



# Better Policy Making

Ofcom's approach to Impact Assessment

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## Section 1

# Introduction

## Why is Impact Assessment important?

- 1.1 The decisions which Ofcom makes can impose significant costs on our stakeholders and it is important for us to think very carefully before adding to the burden of regulation. 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.

**“The option of not intervening...should always be seriously considered. Sometimes the fact that a market is working imperfectly is used to justify taking action. But no market ever works perfectly, while the effects of...regulation and its unintended consequences, may be worse than the effects of the imperfect market”**

**Better Regulation Task Force (September 2003)**

- 1.2 Impact Assessments form a key part of best practice policy making, which is reflected in our statutory duty to carry them out. 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.
- 1.3 Impact Assessments are also useful tools for reviewing existing regulation. They provide a framework for weighing up the costs and benefits of removing regulation, as well as analysing other options.
- 1.4 In identifying options, we will aim to consider a wide range of options, including not regulating. Where appropriate, we will explore more risk-based, targeted approaches to regulation and will consider whether there are alternatives to formal regulation, such as co-regulation.
- 1.5 In developing policy proposals, our aim will be to think widely about the possible impacts, taking account of the whole value chain and knock-on effects across the communications sector. By doing so, we will seek to minimise any unintended consequences.
- 1.6 To be effective, the process of doing an Impact Assessment should begin right at the start of a project, with the Impact Assessment being developed from then onwards. An Impact Assessment should therefore be a core part of the policy-making process, not a bureaucratic add-on.

- 1.7 In these guidelines we say we expect Impact Assessments to be carried out in relation to the great majority of our policy decisions. This is a significant commitment, but in carrying out Impact Assessments, we will be guided by the principle of proportionality. This means that 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>1</sup>
- 1.8 An Impact Assessment should show how a regulatory decision is designed to fulfil our statutory duties. The principal duty of Ofcom is to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition.<sup>2</sup> What the Act requires us to do to fulfil this principal duty falls into six main areas, ranging from ensuring the optimal use of the radio spectrum to providing audiences with adequate protection against offensive and harmful material.
- 1.9 We are also required to keep the carrying out of our functions under review to ensure that regulation does not involve:
- the imposition of burdens which are unnecessary; or
  - the maintenance of burdens which have become unnecessary.<sup>3</sup>
- 1.10 The benefits for citizens and consumers are potentially largest where markets are open, new entrants can compete against incumbents, investment is encouraged and innovation flourishes. For this reason, we are committed to promoting open and competitive markets. Where appropriate, therefore, Impact Assessments need to show the extent to which the options under consideration would have an impact on competition.
- 1.11 Another benefit of carrying out Impact Assessments is that they provide a mechanism for considering the impact of our work on the interests of the full range of our stakeholders, including different groups of citizens and consumers. In some cases, for example, we will need to consider the impact of policy options on the interests of people living in different parts of the country or people who are elderly, disabled or on low incomes.
- 1.12 Our stakeholders play an important part in the Impact Assessment process as often they will be in possession of the information needed to carry out the analysis. Generally, therefore, we will seek to engage with stakeholders at an early stage.
- 1.13 These guidelines reflect the comments we received from stakeholders in response to the draft guidelines that we published in February 2005. The overall response to the guidelines was very positive, although many respondents made the point that we will now need to implement them effectively. We have not made wholesale changes to the guidelines following the consultation, but have made some amendments which we hope will provide greater clarity about our approach. A summary of the key points made by respondents to the consultation and an explanation of how we have addressed them can be found in Annex B. All the non-confidential responses to the consultation are on our website.

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<sup>1</sup> This assumes that it is appropriate for an Impact Assessment to be undertaken.

<sup>2</sup> Ofcom's principal duty is set out in section 3(1) of the Communications Act 2003.

<sup>3</sup> See section 6(1) of the Communications Act 2003.

- 1.14 In producing these guidelines, Ofcom has had regard to other relevant guidelines, including the Cabinet Office publication, “Better Policy Making: a Guide to Regulatory Impact Assessment” (January 2003). We have also taken into account the guidance issued by the Better Regulation Task Force, which identified five principles of good regulation: proportionality, accountability, consistency, transparency and targeting. These guidelines also reflect our experience of carrying out Impact Assessments in the period since Ofcom’s inception. While they set out our general approach to Impact Assessments, the wide range of decisions which Ofcom has to make means this approach will be tailored as necessary to fit the type of decision being made.
- 1.15 It is important to stress that the publication of these guidelines forms part of a programme of work designed to embed the process of carrying out Impact Assessments across the organisation. We will be following the approach set out in the guidelines from 1 August 2005, although the process of improving Ofcom’s Impact Assessments and thereby improving our policy decisions will continue. This will involve training for those involved in carrying out Impact Assessments and other initiatives to raise awareness and provide assistance. We will also continue to draw on best practice in the UK and elsewhere.
- 1.16 We have chosen to use the term ‘Impact Assessment’ rather than ‘Regulatory Impact Assessment’. This is for two reasons. First, it better conveys the potentially broad scope of our policy proposals, which will often extend beyond introducing new regulation. The introduction of spectrum trading, for example, is a fundamental change in the way that spectrum is allocated and has the potential to lead to significant de-regulation. Secondly, ‘Impact Assessment’ is the term used in section 7 of the Communications Act 2003 (“the Act”), which sets out Ofcom’s legal obligation to consider the impact of its proposals and is discussed in section 4 of these guidelines.
- 1.17 These guidelines do not have binding legal effect. Ofcom will consider each case on its merits and will apply the guidelines where it is appropriate to do so. In the event that we decide to depart from the guidelines, we will normally set out our reasons for doing so.
- 1.18 If you have any comments or questions about these guidelines or Ofcom’s approach to Impact Assessments more generally, please contact Tom Kiedrowski ([tom.kiedrowski@ofcom.org.uk](mailto:tom.kiedrowski@ofcom.org.uk)) or Marco Marini ([marco.marini@ofcom.org.uk](mailto:marco.marini@ofcom.org.uk))

## Section 2

# What is an Impact Assessment?

2.1 An Impact Assessment is an essential part of considering different options for regulation, including alternatives to formal regulation, and then, using objective criteria, selecting the best option. Subject to the principle of proportionality, an Impact Assessment will generally:

- identify the impacts of each option on the interests of particular groups of stakeholders;
- identify any impacts which each option would have on competition;
- identify and, where possible, quantify the costs and benefits flowing from the impacts which each option would have<sup>4</sup>;
- assess the key risks associated with each option.

2.2 In making regulatory decisions, we should select the option most closely aligned with Ofcom's principal duty, which is to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition. By encouraging policy makers to identify and analyse a wide range of policy options, Impact Assessments form an important part of the decision-making process.

2.3 The Act requires Ofcom to carry out Impact Assessments in relation to proposals which are "important" and the nature of this obligation is explained in section 4 below. However, Ofcom regards this as a minimum requirement and believes Impact Assessments form a key part of best practice policy-making. We therefore expect Impact Assessments to be carried out in relation to the great majority of our policy decisions.

2.4 Impact Assessments should enable Ofcom and our stakeholders to see more clearly the costs and benefits associated with different policy options. They will therefore be able to comment on our proposals more easily and as a result, consultations should be more effective.

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<sup>4</sup> Ofcom's approach to quantifying costs and benefits is explained more fully in section five.

## Section 3

# How does Impact Assessment fit into Ofcom's policy making process?

- 3.1 Producing an Impact Assessment is a key part of the policy-making process and should inform Ofcom's decision about whether to intervene and, if so, in what way.
- 3.2 The process of conducting an Impact Assessment should be an integral part of Ofcom's work and should usually begin as soon as we start to consider an issue, with the Impact Assessment being developed from then onwards. An Impact Assessment is not an additional step which takes place after a policy decision has already been made. This applies both to new issues and where Ofcom is reviewing existing regulation.
- 3.3 At the outset we should identify the issue to be addressed and the options available to us. In doing so, we should continue to bear in mind the need for options to be linked with our statutory duties. We will start by considering the option of not changing the regulatory framework, either by not introducing regulation or by retaining existing regulation. This option – no new intervention – will generally be the benchmark against which other options are judged i.e. what costs and benefits would be incurred additional to those which would be incurred if there were no new intervention?
- 3.4 The other options will normally include the option of removing any existing regulation. In some cases we may have an obligation to regulate, for example, because a communications provider has Significant Market Power. Nevertheless, we should seek to explain why the option of not regulating is inappropriate and explore different ways in which we can fulfil our obligation to regulate.
- 3.5 At the start of a project we should also consider whether it will be necessary to assess and consult on the likely impact of proposed policies on the promotion of race equality, disability equality and equality in Northern Ireland. Ofcom is committed to promoting diversity, both internally and through the policy decisions we make and this commitment is reflected in our statutory obligations.
- 3.6 Under the Race Relations (Amendment) Act 2000, Ofcom has a duty to publish a Race Equality Scheme. We published a draft scheme in March 2005 and following consultation, the final version was published in May 2005. One requirement of the Race Equality Scheme is that it should set out arrangements for assessing and consulting on the likely impact of proposed policies on the promotion of race equality. Like most public authorities, we will not have to assess the impact of every policy decision. To decide whether a Race Equality Impact Assessment is necessary, we will need to carry out an initial assessment of whether our decision will have any relevance to race equality or have a negative impact on one or more racial groups. If such an assessment is necessary, we will build this into our assessment of the policy options and our

decision as to which option to choose. The same approach will be adopted in order to implement the statutory equality scheme required by the Northern Ireland Act 1998, the final version of which we expect to publish by the end of the financial year 2005/6<sup>5</sup>. Also, Ofcom has been notified that we will be required to produce a Disability Equality Scheme, which will include an analogous duty to carry out a Disability Impact Assessment. This Scheme will need to be put in place by the end of 2006. Our intention is to build this into the process of producing an Impact Assessment from the outset. In the meantime, however, we will seek to take account of disability impacts where appropriate.

- 3.7 As discussed, the process of producing an Impact Assessment should begin with the identification of the issue to be addressed. It is then important to define our policy objective and at an early stage, to identify a range of options. This should help to ensure that different approaches are not overlooked inadvertently. We should, as far as possible, list the benefits and costs likely to flow from each option, even if it is not possible to analyse them in more detail or quantify them at this stage. We should also, at the outset, draw up a list of the different groups of stakeholders likely to be affected by any of the options identified. Examining how other regulators have approached similar issues may be worthwhile in some circumstances.
- 3.8 The information needed to develop an Impact Assessment will then be gathered, often through informal contact with stakeholders. A possible consequence of this engagement is that additional options will need to be considered or existing options will need to be revisited. By the time the formal consultation stage is reached, a more detailed analysis should have been produced. At this stage an Impact Assessment will generally identify a preferred option and we would normally expect to show how we have developed our initial assessment of the possible options, the stakeholders affected and the depth of analysis required. It is likely that we will have narrowed down our list of possible options because to examine all of them in detail would probably be disproportionate in terms of resources. In accordance with Ofcom's guidance on consultation (available on our website), stakeholders will then be asked for their comments and for any further information which might help complete our assessment. Often the information needed to quantify costs and benefits will be in the possession of stakeholders so their engagement throughout the process is very important in ensuring that the options are tested thoroughly and that the best option is chosen.
- 3.9 Producing an Impact Assessment also helps make transparent the consideration of the impact of our policies on the interests of different groups of stakeholders. Given Ofcom's principal duty, it is particularly important for us to identify the impact of options on the interests of citizens and consumers, including particular groups of citizens and consumers. For example, Ofcom

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<sup>5</sup> Ofcom is required by Section 75 of the Northern Ireland Act 1998 to review its policies to determine if they have, or are likely to have, a significant impact on equality of opportunity for nine groups in society in Northern Ireland, namely people of different: religious belief; political opinion; gender; marital status; age; sexual orientation; race; disability; caring status. The draft Equality Scheme which Ofcom has submitted to the Equality Commission in Northern Ireland lists seven key policy areas which outline its work. An initial assessment of policies will be undertaken prior to publication of Ofcom's Annual Plan. The policies in question will need to be screened and where there is, or is likely to be, a significant impact on equality, Ofcom is obliged to carry out an equality impact assessment. New policies will also need to be screened for equality.

may have to consider the impact of a policy option on the interests of citizens and consumers who live in rural areas or who are elderly, disabled or on low incomes.

- 3.10 Following the consultation stage of a policy initiative, Ofcom will generally publish a decision or policy statement. In a separate section or annex of this document, we will:
- summarise the analysis set out in the earlier Impact Assessment;
  - set out our response to the comments made about the Impact Assessment;
  - show how the comments have affected our assessment of the impact of the options considered; and
  - set out the option we have chosen and why.
- 3.11 If, following the consultation stage, there is no reason to change the Impact Assessment, this will be made clear.
- 3.12 At an appropriate later date, the impact of the chosen option should normally be evaluated. For example, it is likely to be useful to consider whether the assumptions we made proved to be correct and whether the policy objective was achieved.
- 3.13 The way in which Impact Assessments fit into Ofcom's policy-making process is summarised in Annex A.

## Section 4

# When will Ofcom do an Impact Assessment?

- 4.1 Ofcom believes that Impact Assessments form a key part of best practice policy-making and we expect them to be carried out in relation to the great majority of our policy decisions. The nature of the Impact Assessment will depend on the type of decision we are making and an Impact Assessment relating to a wide-ranging strategic review will look different to an Impact Assessment concerned with a detailed, narrowly-focused policy proposal.
- 4.2 Section 7 of the Act says that Ofcom must carry out and publish an Impact Assessment:
- where we are proposing to do anything related to the carrying out of our functions; and
  - it appears to us that the proposal is important;
- unless it appears to Ofcom that the urgency of the matter makes it impracticable or inappropriate for us to comply.
- 4.3 The Act says a proposal is “important” if it would be likely to do one or more of the following:
- involve a major change in Ofcom’s activities;
  - have a significant impact on persons carrying on businesses operating in markets Ofcom regulates; or
  - have a significant impact on the general public in the UK or a part of the UK.
- 4.4 Assuming that the urgency of the matter does not make it impracticable or inappropriate for us to comply, if we are making an “important proposal”, we must carry out an Impact Assessment. The exception is if we believe this to be unnecessary, in which case we must publish a statement saying why this is the case. An example of where an Impact Assessment would be unnecessary could include a situation where an Impact Assessment relating to the same issue has been produced relatively recently.
- 4.5 The obligation to carry out Impact Assessments contained in the Act is wide-ranging and whether or not a proposal is “important” within the meaning of the Act will often be open to debate. However, because Impact Assessments form part of good policy making, we expect to carry out Impact Assessments in relation to the great majority of our policy decisions, including those which are “important”. Nevertheless, there are some cases where, as a general rule, an Impact Assessment will not be required. Ofcom will not carry out Impact Assessments when conducting investigations. This is because what is being enforced will have been put in place as a consequence of an Impact

Assessment and/or primary or secondary legislation.<sup>6</sup> Also, when resolving a dispute Ofcom will not generally carry out an Impact Assessment where the dispute relates to regulation which has been put in place as a consequence of an Impact Assessment and/or primary or secondary legislation.<sup>7</sup> Similarly, Ofcom will not normally carry out an Impact Assessment when publishing guidance relating to how we will undertake such investigations. Such guidance will generally just flesh out how Ofcom will fulfil obligations created following the carrying out of an Impact Assessment.

- 4.6 It should be noted that the Act also requires Ofcom to publish details of our Impact Assessments in our Annual Report, enabling stakeholders to judge whether we have met our commitment.

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<sup>6</sup> For example, see section 94 of the Act (reasonable grounds for believing that there has been or is a contravention of a condition).

<sup>7</sup> For example, this might be the case if we are resolving a dispute under section 188 of the Act (procedure for resolving disputes relating to the provision of Network Access).

## Section 5

# What stages are involved in an Impact Assessment?

- 5.1 A key principle is that an Impact Assessment should be proportionate to the likely impact of our decision. This means that the more substantial and/or wide-ranging the impact on stakeholders, the more comprehensive the Impact Assessment should be. This means that there would normally be a deeper level of analysis. However, the depth of analysis will also depend on the information available.
- 5.2 The level of detail included in Impact Assessments will therefore vary and, as mentioned in the previous section, an Impact Assessment relating to a detailed, narrowly-focused policy decision will look different to an Impact Assessment concerned with a wide-ranging strategic review. Such reviews are likely to examine high-level options concerned with Ofcom's strategic direction and although these options would be likely to have a substantial and wide-ranging impact and would need to be examined carefully, it may not be possible, particularly at an early stage of a review, to quantify the costs and benefits associated with such options.
- 5.3 Generally, we will be able to take an initial view of the likely impact of our decision at the start of a project, but this judgement will need to be revisited later on in the process in the light of the information we have gathered.
- 5.4 Producing an Impact Assessment will normally involve six stages:
  - defining the issue we need to consider and identifying the citizen or consumer interest (stage 1);
  - defining the policy objective (stage 2);
  - identifying the options (stage 3);
  - identifying the impacts on different types of stakeholders (stage 4);
  - identifying any impacts on competition (stage 5);
  - assessing the impacts and choosing the best option (stage 6).
- 5.5 At the point where Ofcom starts to examine an issue it ought to be possible to consider the first two of these stages. It should also be possible to produce provisional lists of possible options and the groups of stakeholders likely to be affected (stage 3). These lists will be revisited and revised during the policy-making process. As mentioned in section 3, the list of possible options is likely to be narrowed down over time as it will normally be disproportionate to examine all the options in detail.
- 5.6 Prior to stakeholders being consulted formally on the options, more detailed work may need to be carried out to identify the impacts on stakeholders and any impacts on competition. There will then follow an assessment of what is the

best option (stages 4 to 6). In presenting this work, we will generally show how we have taken account of the information obtained from stakeholders, subject to the need to preserve any requirements of confidentiality.

- 5.7 As mentioned in section 3, it may also be necessary to carry out a Race Equality Impact Assessment. If this is the case, the assessment will be built into the process of identifying the impacts on stakeholders and our analysis of the different policy options.<sup>8</sup> Equivalent action will need to be taken with regard to equality obligations under the Northern Ireland and Disability Equality Schemes.
- 5.8 Each of the six stages in the process is examined in more detail below:

### **Stage 1 – Defining the issue and identifying the citizen or consumer interest**

- 5.9 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. For example, in relation to our ongoing work to assess the impact of TV advertising on the health of children, the citizen or consumer interest could be described as an interest in children not suffering harm as a result of exposure to TV advertising. This interest is reflected in Ofcom’s duty to have regard to, “the vulnerability of children and of others whose circumstances appear to Ofcom to put them in need of special protection” when exercising its functions.<sup>9</sup>

### **Stage 2 – Defining the policy objective**

- 5.10 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. As mentioned above, the objective should always be linked to our statutory duties, both to our principal duty to further the interests of citizens and consumers and to more specific requirements, such as the need to maintain a sufficient plurality of providers of different television and radio services.<sup>10</sup> In circumstances where it is necessary to balance a number of different objectives, we will seek to explain how we propose to do this. However, we should avoid being too prescriptive at an early stage as it may be useful to choose options that reflect different ways of balancing the objectives. In analysing these options it should then be possible to explore the extent to which they would meet the different objectives.
- 5.11 Our general aim is to withdraw from regulation wherever possible and there are a number of different ways in which this might be achieved. The following are examples of possible exit paths:
- creating the conditions for a market to become effectively competitive and therefore self-regulating, with the result that consumers benefit from lower prices and greater choice;
  - pursuing a specific outcome in the shorter term, such as digital switchover, to promote sustainable competition in the long run;
  - enabling control to be transferred to consumers, for example, enabling them to use technology to control access to content themselves.

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<sup>8</sup> Guidance on how to carry out such an assessment is available on the website of the Commission for Racial Equality: <http://www.cre.gov.uk/>

<sup>9</sup> See section 3(4)(h) of the Act.

<sup>10</sup> See section 3(2) of the Act.

### **Stage 3 – Identifying the options**

- 5.12 The next step is to consider the different ways in which our policy objective (or objectives) could be achieved. There are likely to be different approaches to selecting options:
- In straightforward cases there will be just a single issue that needs to be addressed, in which case we will only need to select a set of options to address that issue.
  - In other cases there will be multiple issues i.e. achieving the policy objective will require a number of issues to be addressed. In cases like this it may be necessary to identify the options available to address each of the issues.
  - A third type of case is where a sequence of issues needs to be addressed e.g. we may first of all need to make a high level decision about whether to introduce, maintain or remove regulation. Having decided which route to take, we will then need to consider the options available.
- 5.13 When identifying the possible options, we will generally start by considering the option of not changing the regulatory framework, either by not introducing regulation or by retaining existing regulation. This option – no new intervention – 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?
- 5.14 The other options will normally include the option of removing any existing regulation. In some cases we may have an obligation to regulate, for example, because a communications provider has Significant Market Power. Nonetheless, we should explain why the option of not regulating is unavailable and should explore different ways in which we can fulfil our obligation to regulate, bearing in mind our aim of choosing the least intrusive means of achieving our objective.
- 5.15 As well as removing any existing regulation, there are likely to be options that would involve revising the regulatory framework, either by reducing or increasing regulation. If it proves difficult to identify a range of options, it may be helpful to review the policy objective: if it has been framed too narrowly this may have inadvertently limited the range of options available.
- 5.16 Another option which it will often be useful to consider is the ‘wait and see’ option. This means no new intervention immediately, but a commitment to monitoring the situation and reviewing the position at a later time on the basis of further evidence. For example, it may be helpful to carry out research prior to performing the review.
- 5.17 The process of identifying options should involve considering different types of regulatory approach, for example, self or co-regulation, the provision of consumer information to make markets work better or more targeted, risk-based regulation.

### **Stage 4 – Identifying the impacts on different types of stakeholders**

- 5.18 Having selected the options, Ofcom will assess their likely impact on the appropriate groups of stakeholders. This stage of the process should help

ensure that we consider the interests of the full range of relevant stakeholders and not just those with the loudest voices. Given our principal duty, we will clearly have to consider the impact on the interests of citizens and consumers. The other stakeholders whose interests we will need to consider will vary from case to case, including where appropriate:

- small businesses, including spectrum users;
- large business users;
- broadcaster s;
- telecoms operators, both incumbents and suppliers of alternative networks;
- telecoms service providers;
- equipment manufacturers;
- transmission companies.

5.19 In relation to citizens or consumers, we will often need to consider the impact on different groups. For example, we may have to consider the impact of options on the interests of people living in different parts of the country or on people who are elderly, disabled or on low incomes.

5.20 If it is necessary to carry out a Race Equality Impact Assessment, the impact on racial groups will need to be identified.<sup>11</sup> Equivalent action will need to be taken with regard to equality obligations under the Northern Ireland and Disability Equality Schemes.

5.21 In looking at the impact on stakeholders, it is necessary to apply the principle of proportionality. This means it will often be appropriate to identify the groups or sub-groups of stakeholders who might be most affected and focus on the impacts on those groups.

### **Stage 5 – Identifying any impacts on competition**

5.22 Given Ofcom’s commitment to promoting open and competitive markets, it will normally be appropriate to identify any impacts which each of the options would have on competition. Where the policy objective involves promoting competition in a particular market, this analysis will be an integral part of the policy-making process and it may be appropriate for the Impact Assessment to refer to other sections of the consultation document or statement.

5.23 Where promoting competition is not the main focus of the policy, it may still be important to assess the risk of options having a detrimental effect on the operation of markets and to factor this into the decision-making process. By doing so, it may be possible to lessen or remove significant adverse effects by modifying the proposed options or finding alternatives. However, it is important to distinguish between impacts on competition that would happen anyway and would therefore be taken into account in considering the option of no new intervention and impacts on competition that would happen as a result of other options. Ofcom would not generally proceed with a policy option unless any negative impacts on competition were outweighed by the benefits that would accrue.

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<sup>11</sup> Guidance on how to carry out a race equality impact assessment is available on the website of the Commission for Racial Equality: <http://www.cre.gov.uk/>

## Stage 6 – Assessing the impacts and choosing the best option

- 5.24 Ofcom’s regulatory principles will play an important part in making our decisions. Our bias against intervention means that there must be a clear case for regulation, and the prospective benefits should exceed the costs. If a case for regulation can be made, we will choose the least intrusive means of achieving our objective.
- 5.25 Choosing the best option will involve an assessment of the costs and benefits which would flow from the options selected. However, this will generally inform rather than determine our decision. There are two main reasons for this. First, fulfilling our statutory duties will often mean taking account of issues that would fall outside a narrow consideration of costs and benefits. Secondly, 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.
- 5.26 It may be necessary to develop criteria by which to rank the options under consideration. These criteria should be linked to our statutory duties, in particular, the need to further the interests of citizens or consumers. For example, in the Impact Assessment attached to the Digital Replacement Licence Consultation (available on our website), Ofcom took into account all of our relevant duties, but of particular importance were the following factors:
- the extent to which different TV platforms are affordable for all consumers;
  - issues of equity and the distribution of costs and benefits;
  - the extent to which different TV platforms are available to consumers;
  - any implications for the process of implementing switchover, including the provision of information on switchover;
  - the costs involved in deploying different TV platforms.
- 5.27 Another factor to bear in mind is that we may have to take into account other initiatives which are designed to tackle the same issue. For example, work by other Government departments to improve the health of children is clearly relevant to Ofcom’s ongoing work on the impact of food advertising. Indeed, the existence of other initiatives will complicate our analysis and may make it difficult to quantify the costs and benefits that would result directly from Ofcom action. Nevertheless, the potential impacts of both Ofcom action and those resulting from other initiatives should be taken into account in our decision-making.
- 5.28 In the event that it is necessary to carry out a Race Equality Impact Assessment and an option under consideration is likely to have an adverse impact on a particular racial group or groups, Ofcom will:
- explore the possibility of changes to the proposed option that satisfy the concerns raised;

- consider ways of putting the proposal into practice that remove or reduce its potential for adversely affecting some racial groups;
- explore other options.

5.29 Similarly, in the event that it is necessary to carry out an Equality Impact Assessment under the Northern Ireland Act 1998 and an option under consideration is likely to have an adverse impact on a particular group or groups, Ofcom will:

- explore the possibility of changes to the proposed option that satisfy the concerns raised;
- consider ways of putting the proposal into practice that remove or reduce its potential for adversely affecting a particular group or groups;
- explore other options.

### **Analysing costs and benefits**

5.30 A key part of our assessment of which is the best option will be an analysis of the benefits and costs that would flow from each option. In doing so, we expect to apply the following principles:

- All significant impacts of regulation should be included (regardless of whether the resulting costs and benefits can be quantified) and the types of costs and benefits should be spelled out e.g. whether the costs or benefits are financial or non-financial.
- In analysing costs and benefits it is necessary to apply the principle of proportionality, which means it will often be appropriate to focus on the most significant costs and benefits and not spend a disproportionate amount of time considering costs and benefits which are relatively minor.
- As far as possible, it should be made clear who bears the costs and who receives the benefits, including those flowing from the impacts on the interests of particular groups or sub-groups of stakeholders. Assumptions should be clearly spelt out.
- Only costs and benefits that would be reasonably incurred as a result of an option being implemented (as opposed to costs and benefits that would be incurred anyway) should be taken into account.
- Where there is significant uncertainty about the impact of an option, it is good practice to present an analysis of the sensitivity of the results to changes in some of the most important variables. This should help ensure that the Impact Assessment and the final policy decision are more robust.
- The cost of complying with regulation e.g. of providing regulatory information or adopting new technical requirements, should be identified if possible, as well as the possible negative impacts of regulation.

- Dynamic benefits and costs should be taken into account e.g. regulation may have a wider benefit in terms of enhancing the productivity and competitiveness of the sector.

### **Quantifying costs and benefits**

- Costs and benefits should be quantified where possible, although benefits in particular may be hard to quantify as they tend to be more uncertain and are often spread across many citizens or consumers.
- Precise quantification will often not be possible and we should avoid spurious accuracy. Where quantification is possible, it will often be partial i.e. it is not possible to quantify all the relevant costs and benefits.
- Where costs and benefits cannot be quantified precisely, we should aim to give broad estimates e.g. in the order of £x million, or ranges of costs and benefits e.g. between £x million and £y million. It is also helpful to form an idea of the relative size of the respective costs and benefits. As a minimum, costs and benefits should be described qualitatively.
- Where it is possible to quantify costs and benefits, we will use the discount rate recommended by HM Treasury (unless there are specific reasons to do otherwise) to discount future costs and benefits and work out the net present value.

### **Assessing risks and possible unintended consequences**

- 5.31 It is also important to consider the risks relating to particular options, for example, the risk that the intended impact would not be achieved or would be delayed by problems with implementation. An option which has a high net benefit, but which carries a high risk, might be less attractive than a lower risk option which has a lower net benefit. The degree of risk will be influenced by the likelihood of it occurring and the extent to which it may be possible to mitigate the risk.
- 5.32 A related issue is that of possible unintended consequences. In selecting and assessing the different options, our aim will be to think widely about the possible impacts, taking account of possible knock-on effects across the communications sector, including other parts of the value chain, and on existing regulation. By doing so, we will seek to minimise any unintended consequences, but it is important to be alive to the possibility that they may occur.
- 5.33 We should also consider the risk of non-compliance with our decision. Our assessment of the costs and benefits that would flow from an option should therefore be based on a realistic level of likely compliance. This will involve exploring the incentives to comply, whether compliance will be practically possible and the costs of enforcement.

### **Analysing distributional impacts**

- 5.34 The distributional impacts which the different options would have should also be taken into account and, where possible, quantified. A distributional impact is an impact which is transferred rather than being additional e.g. a policy might benefit consumers in urban areas at the expense of consumers in rural areas,

while the net benefit remains the same. Clearly this would be a relevant consideration even though it would not be revealed by a narrow analysis of the costs and benefits.

### **Cost to Ofcom of implementing options**

5.35 Another consideration is the cost to Ofcom of implementing an option. In considering an option which would carry significant implementation costs, we would need to bear in mind that these costs would place a burden on stakeholders in terms of increased administrative fees. Other things being equal, this might make the option less attractive than an option with lower implementation costs.

5.36 It may also be appropriate to consider the implementation costs that would be incurred by other bodies, such as ICSTIS or the Advertising Standards Authority, if a regulatory function is being transferred.

### **Assessing when costs and benefits are likely to be felt**

5.37 In assessing the costs and benefits of different options it is important to consider when and how they are likely to be felt. This may have the following benefits:

- It will be easier to assess the actual impact of our interventions and feed back lessons learned into future policy-making.
- We will know when we expect to be able to withdraw the regulation or at least review whether it continues to be necessary.
- It will help us fulfil our statutory obligation not to maintain burdens for longer than necessary.<sup>12</sup>
- It will assist in considering calls for further intervention. If we intervene again too quickly we risk undermining or negating the initial intervention. Therefore, we may want to resist calls for additional regulation until the initial intervention has been given time to take effect.

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<sup>12</sup> See section 6 of the Act.

## Section 6

# What form should an Impact Assessment take?

- 6.1 Ofcom is committed to being both accountable and transparent in its approach to regulation. Although the analysis set out in an Impact Assessment should inform and underpin the main body of any consultation on a policy proposal, it is important that an Impact Assessment should be clearly identified. It will generally be set out in a separate section or annex, although in many cases the Impact Assessment is likely to be a summary of the analysis which forms the main substance of the consultation document or statement. For example, see the Impact Assessment in annex B of phase 2 of Ofcom's review of public service broadcasting (available on our website). It will often be possible, therefore, for the main part of the Impact Assessment to be fairly short and to the point i.e. it should not be read in isolation from the rest of the document.
- 6.2 So as to be able to evaluate our decisions in the future, it is useful to set out clearly in our Impact Assessments what we expect the outcomes to be and by when we expect them to occur. Evaluation is a key part of the policy-making process and the lessons learned should feed into future work. We are currently developing our approach to evaluation, in relation to both the performance of the organisation as a whole and the impact of individual policy decisions.
- 6.3 To inform the subsequent evaluation, it may be appropriate to put in place a programme of research. Evaluation is likely to encompass a range of issues that may be examined at different points in time, including:
- whether we have met our own timetable for regulatory action, for example, the staged introduction of spectrum trading;
  - whether the expected costs and benefits have materialised;
  - whether longer term dynamic benefits have been felt.

## Annex A

# Impact Assessment process checklist

Ofcom will generally, among other things:

<b>Start of the process</b>	<ul style="list-style-type: none"><li>• Define the issue we need to consider</li><li>• Identify the citizen and/or consumer interest</li><li>• Define the policy objective, which should be linked to our statutory duties</li><li>• Produce a provisional list of possible options, including the options of no new intervention (the base case) and the option of withdrawing regulation</li><li>• Produce a provisional list of the groups of stakeholders likely to be affected</li><li>• Determine the depth of analysis that will be needed i.e. take an initial view of the extent to which our decision will have a significant and/or wide-ranging impact on stakeholders</li></ul>
<b>Developing our analysis</b>	<ul style="list-style-type: none"><li>• Develop our analysis of the options under consideration. This is likely to involve, among other things,:<ul style="list-style-type: none"><li>○ reviewing the options which we initially selected and, where appropriate, narrowing them down</li><li>○ identifying the impacts of the different options on different types of stakeholders</li><li>○ identifying any impacts the different options would have on competition</li><li>○ analysing the costs and benefits that would flow from those impacts</li><li>○ assessing the risks attached to the options and the possible unintended consequences</li><li>○ analysing the distributional effects that would flow from the different options</li><li>○ generally, selecting our preferred option – in doing so, we will be selecting the option which will best enable us to fulfil our statutory duties, with this decision being informed by our regulatory principles</li></ul></li><li>• Where appropriate, consult informally with stakeholders to gather information about the options under consideration, including information needed to quantify costs and benefits</li></ul>
<b>Consulting formally on the proposed decision</b>	<ul style="list-style-type: none"><li>• Consult stakeholders formally on our proposed decision, including the analysis contained in the Impact Assessment</li><li>• Normally the Impact Assessment will be set out in a separate section or annex of the consultation document</li></ul>

## **Finalising our decision**

- Following the consultation stage, we will generally publish a decision or policy statement
- In a separate section or annex of this document, we will usually:
  - summarise the analysis set out in the earlier Impact Assessment
  - set out our response to the comments made about the Impact Assessment
  - show how the comments have affected our assessment of the impact of the options considered
  - set out the option we have chosen and why
- So as to be able to evaluate our decisions in the future, it is useful to set out clearly what we expect the outcomes to be and by when we expect them to occur

## Annex B

# Summary of main points raised in the consultation responses

- B.1 There were twelve responses to our consultation. The non-confidential responses are on our website.
- B.2 There was strong support for our commitment to carrying out Impact Assessments in relation to the great majority of our decisions and for the framework we proposed. There was also strong support for our recognition of the need to evaluate the impact of our chosen option at an appropriate point in the future. We have sought to provide greater clarity about how we will do this, but we are still developing our thinking in this area.
- B.3 Stakeholders were keen for us to implement the guidelines as soon as possible, with mention being made of the fact that Ofcom will be making a number of important decisions over the coming months.
- B.4 There was agreement that Impact Assessments contained in our consultation documents and statements should be clearly identifiable and stakeholders supported the idea of putting them in a separate chapter or annex where appropriate. Stakeholders also suggested that we should make Impact Assessments easy to find on our website and this is something we will be seeking to do.
- B.5 Stakeholders felt we should emphasise more the importance of considering possible unintended consequences, in particular the impact on the whole value chain. This is something we have sought to do, stressing the need to minimise the risk of unintended consequences by thinking widely about possible impacts and engaging with stakeholders to canvass their views.
- B.6 It was suggested that we should be more transparent about our initial view of the possible options and the groups likely to be affected. In revising the guidelines we have tried to explain more clearly how an Impact Assessment will be developed during the course of a project. We will not normally publish our initial view of all the possible options, but as mentioned above we will seek to engage with stakeholders to avoid inadvertently overlooking options worthy of analysis.
- B.7 A number of stakeholders were keen for us to stress more the importance of quantifying costs and benefits and not to shy away from quantification because of the difficulties involved. Our position is that we will normally quantify costs and benefits where possible, while recognising that we will rarely be able to do this precisely and that it will not always be proportionate to quantify all costs and benefits. Where precise quantification or valuation is not possible, we should aim to provide estimates or set out ranges of costs and benefits. Where there is significant uncertainty about the impact of an option, it is good practice to present an analysis of the sensitivity of the results to changes in some of the most important variables. However, 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.

- B.8 There was strong support for our intention to consider the option of not regulating.
- B.9 There was also a request for more detailed guidance, particularly in relation to how we will quantify costs and benefits and how we will gather information. We have supplemented the guidance contained in the draft guidelines, particularly in relation to how we intend to analyse costs and benefits and seek to engage with stakeholders in the course of the policy-making process. Also, as mentioned in the introduction, these guidelines form part of a programme of work designed to improve Ofcom's approach to Impact Assessments and we will continue to draw on best practice elsewhere.
- B.10 It was suggested that the depth of our analysis should depend on how substantial *and/or* wide-ranging the impact is likely to be (as opposed to substantial and wide-ranging). This is a valid point which we have taken on board.
- B.11 One stakeholder felt we should identify our primary policy objective more clearly and explain how we will balance this against other objectives. We have added to the section of the guidelines which deal with this issue and more generally, have sought to bring out more clearly the need for our statutory duties to be borne in mind when selecting and analysing options. The particular issue of how Ofcom balances the need to further both the interests of citizens and the interests of consumers is something which we are considering as part of our programme of work for 2005/6.
- B.12 It was suggested that we should always consider the option of not changing the regulatory framework i.e. examining what would happen anyway, as well as the option of removing regulation. We agree with this suggestion and have clarified the section of the guidelines which deal with selection of options. We have also added the point that it may be appropriate to consider the option of not changing the regulatory framework now, but monitoring the situation and reviewing it in the light of further evidence.
- B.13 One respondent said they would like more guidance on how we will interpret our statutory duty to do IAs in relation to "important proposals". Our position is that we will not limit ourselves to doing Impact Assessments only in relation to proposals which are important. Our intention is to do Impact Assessments in the great majority of cases and we have clarified the guidelines to make clear that we expect this to include decisions which would be regarded as "important" under the Act.
- B.14 We have also brought out more clearly the need to consider any impacts which options would have on competition, including this as a separate stage in the process.
- B.15 We have also amended the guidelines to reflect Ofcom's duty to carry out Equality Impact Assessments in relation to policy proposals which are relevant to racial or disability equality and equality in Northern Ireland.