny is not to question the merits of a decision. But rather to ensure that the best practice approach to conducting the impact assessments has been followed to ensure that the evidence and analysis supports the decision made.
- f) **Review and monitor implementation.** Following the implementation of the policy decisions, it is good practice to monitor and review them periodically, to ensure that the ongoing costs of implementation are outweighed by benefits. Therefore any decision which imposes significant costs could contain a commitment to monitor and review the decision in a fixed period (five years). This would not be a resource intensive process and would enable Ofcom to continually learn from its decisions, and improve its approach and policies.
- g) **Publish cumulative impacts.** Many of Ofcom's decisions impose costs on industry in order to generate consumer benefits. Ultimately these costs will be borne by consumers and shareholders of the operators who bear the costs. In order that the totality of Ofcom's decisions can be assessed, and the impact on stakeholders can be appraised Ofcom should periodically publish an assessment of the costs of its decisions on industry in aggregate, which can be compared with the benefits claimed.

87 These changes are not costly to implement and would not add significant time to the process for decision making, but they would bring clear benefits. They would increase transparency of Ofcom's decisions and hence make Ofcom's decisions more accountable to its stakeholders. These changes would lower the regulatory burden on stakeholders by making decisions and evidence used clearer. Ultimately these changes should support Ofcom in making better decisions which would improve outcomes for all citizens and end users of services regulated by Ofcom.

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<sup>96</sup> BEIS, Better Regulation Framework, 1.1.3

## ANNEX A - A DRAFT TEMPLATE FOR SUMMARISING IMPACT ASSESSMENT DECISIONS

### Summary: Intervention and Options

#### Cost of Preferred (or more likely) Option (in 20xx prices)

Total Net Present Social Value *	Business Net Present Value**	Net cost to business per year***	
£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>			
<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>			

*\*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	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:
<b>COSTS (£m)</b>	<b>Total Transition</b> (Constant Price) Years		<b>Average Annual</b> (excl. Transition) (Constant Price)		<b>Total Cost</b> (Present Value)
Low	Optional		Optional	Optional	Optional
High	Optional		Optional	Optional	Optional
Best Estimate					
<b>Description and scale of key monetised costs by 'main affected groups'</b> Maximum of 5 lines					
<b>Other key non-monetised costs by 'main affected groups'</b> Maximum of 5 lines					
<b>BENEFITS (£m)</b>	<b>Total Transition</b> (Constant Price) Years		<b>Average Annual</b> (excl. Transition) (Constant Price)		<b>Total Benefit</b> (Present Value)
Low	Optional		Optional	Optional	Optional
High	Optional		Optional	Optional	Optional
Best Estimate					
<b>Description and scale of key monetised benefits by 'main affected groups'</b> Maximum of 5 lines					
<b>Other key non-monetised benefits by 'main affected groups'</b> Maximum of 5 lines					
Key assumptions/sensitivities/risks					Discount rate (%)
Maximum of 5 lines					

### BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:		
Costs:	Benefits:	Net:



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