

<b>Title:</b> <b>Reforming the Appeals Regime for the Electronic Communications Sector</b>  <b>Lead department or agency:</b> Department for Culture, Media and Sport <b>Other departments or agencies:</b> Ofcom, Competition Appeal Tribunal, Competition Commission	<b>Impact Assessment (IA)</b>
	<b>IA No:</b> DCMS020
	<b>Date:</b> 01/06/2011
	<b>Stage:</b> Consultation
	<b>Source of intervention:</b> Domestic
	<b>Type of measure:</b> Secondary legislation
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## Summary: Intervention and Options

### What is the problem under consideration? Why is government intervention necessary?

In the electronic communications sector, the current appeals regime requires the appeal body to 'decide the appeal on the merits' of the case, which has led to a more extensive and rigorous level of scrutiny of regulatory decisions than exists for any other regulated sector. Whilst the EU Framework Directive requires an appeals process that ensures the merits of the case are 'duly taken into account', it does not require the level of scrutiny currently applied in the UK. The UK's legislation therefore gold-plates European requirements and this has led to a diversion of the regulator's (Ofcom's) resources away from its principal duty, namely furthering the interests of citizens and consumers in relevant markets.

### What are the policy objectives and the intended effects?

The Government's objective is to deliver a quicker and more focused appeal process which is less costly for the appellants, Ofcom and the appeal bodies but still ensures access to justice and an ability to challenge Ofcom decisions where a material error is identified. It is also the aim of Government to minimise the gold-plating of European Directives and therefore ensure that the appeals regime more closely reflects the requirements of the Framework Directive. This aligns with the economic objective, which is to minimise the risk of regulatory uncertainty.

### What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

In order to meet the objectives outlined above, the Government is considering two options:

1. Maintain the status-quo ('do nothing')
2. Reform the appeals process and implement a judicial review which duly takes account of the merits

At this stage, the preferred approach is option 2, as it provides an effective, proportionate and fair appeal mechanism for industry - in line with the European Directive - but it also allows Ofcom to regulate the communications market more effectively, to the benefit of consumers and UK businesses.

**Will the policy be reviewed?** It will be reviewed. **If applicable, set review date:** 5/2016

**What is the basis for this review?** Duty to review. **If applicable, set sunset clause date:** Month/Year

**Are there arrangements in place that will allow a systematic collection of monitoring information for future policy review?**

Yes

**SELECT SIGNATORY Sign-off** For consultation stage Impact Assessments:

*I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.*

Signed by the responsible SELECT SIGNATORY: \_\_\_\_\_



Date: 11/07/2011

# Summary: Analysis and Evidence

# Policy Option 1

## Description:

Reform the appeals process and implement a judicial review which duly takes account of the merits

Price Base Year 2011	PV Base Year 2011	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: 117	High: 229	Best Estimate: 173

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	0	1-3	0
High	0.965		2.8
Best Estimate	0.48		1.4

### Description and scale of key monetised costs by 'main affected groups'

There is no legislative precedent in the UK for having a statutory judicial review which expressly sets out that an appeals body must duly take into account the merits of the case. There will therefore be a transitional cost associated with higher levels of litigation (e.g. more Competition Appeals Tribunal rulings being challenged in the Court of Appeal) as stakeholders test the legal boundaries of the new regime. These are estimated to be £0-190k to Ofcom and £0-775k for industry over a 1-3 year period.

### Other key non-monetised costs by 'main affected groups'

The number of appeals brought to the CAT could increase because the reduced costs of bringing an appeal will make it more accessible to smaller firms (though the decision to appeal is at the firm's discretion). Therefore, there will be costs associated with a higher number of appeals in both the short and long-term. However, it is expected that this will be more than offset by the cost saving from appeal bodies not needing to examine appeals as intensively as they do currently.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	0	14.9	120
High	1.88	26.9	229
Best Estimate	0.94	20.9	174

### Description and scale of key monetised benefits by 'main affected groups'

The Competition Appeals Tribunal – the main appeals body – will not need to scrutinise and examine appeals as extensively as it does under the current regime. Therefore, the average annual cost of appeals will fall by £0-380k and £0-1.5m for Ofcom and industry respectively in the transition period and £570k and £2.3m in the longer term. These estimates are considered conservative. Consumers are expected to benefit by around £12m-£24m per year as Ofcom regulatory interventions are implemented in a timelier manner.

### Other key non-monetised benefits by 'main affected groups'

In addition to the impact on consumers, reforming the appeals regime will have an effect on the wider market (e.g. competition and total welfare). By ensuring that regulatory decisions are less prone to delay, there will be more regulatory certainty and firms may be able to better plan their investments. It could also remove barriers to entry (which currently deter new entrants) and promote innovation. Some of the benefits to consumers will also apply to UK firms, the vast majority of which (at least 88%) are telecoms users.

### Key assumptions/sensitivities/risks

Discount rate (%) 3.5

It is not expected that the transition period required to clarify the scope of the new regime will last for more than 3 years. Direct costs of appeals are expected to fall by at least 20% in the transition period and 30% afterwards because the detailed review of economic and modelling assumptions (which will not be required under this option) is the most costly aspect of the appeal process. In the short-term, the reduction in cost due to efficiency gains is tempered by higher levels of litigation. The benefits to consumers and the wider market depend on the assumption that the new regime ensures that an Ofcom decision is overturned when the regulator makes a material error. This should hold because the merits of the case are still taken into account. Furthermore, the appeals process will remain more intensive than for other economic regulators.

Direct impact on business (Equivalent Annual) £m):			In scope of OIOO?	Measure qualifies as
Costs: 0.14	Benefits: 1.84	Net: +1.7	Yes	OUT

# Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?		United Kingdom			
From what date will the policy be implemented?		End 2011			
Which organisation(s) will enforce the policy?		Ofcom, CAT			
What is the annual change in enforcement cost (£m)?		-0.5			
Does enforcement comply with Hampton principles?		Yes			
Does implementation go beyond minimum EU requirements?		No			
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)		Traded: N/A		Non-traded: N/A	
Does the proposal have an impact on competition?		Yes			
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?		Costs:		Benefits:	
Distribution of annual cost (%) by organisation size (excl. Transition) (Constant Price)	Micro	< 20	Small	Medium	Large
Are any of these organisations exempt?	No	No	No	No	No

## Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on...?	Impact	Page ref within IA
<b>Statutory equality duties<sup>1</sup></b> <a href="#">Statutory Equality Duties Impact Test guidance</a>	No	
<b>Economic impacts</b>		
Competition <a href="#">Competition Assessment Impact Test guidance</a>	Yes	24
Small firms <a href="#">Small Firms Impact Test guidance</a>	Yes	24
<b>Environmental impacts</b>		
Greenhouse gas assessment <a href="#">Greenhouse Gas Assessment Impact Test guidance</a>	No	
Wider environmental issues <a href="#">Wider Environmental Issues Impact Test guidance</a>	No	
<b>Social impacts</b>		
Health and well-being <a href="#">Health and Well-being Impact Test guidance</a>	No	
Human rights <a href="#">Human Rights Impact Test guidance</a>	No	
Justice system <a href="#">Justice Impact Test guidance</a>	Yes	24
Rural proofing <a href="#">Rural Proofing Impact Test guidance</a>	No	
<b>Sustainable development</b> <a href="#">Sustainable Development Impact Test guidance</a>	No	

<sup>1</sup> Public bodies including Whitehall departments are required to consider the impact of their policies and measures on race, disability and gender. It is intended to extend this consideration requirement under the Equality Act 2010 to cover age, sexual orientation, religion or belief and gender reassignment from April 2011 (to Great Britain only). The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

## Evidence Base (for summary sheets) – Notes

Use this space to set out the relevant references, evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Please fill in **References** section.

### References

Include the links to relevant legislation and publications, such as public impact assessments of earlier stages (e.g. Consultation, Final, Enactment) and those of the matching IN or OUTs measures.

No.	Legislation or publication
1	First Government consultation <a href="http://www.culture.gov.uk/consultations/7806.aspx">http://www.culture.gov.uk/consultations/7806.aspx</a>
2	Responses to first consultation <a href="http://www.culture.gov.uk/consultations/8050.aspx">http://www.culture.gov.uk/consultations/8050.aspx</a>
3	Government approach to implementing the revised EU Electronic Communications Framework <a href="http://www.culture.gov.uk/publications/8048.aspx">http://www.culture.gov.uk/publications/8048.aspx</a>
4	European Legislation <a href="http://ec.europa.eu/information_society/policy/ecom/doc/library/regframeforec_dec2009.pdf">http://ec.europa.eu/information_society/policy/ecom/doc/library/regframeforec_dec2009.pdf</a>
5	Communications Act 2003 <a href="http://www.legislation.gov.uk/ukpga/2003/21/contents">http://www.legislation.gov.uk/ukpga/2003/21/contents</a>

### Evidence Base

Ensure that the information in this section provides clear evidence of the information provided in the summary pages of this form. Complete the **Annual profile of monetised costs and benefits** (transition and recurring) below over the life of the preferred policy (use the spreadsheet attached if the period is longer than 10 years).

#### Annual profile of monetised costs and benefits\* - (£m) constant prices

	Y <sub>0</sub>	Y <sub>1</sub>	Y <sub>2</sub>	Y <sub>3</sub>	Y <sub>4</sub>	Y <sub>5</sub>	Y <sub>6</sub>	Y <sub>7</sub>	Y <sub>8</sub>	Y <sub>9</sub>
<b>Transition costs</b>	0.48	0.48	0.48	0	0	0	0	0	0	0
<b>Annual recurring cost</b>	0	0	0	0	0	0	0	0	0	0
<b>Total annual costs</b>	0.48	0.48	0.48	0	0	0	0	0	0	0
<b>Transition benefits</b>	0.94	0.94	0.94	0	0	0	0	0	0	0
<b>Annual recurring benefits</b>	18	18	18	20.9	20.9	20.9	20.9	20.9	20.9	20.9
<b>Total annual benefits</b>	18.94	18.94	18.94	20.9	20.9	20.9	20.9	20.9	20.9	20.9

\* For non-monetised benefits please see summary pages and main evidence base section

# Evidence Base (for summary sheets)

## Background

1. In September 2010, Government published a consultation on the implementation of the revised EU Electronic Communications Framework Directive<sup>2</sup>. As part of its implementation, Government proposed to reform the appeals regime in the electronic communications sector. Although the proposals were not required by the amendments to the Directive, other mandatory requirements (for example more regular market reviews) are likely to have an impact on the appeals system. Furthermore, because transposition of the original Directive in 2003 (through the Communications Act 2003) went beyond EU requirements with regards to appeals, implementing the changes to the Directive offered an opportunity to bring UK legislation more closely in line with the Framework.
2. However, after the consultation closed in December 2010, a number of industry stakeholders voiced concerns about the proposed changes to the appeals regime. In order to address these concerns, Government has implemented the mandatory changes to the EU Framework separately<sup>3</sup>, without making the proposed changes to appeals, and decided to launch a second consultation on the issue with more focus and detail. This impact assessment accompanies the second consultation and assesses the impact of the Government's proposed reforms.

## Scope

3. The focus of this impact assessment is the electronic communications market and the UK's independent regulatory authority, the Office of Communications (Ofcom). This market is defined as the provision of electronically transmitted communications, whether wireless or fixed, data or voice, internet-based or circuit switched, broadcast or personal. It therefore covers the transmission and access of fixed and mobile telephone services, the internet and content-based broadcasting. Ofcom regulates the market by using the powers and authority granted to it under the Communications Act 2003, much of which transposes the five Directives that form part of the EU Electronic Communications Framework.
4. The communications sector itself generates around £50 billion of revenue per year, most of which comes from the telecommunications sector<sup>4</sup>. According to the Office for National Statistics<sup>5</sup>, the telecommunications and broadcasting sectors contribute almost £35 billion in Gross Value Added to the UK economy (almost 3% of total GVA) and employ approximately 236,000 individuals, although it should be noted that the ONS include activities that are not regulated by Ofcom (e.g. network installation and maintenance).
5. As Ofcom does not operate a licensing regime, the exact number of electronic communication providers is unknown. It is estimated that there are currently more than 600 providers in the UK, divided into the following: fixed network operators; mobile network operators; cable operators, and; service providers. The latter includes firms that provide access to electronic communications even though they do not operate a network, for example some internet service providers. Table 1 shows the number of providers for some of these. In addition, there are a wide range of service providers for fixed telephone and the internet, as well as firms that purchase and resell network capacity without providing additional services ('resellers'). Whilst recent figures are not available, research by Ofcom in 2007 indicated that the UK niche ISP market was made up of approximately 686 service providing businesses<sup>6</sup>, although it is likely that this has fallen in recent years due to market consolidation. In addition, there are an estimated 70 – 100 resellers in the UK that provide mobile phone services and more than 700 broadcast channels.

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<sup>2</sup> <http://www.culture.gov.uk/consultations/7806.aspx>

<sup>3</sup> The amendments to the Framework Directive have been implemented by the Electronic Communications and Wireless Telegraphy Regulations 2011 (S.I. 2011/1210). For further detail on implementation, see <http://www.culture.gov.uk/publications/8048.aspx>

<sup>4</sup> Ofcom, 'Communications Market Report 2010'. It should be noted that these figures represent wholesale and retail revenues for all communications and are not completely restricted to the transmission of electronic communications (particularly for radio and television, which includes advertising revenue).

<sup>5</sup> Annual Business Survey. The figures have been produced by using the 2007 SIC Codes for Programming and broadcasting activities (60) and Telecommunications (61).

<sup>6</sup> Ofcom, 'The Communications Market Special Report Niche ISPs' (2007)

**Table 1: Number of Communication Providers in the UK (2010)**

Communication Type	Number of Providers
Fixed PSTN* (local, national and international)	120
Mobile	4
Mobile Virtual Network Operators**	30+
Licensed Cable Operators	2

Source: Ofcom and OECD

\* Public switched telephone network (or PSTN) is the network that manages circuit-switched fixed-line telephone systems. This figure is an estimate as the UK does not have a licensing regime for the telecommunications industry.

\*\* MVNOs are organisations which provide mobile telephone services to its customers, but do not have allocation of spectrum or their own wireless network

6. Due to the fact that telecommunications is a network industry, is it relatively concentrated compared to other sectors (though it is worth noting that, in terms of market competition, the UK measures up strongly compared to other countries<sup>7</sup>). In the fixed-line market, BT and Virgin account for more than two thirds of connections whilst four mobile network operators (Vodafone, O2, Everything Everywhere and 3UK) account for almost 90% of mobile connections. With regards to internet access, although the number of providers is greater than for fixed and mobile services, the market has become increasingly concentrated during the past five years, with BT, TalkTalk and Virgin Media making up almost three quarters of the market<sup>8</sup>.

## Issue

7. The issue under consideration in this impact assessment is the appeals process that currently operates in the electronic communications sector. An effective appeal mechanism is an essential part of any regulatory regime, as it ensures that the system is proportionate and fair. Article 4 of the EU Framework Directive dictates that effective national mechanisms must allow any user or provider of electronic communications networks or services the right of appeal to an independent appeal body in the event of any disputes with the national regulatory authority.
8. In general, regulated companies affected by the actions of economic regulators have rights of appeal enabling them to take their case to the High Court for judicial review. The Court will review the manner in which the decision was made but it will not review the merits of the decision itself. However, the standard of appeal is different in the electronic communications sector. Article 4 of the EU Framework Directive states that 'Member States shall ensure that the merits of the case are duly taken into account'. This has been implemented through sections 192-197 of the Communications Act 2003, which includes provision for a merits-based appeal, using the Competition Appeal Tribunal (CAT) and the Competition Commission (CC). Specifically, Section 195(2) of the Act states that,
- "The Tribunal shall decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of the appeal".*
9. Therefore, unlike a judicial review the Tribunal can challenge the merits of the decision, looking at all parts of the decision-making process. For example, the Tribunal can consider whether each of sometimes more than a hundred variables in a model used by Ofcom to reach its decision was correct. The Tribunal sometimes takes new evidence that was not presented to Ofcom during the original decision making process. If it upholds an appeal the CAT can supplant Ofcom's decision, remitting the decision back to Ofcom with such directions (as any) as the Tribunal considers appropriate for giving effect to its decision. This is significantly different from other regulators which, outside their competition decisions, in most respects can only be appealed on the process of the decision making<sup>9</sup>. By allowing the CAT to carry out a detailed review of economic and modelling assumptions, the appeals process becomes significantly more time-consuming and costly.

<sup>7</sup> For further detail, see the impact assessment that accompanied the UK's approach to implementing the revised EU Electronic Communications Framework (April 2011)

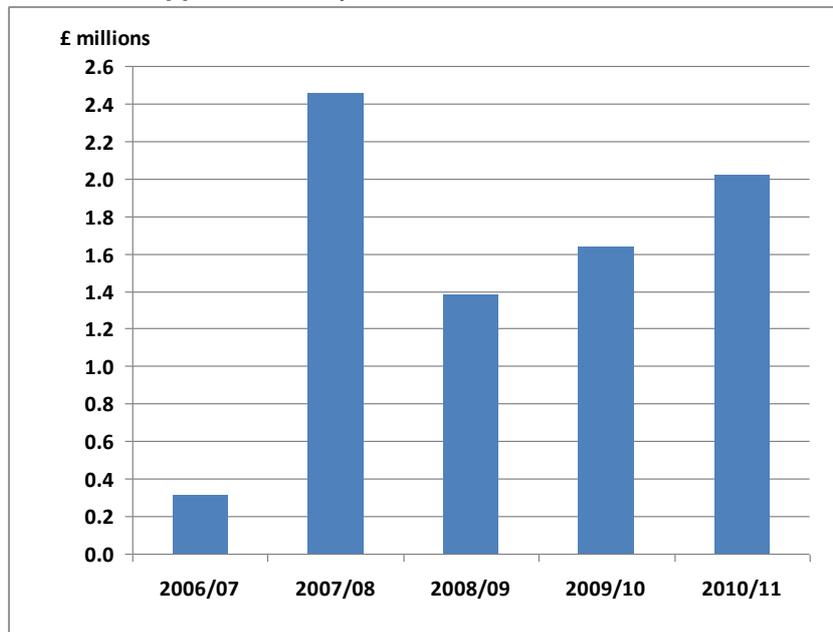
[http://www.culture.gov.uk/images/publications/Implementing\\_revised\\_EU\\_ElectronicCommunicationsFramework\\_IA.pdf](http://www.culture.gov.uk/images/publications/Implementing_revised_EU_ElectronicCommunicationsFramework_IA.pdf)

<sup>8</sup> Ofcom, 'Communications Market Report' (2010) and 'International Communications Market Report' (2010)

<sup>9</sup> NAO, 'Ofcom: The effectiveness of converged regulation' (November 2010)

10. Since the Communications Act 2003 came into force, Ofcom has been appealed 46 times<sup>10</sup>, leading to 32 Tribunal proceedings (some of the appeals were heard together as they covered similar issues). Of these, Ofcom has won eleven, lost four, achieved a split decision in four, and six cases were withdrawn (seven cases are ongoing)<sup>11</sup>. In one case which overturned a decision by Ofcom, the Tribunal's decision was itself subsequently overturned by the Court of Appeal<sup>12</sup>.
11. Figure 1 below outlines Ofcom's costs associated with Communication Act appeals, including legal costs and staff time. The level of staff time required to defend an appeal varies considerably, but in one year, on one appeal, over 7,000 staff hours (almost four staff years) were recorded<sup>13</sup>. More recent evidence from Ofcom indicates that more than 11,500 hours (about six staff years) were allocated to addressing appeals litigation in the financial year 2009-10, whilst the figure for the period April 2010 – January 2011 was almost 9,000<sup>14</sup>.
12. The frequency and length of Communications Act appeals under Section 192 (s192) has risen and, as a result, the associated cost to Ofcom has been over £1 million per year since 2007/08. Figure 1 shows that after falling from the 2007/08 peak – which was partly due to an Ofcom decision on mobile termination<sup>15</sup> – the costs have steadily increased to more than £2 million in 2010/11 (the total cost - if all appeals against Ofcom's decisions are included – was £4.7 million during that financial year). The cost of appeals in 2011/12 is also expected to be high because of the mobile call termination and Pay TV appeals<sup>16</sup> taking place at the same time, as well as various related disputes appeals. In the first month of the financial year 2011/12, Ofcom incurred almost £0.5 million of costs linked to appeals. Whilst the annual costs are a small proportion of Ofcom's total spending (between 1 and 2 per cent), if one just considers the resources that Ofcom devotes to competition, then appeals accounts for around 6 per cent of competition-related work and a higher proportion of senior staff time<sup>17</sup>. If costs remain at the levels experienced in 2010/11 (and expected for 2011/12), the impact on Ofcom's finances will be significant. The European Commission also noted in a recent report that appeals against Ofcom decisions, 'in particular put a strain on the regulator's resources'<sup>18</sup>.

**Figure 1: Ofcom's appeals costs (under Section 192 of the Communications Act)**



Source: Ofcom. The costs are higher than those presented in the NAO report because they include overheads.

<sup>10</sup> Of these 46 appeals, 39 were referenced under part 2 of the Communications Act 2003 or parts 1-3 of the Wireless Telegraphy Act (this includes appeals related to electronic communications networks, services and radio spectrum). The remainder of the appeals are mostly associated with Pay TV matters. (Source: Ofcom)

<sup>11</sup> Information obtained from NAO, 'Ofcom: The effectiveness of converged regulation' (November 2010), with updates to May 2011 provided by Ofcom.

<sup>12</sup> Case 1100/3/3/08 – The Number (UK) Limited and Conduit Enterprises Limited v Ofcom

<sup>13</sup> Ibid

<sup>14</sup> Source: Ofcom

<sup>15</sup> Towerhouse Consulting, 'Appeals from Ofcom decisions: Time for reform?' (December 2010)

<sup>16</sup> Though it is important to note that the Pay TV appeal does not fall under s192 of the Communications Act so the cost would not be affected by the changes discussed in this document. Section 317 of the Communications Act is the relevant section for broadcasting appeals.

<sup>17</sup> Source: Ofcom

<sup>18</sup> European Commission, '15<sup>th</sup> Progress Report on the Single European Electronic Communications Market' (2009)

13. Ofcom's income is sourced from both grant-in-aid by Government – primarily for spectrum management - and regulated companies, the latter through broadcast licence fees, administrative and other charges. In 2009/10, Government grant-in-aid amounted to around £76.2 million whilst income from industry totalled £56.5 million (total income was therefore £132.7 million)<sup>19</sup>. However, Ofcom's resources are subject to a financial cap on the regulator, which is agreed on a cash basis with HM Treasury (HMT). Whilst HMT accepted when Ofcom was created that the regulator should have operational freedom, as the guardian of overall public expenditure it set an overall ceiling on Ofcom's spending<sup>20</sup>. Since its creation the level of this cap has been reduced year-on-year, meaning that Ofcom has accordingly been required to deliver its work programme for a lower total expenditure each year. Furthermore its work programme includes the delivery of additional duties, such as those imposed by European legislation, as well as: requirements to plan and manage the spectrum for the London 2012 Olympic and Paralympic Games; preparing for the possible integration of the postal services regulator (Postcomm); increasing digital participation; reducing the scale of illegal peer-to-peer file sharing; and taking forward a mobile spectrum modernisation plan. During the next four years, Ofcom is expected to cut its overall real-terms budget by 28%<sup>21</sup>.
14. As a result of the increasing number and cost of appeals, Ofcom has argued there have been delays in implementing regulatory decisions, in addition to the increased operational and financial resources required to defend the challenges. In a report published in November 2010, the National Audit Office found evidence that Ofcom does not always act on its consultations in a timely manner on relevant issues. Ofcom responded by indicating that the speed of its action is hampered by the incentives on regulated firms to appeal its decisions. As a result, Ofcom considers evidence submitted by regulated companies several months after the formal close of a consultation, as failure to do so could itself be grounds for appeal. For example in March 2007, Ofcom started an investigation into the pay-TV market which included three consultations, the last of which began on 26 June 2009 with a closing date of 18 September 2009. Despite this closing date, Ofcom received consultation responses up to the end of February 2010 and did not publish its final response until March 2010, which was appealed<sup>22</sup>. Another example of appeals holding up decisions is in relation to dispute resolution. Ofcom currently has one dispute which is not progressing pending a judgment from the CAT on a separate dispute appeal, which raised issues of direct relevance to the subsequent dispute, and which has resulted to date in over eight months of delay.
15. Ofcom considers this to be a shortcoming in a legislative environment that leads to regulatory uncertainty. The European Commission also noted delays in decision-making in the case of market analysis of leased lines, which created uncertainty for operators using the regulated wholesale products<sup>23</sup>.
16. Given that the Communications Act 2003 sets a higher hurdle for Ofcom in dealing with appeals against its regulatory decisions than is the case for the other economic regulators, the NAO recommended that Government should take into account evidence concerning the impact of the current regime as part of its review of the legislative framework. Furthermore, due to the other changes that are being implemented as part of the revised EU Electronic Communications Framework, for example a more frequent market review process, there is a risk that these changes - combined with the current appeals process - may lead to an increase in regulatory uncertainty caused by a 'gridlock' of continuous overlapping appeals and market reviews. In the case of the latter, any annulment or partial reform of a market review can create regulatory uncertainty – the fact that an Ofcom market analysis on voice call termination on individual mobile markets was partially amended by the CAT reduced the UK's regulatory score on the most recent scorecard by the European Competitive Telecommunication Association (ECTA)<sup>24</sup>.

## Government Rationale

17. Whilst regulation is required to remedy certain market failures in the electronic communications market, the regulatory regime must be proportionate, accountable and provide legal certainty. It is

<sup>19</sup> Ofcom Annual Report 2009-10

<sup>20</sup> Ofcom, 'A case study on public sector mergers and regulatory structures'

<sup>21</sup> Public Accounts Committee, <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmpublicacc/688/68804.htm>

<sup>22</sup> This particular case is relevant to Ofcom's broadcasting power, and so the appeal mechanism does not flow from the Framework Directive. However, the mechanism is the same for electronic communication providers and the scope for delay remains the same.

<sup>23</sup> European Commission, '15<sup>th</sup> Progress Report on the Single European Electronic Communications Market' (2009)

<sup>24</sup> ECTA Regulatory Scorecard 2009

therefore essential that an effective appeals mechanism is available for both regulated bodies and communication users. In addition, a robust appeals process raises the standard of regulatory decision making. However, such a process should operate in a way that the regulator is able to fulfil its principal duty - in the case of Ofcom, this is to further the interests of citizens and consumers in relevant markets. Furthermore, given the changes that the revised EU Framework imposes - for example the requirement to conduct market reviews every three years - there is a possibility that the current mechanism could act as an impediment in Ofcom's ability to make timely and effective decisions in the interests of citizens and consumers.

18. As acknowledged by ECTA, the possibility of appealing decisions of the regulator and the way in which such appeals are implemented in practice can significantly impact the effectiveness of a regulatory regime. Appeals of market analysis decisions create significant legal uncertainty in the market, which is detrimental to all market players (and new entrants in particular who are more likely to depend on regulated access products for developing their activities). ECTA has argued that the suspensive effect of such appeals in many EU countries has presented a potential hurdle for new entrants seeking to ensure that Significant Market Power (SMP) operators effectively comply with the decisions of the regulators<sup>25</sup>. In addition, the timeframe for obtaining a decision on appeal and the likelihood that decisions are overturned are important given the inherent legal uncertainty caused by such appeal processes.

### *Gold-plating*

19. The Coalition Agreement includes a commitment to “end the so-called ‘gold-plating’ of EU rules”<sup>26</sup>. The Communications Act, as it is currently written, goes beyond the requirements of the Directive with regards to appeals because it obliges the CAT to “decide the appeal on the merits” rather than “ensuring that the merits of the case are *duly taken into account*”. When the Government originally implemented Article 4 of the Framework Directive in 2003, the intention was not to gold plate UK implementation. However, it has since become clear that in practice an appeal “on the merits” goes beyond what is required. The impact of this is that it imposes unnecessary costs on the regulatory system, making it less effective than it could be.
20. It has been argued that the current transposition has been interpreted by some appellants as requiring a full rehearing of the case, rather than a consideration as to whether Ofcom made a material error. In December 2008, the question of what is required by Article 4(1) of the Framework Directive to provide an effective appeal against regulatory decisions by Ofcom was considered by the Court of Appeal in the T-Mobile case, in December 2008<sup>27</sup>. The case concerned the question of whether the CAT had jurisdiction to hear a judicial review of an Ofcom decision to hold a spectrum auction and in particular (i) whether Article 4 requires a rehearing and (ii) whether judicial review was capable of meeting the specific requirements of Article 4(1) Framework Directive *duly to take account of the merits of a case*. Lord Justice Jacob held in relation to the requirements of Article 4(1) that: “*it is inconceivable that Art. 4 in requiring an appeal which can duly take into account the merits, requires Member States to have in effect a fully equipped duplicate regulatory body waiting in the wings just for appeals. What is called for is an appeal body and no more, a body which can look into whether the regulator had got something material wrong.* (paragraph 31)” He went on to find that a judicial review was capable of meeting the requirements of Article 4(1) because the intensity of judicial scrutiny could be adjusted according to those requirements.
21. The Government received responses to its original consultation which argued that the current legislation does not require a full rehearing of the case and that it instead focuses on the parts of an Ofcom decision where appellants have raised particular issues. Whilst Government accepts that this is the case on a strict interpretation of the provision as it stands, the key issue is that during the appeals process, factual and analytical findings are re-examined in rigorous and extensive detail, even though it is not required by the Directive. More importantly, this current standard of review by the CAT and the Competition Commission has detrimental consequences in terms of how effectively Ofcom regulates the market, which has a direct impact on consumers. This is discussed in more detail below.

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<sup>25</sup> ECTA Regulatory Scorecard 2009

<sup>26</sup> HM Government, ‘The Coalition: our programme for government’ (2010)

<sup>27</sup> Judgement by Lord Justice Jacob, T-Mobile (UK) Ltd & Telefónica O2 Ltd v Ofcom (2008) EWCA Civ 1373

## Policy Objectives

22. The Government's objective is to deliver a quicker and more focused appeal process which is less costly for the appellants, Ofcom and the appeal bodies but still ensures access to justice and an ability to challenge Ofcom decisions where a material error is identified. It is also the aim of Government to minimise the gold-plating of European Directives and therefore ensure that the appeals regime more closely reflects the requirements of the Framework Directive. This aligns with the economic objective, which is to minimise the risk of regulatory uncertainty.

## Options Analysis

23. Article 4(1) of the EU Framework Directive states that,

*"Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise to enable it to carry out its functions effectively. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism. Pending the outcome of the appeal, the decision of the national regulatory authority shall stand, unless interim measures are granted in accordance with national law."*

24. This is implemented through section 195(2) of the Communications Act 2003, which states that, "*the Tribunal shall decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal.*" As discussed above, the current transposition of Article 4 goes beyond the Directive's requirements.
25. Therefore, in order to better align UK regulation with EU legislation the Government is consulting on amending section 195 of the Communications Act to make it more consistent with the principles of Article 4(1) of the Framework Directive. Specifically, it is considering whether it is suitable to have a more narrowly-focused appeal process along the lines of a judicial review which duly takes account of the merits. This option is therefore assessed against a baseline scenario of maintaining the status quo.

### Option 1 – Do nothing

26. This option would leave section 195 of the Communications Act unchanged and maintain the current appeals regime.

### Costs

27. Under the current appeals system, Ofcom's findings of fact and analysis are routinely interrogated in considerable detail. Decisions are subject to profound and rigorous scrutiny and hearings are considerably lengthier than is typically the case for judicial reviews. In many cases, this is due to the treatment of alleged errors of fact and/or analysis of those facts, and the regular extensive examination and cross examination of factual and expert witnesses in relation to these matters on part of Ofcom's decision. This 'double banking' of decision making, where certain (though not all) matters are considered in full by Ofcom and then again in full by the CAT and/or the CC, has led to significant time and resource costs for Ofcom and for all concerned.
28. As Figure 1 above highlights, the direct costs to Ofcom of defending Communication Act appeals under s192 have increased significantly over the past four years (relative to the costs before 2007/08). Based on this trend, it is possible that the annual costs could remain at around £2 million or possibly increase further in the years ahead.
29. Of much greater significance however are the indirect effects of Ofcom decisions being delayed or held up, either due to a re-allocation of resources away from its policy and enforcement work or as a result of Ofcom spending more time to prepare for the risk of a very granular appeal (for example see paragraph 14 above). This has the potential to create regulatory uncertainties and consumer detriment as it affects all of Ofcom's interventions and therefore reduces the speed of decision

making across regulatory projects (as highlighted in the NAO report). Furthermore, although Ofcom decisions usually remain binding until the CAT has made its ruling, in many cases Ofcom must wait for an appeal to conclude before it can take action on other separate matters (due to the need for legal certainty and a more general need to make effective use of its internal resources).

30. It is difficult to robustly quantify such indirect impacts. However, Table 2 below provides some recent examples of the costs to consumers from having an appeals regime that is more scrutinous than necessary. It also shows that the legislative environment in which Ofcom operates has an impact on all of its consultations and decisions and not just those that are appealed. Indeed, it is not whether a decision is ultimately appealed that drives the consumer detriment, but the need for Ofcom to mitigate the risk of appeal (for example by considering consultation responses after the closing deadline) and the fact that Ofcom does not have sufficient dedicated resource. With regards to the latter, detailed appeals are costly for Ofcom to defend in terms of the internal and external resources that are needed, which in turn slows down the number of ongoing policy projects as senior staff need to spend a considerable amount of time defending appeals. This delays the regulator's decision-making and potential improvements in consumer welfare. Table 2 illustrates that such indirect costs to consumers are typically of a much higher order than the direct legal costs of appeals to both Ofcom and communication providers.

**Table 2: Indirect costs to consumers due to delays in regulation**

Project name / reference	Intervention measure	Date started	Date of statement	Estimated delay due to appeals regime <sup>28</sup>	Description of consumer benefit foregone due to the above delay	Estimate of the cost of delay to UK consumers	Appealed?	Grounds of appeal
Pay TV market investigation (statement <sup>29</sup> with CBA at p.593, 619-627)	Ofcom found that Sky exploits its market power by limiting the wholesale distribution of its premium channels, with the effect of restricting competition from retailers on other platforms. Ofcom decided that it should use its powers under section 316 of the Communications Act to ensure fair and effective competition by requiring Sky to offer the most important sports channels – Sky Sports 1 and Sky Sports 2 – to retailers on other platforms, at prices set by Ofcom.	March 2007	March 2010	1 year	Taking account of both quantifiable and non-quantifiable benefits and costs to consumers and industry participants, Ofcom concluded that the wholesale must-offer obligation would give rise to a range of dynamic benefits, particularly driven by greater retail and platform innovation. It also concluded that there was the potential for substantial static benefits to consumers resulting from a greater ability to exercise a choice of platform.	£20m*	Yes  BSkyB, BT, Virgin Media (arguing that the wholesale price set by Ofcom is too high)	Powers – legal argument Analysis of Sky's incentives to withhold supply Remedy and IA – consumer surplus, sports rights Pricing – Sky's costs versus entrants' costs
Mobile mis-selling (statement <sup>30</sup> with CBA at p.3, 89)	The statement established a General Condition on sales and marketing practices that would apply to all mobile service providers. The aim was to tackle inappropriate sales and marketing behaviour that can undermine consumer confidence in markets and cause individuals harm.	September 2007	March 2009	3 months	Consumers mis-sold services can suffer anxiety, distress and inconvenience. Financial harm can also result if consumers are on inappropriate price or service packages due to mis-selling.	£3m**	No	
Mobile number portability (statement <sup>31</sup> , consultation <sup>32</sup> with CBA at p.62)	The statement aimed to make mobile number porting easier and quicker for consumers. It modified General Condition 18 as follows: i) reduced the porting time from two to one working days; ii) required communications providers, to accept porting requests by telephone; iii) required communications providers to issue the PAC code (following requests by telephone) immediately or within two hours by SMS.	September 2008	July 2010	1 month***	Faster mobile number porting makes it easier for consumers to keep their mobile numbers when switching provider, and limits any harm to consumers (such as unnecessary cost) arising from the process.	£160K****	No	
Tackling abandoned and	Over 22% of the population have experienced silent calls on their	November 2009	October 2010	2 months	Abandoned and silent calls will almost invariably result in consumer	£1.7m*****	No	

<sup>28</sup> Estimates provided by Ofcom

<sup>29</sup> [http://stakeholders.ofcom.org.uk/binaries/consultations/third\\_paytv/statement/paytv\\_statement.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/third_paytv/statement/paytv_statement.pdf)

<sup>30</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/mobmisselling/statement/statement.pdf>

<sup>31</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/mnp/statement/mnp.pdf>

<sup>32</sup> [http://stakeholders.ofcom.org.uk/binaries/consultations/mnp/summary/mnp\\_condoc.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/mnp/summary/mnp_condoc.pdf)

<p>silent calls (statement<sup>33</sup>, consultation<sup>34</sup> with CBA at p.22)</p>	<p>landline in the previous 6 months. Ofcom believes that the consumer harm from repeat silent calls is likely to outweigh the benefits enjoyed by answer machine detection (AMD) users. Therefore, Ofcom added to the policy criteria set out in the 2008 Revised Statement to limit call centres calling answer machines. When a call has been identified by AMD technology as an answer machine (including AMD false positives), any repeat calls to that number may only be made with the guaranteed presence of a call centre agent.</p>				<p>harm, which may range from inconvenience and annoyance through to genuine anxiety, particularly for people who live alone. This is especially the case for silent calls. Multiple calls of this nature over a short period may lead to a consumer believing they are being targeted or harassed. Although the majority of UK consumers do not suffer from repeat silent calls, the impact on those that do, is significant. Some consumers complaining to Ofcom have received 10 or more silent calls a day, from the same company. Ofcom estimates that 2 million people in the UK are affected by this problem.</p>			
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\* £600m of estimated benefits over five years brought forward by a year at 3.5% gives about £20m.

\*\* Ofcom estimated the ongoing net benefit of its intervention at £12m per year.

\*\*\* The main driver of delay to this project was aligning publication with that of the Mobile Call Termination (MCT) consultation (because the discount rate used in the routing project - which was aligned with the porting project - used the discount rate from the MCT project). The MCT project was delayed because of the need to mitigate the risk of a granular appeal.

\*\*\*\* Ofcom estimated the ongoing net benefit of its intervention at a midpoint value of £1.9m per year (ranging between £0.6m-£3.2m).

\*\*\*\*\* The per consumer average benefit of avoiding silent calls is estimated at £5 per year (range: £3-£7). As 2m people are estimated to be affected, this amounts to £10m per year.

<sup>33</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/statement/silentcalls.pdf>

<sup>34</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/summary/condoc.pdf>

31. In addition to the impact on consumers, the appeals regime has an effect on the wider market (e.g. competition and total welfare). Furthermore, if an appeals system causes regulatory interventions to be delayed longer than is necessary, the loss of regulatory certainty may restrict companies' ability to plan their investments, in addition to deterring new entrants and further innovation.
32. As with the consumer impact, this is difficult to quantify but the following paragraphs provide some examples to highlight the scale of the issue. Whilst they are only used as case studies, as with Table 2 they illustrate the effect of having an appeals regime that requires more scrutiny than necessary.
33. Ofcom's award of the 2.6 GHz spectrum band. This spectrum award offered the opportunity for the development of mobile broadband services in the UK, across Europe and in a number of other countries. Some mobile network operators requested a delay in the award but Ofcom analysis demonstrated that any delay would be a detriment to both competition and innovation. Ofcom's model indicated that the award would create greater competition in the provision of mobile services if awarded as soon as possible. If it brought one new player to the market it would generate £800 million in benefit, rising to £1.7 billion if it brought three new players – this is the net welfare effect of increases to consumers and losses to incumbents from reductions in prices. On this basis, Ofcom found that the total welfare from greater innovation would range from £200 million to £1.4 billion. Ofcom found that for every year of delay, the competition and innovation benefits that would have been gained that year would be lost. Ofcom's model implied that for each year of delay to the award, competition benefits alone might fall by between £70 million to £150 million<sup>35</sup>, depending on the number of competitors in the market. In the event, Ofcom's auction decision was appealed and the award was delayed for the better part of a year. Whilst this case was not appealed under section 192 of the Communications Act and may represent an overestimate compared to the average appeal, it illustrates the general point that the wider costs of the current appeals regime to the communications market are higher than the direct costs of litigation.
34. Price controls. As highlighted above, whilst Ofcom decisions are not delayed as a result of the launching of an appeal – as the decision is binding unless overturned – there are a number of cases which are waiting on the appeals process of a previous case to be completed before they can be fully resolved. For example, Ofcom set a price control for access to Openreach's network<sup>36</sup> in May 2009 to run until March 2011. The decision was appealed in July 2009 and the CAT made its final decision in October 2010. This has had a knock-on effect on the price control operating from April 2011 and Ofcom have had to rely on a voluntary undertaking from BT on prices from April until it can issue a new control. This has had an impact on Openreach's ability to plan its business and announce changes to its charges in an orderly way. It also impacts on other communications providers in terms of planning and forecasting the costs of regulated inputs into their services. It is possible this arrangement will have imposed higher prices than Ofcom would otherwise select.

#### **IAQ1. Are there other costs arising from the current appeals system that have not been considered?**

35. With regards to market uncertainty, it is also important that maintaining the current appeals regime is analysed in the context of implementing the revised EU Framework Directive; whilst appeals already impose a significant resource burden on Ofcom, they could take on an even greater significance as a result of the requirement to conduct more regular market reviews (every three years instead of 4-5)<sup>37</sup>. Given that an appeal can last for up to two years (sometimes longer if it is taken further to the Court of Appeal, although the incidence of these has declined in recent years), it will be difficult for Ofcom to conduct reviews in a three year period that produces strong analytical evidence whilst also building in sufficient time for possible appeals. This is because Ofcom's approach to the review (for example

<sup>35</sup>For full details of this analysis, see Ofcom, 'Award of available spectrum: 2500-2690 MHz, 2010-2025 MHz' (April 2008). Annex 4 contains the quantification of competition and innovation benefits.

<sup>36</sup> Openreach supplies communication providers with products and services linked to the UK's local access network. It was established in 2005 when Ofcom accepted undertakings from BT to place its access and backhaul businesses in a business unit that was separate from the company's retail services.

<sup>37</sup> Some of the responses to the first consultation pointed out that the number of markets within the electronic communications sector that warrant ex-ante regulation has been reduced from 18 to 7. However, the recent market overview published by the European Commission shows that only one of the previous 18 markets no longer requires ex-ante regulation in the UK. Therefore, the remainder are still subject to market reviews.

[http://ec.europa.eu/information\\_society/policy/ecomm/doc/implementation\\_enforcement/eu\\_consultation\\_procedures/market\\_overview\\_105201\\_1.pdf](http://ec.europa.eu/information_society/policy/ecomm/doc/implementation_enforcement/eu_consultation_procedures/market_overview_105201_1.pdf)

if it were to change price controls) cannot be finalised until after it has received a relevant decision from the CAT.

36. This could lead to regulatory 'gridlock', resulting in significant uncertainty in the market. It is possible that this would have a detrimental impact on competition because Ofcom remedies would not be implemented in a timely manner. The costs for both consumers and the wider market could therefore escalate significantly over what has been highlighted above. Some industry stakeholders have suggested that this may be mitigated via a learning effect from the past seven years – by both Ofcom and communication providers – that is, appeals may soon be more efficient and concluded more quickly based on learning from previous decisions (for example on price control matters). On the other hand, the evidence of an increase in the length of appeal proceedings in the last few years (reflected by the escalation of associated costs for Ofcom and industry) indicates that this may not be likely if the current legislative framework remains unaltered. Ofcom has also argued that the learning effect could work in the opposite direction, with industry stakeholders bringing increasingly granular and tactical appeals on the back of the CAT's and CC's willingness to engage with very detailed modelling assumptions.
37. This final point is related to the issue of incentives in the current appeals regime. Given that appeals are heard at a granular level, it may be in the interest of regulated firms to appeal Ofcom decisions - regardless of the overall merits of the decision - if the expected benefit (the probability of winning the case multiplied by the commercial gain) is greater than the cost of appeal. For example, the four appeals to Ofcom's mobile call termination decision submitted to the CAT in May 2011 focus on many detailed assumptions in the model used by Ofcom to determine this price cap. A "win" on each of these assumptions could bring significant commercial benefit given the size of the market. The appeal body (in this case the CC) will in practice be asked by the appellants to examine in detail many assumptions in Ofcom's model to be able to decide on each of the granular grounds of appeal. The appellant(s) may also put forward evidence not provided to Ofcom during the original consultation.
38. Some of the responses to the first consultation highlighted concerns about speculative, 'cherry-picking' and defensive appeals<sup>38</sup>. In the case of the latter, a party may launch an appeal even if it is minded to accept Ofcom's decision because it fears that other parties will bring an appeal in relation to certain favourable aspects. On the other hand, however, many firms consider the current regime to provide a sufficient deterrent to speculative and frivolous appeals. This is discussed in the next section.
39. Lastly, the high cost of bringing an appeal could be acting as a deterrent to smaller operators or consumer groups from either appealing, or intervening in support of Ofcom to ensure their position is considered by the CAT (that is, the Tribunal may only hear the direct views of those stakeholders who can afford to appear before it). One of the responses to the first consultation<sup>39</sup> argued that current litigations place heavy cost burdens on smaller, less-resourced firms and that larger incumbents are in a better position to use the appeals regime against smaller firms and new operators. The Federation of Communication Services – the UK Trade Association for the communications services industry – also expressed concerns that there is currently no proportionate appeals process for smaller companies in the communications sector, as current thresholds for appeals represent a significant barrier<sup>40</sup>.

**IAQ2. Do you have further qualitative and quantitative evidence on the impact of the appeals regime on smaller firms?**

**IAQ3. Are there other costs (either to industry or consumers) of the current regime that have not been considered?**

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<sup>38</sup> See for example [http://www.culture.gov.uk/images/consultation\\_responses/FWR2011-BT\\_\(Appeals\).pdf](http://www.culture.gov.uk/images/consultation_responses/FWR2011-BT_(Appeals).pdf) and [http://www.culture.gov.uk/images/consultation\\_responses/FWR2011-Three.pdf](http://www.culture.gov.uk/images/consultation_responses/FWR2011-Three.pdf)

<sup>39</sup> [http://www.culture.gov.uk/images/consultation\\_responses/FWR2011-Three.pdf](http://www.culture.gov.uk/images/consultation_responses/FWR2011-Three.pdf)

<sup>40</sup> [http://www.culture.gov.uk/images/consultation\\_responses/FWR2011-FCS.rtf](http://www.culture.gov.uk/images/consultation_responses/FWR2011-FCS.rtf)

## Benefits

40. Responses to the first consultation<sup>41</sup> showed that many communication providers are generally supportive of the current appeals procedure in the UK. Contrary to the idea that the high level of scrutiny currently applied to appeals creates regulatory uncertainty, a number of firms consider that the appeals process provides certainty by confirming the correctness of Ofcom's decision and its underlying principles, as well as enhancing the consistency of final regulatory decisions. They also believe that it ensures that the quality of regulatory decisions is of an adequate standard and that there are no regulatory 'gaps' or lacunas.
41. As discussed in paragraph 10 above, out of 25 appeals that have been concluded, Ofcom's decision was ultimately overturned on three occasions<sup>42</sup>, with a split decision on a further four. Whilst only a minority of decisions have been fully or partially overturned, the fact that they still represented just over a quarter of appeals demonstrates that the current process has been an effective check on Ofcom's regulatory role, for example where mistakes have been made in procedure or analysis. BSKyB has cited the Carphone Warehouse Group's appeal of Ofcom's decisions imposing price controls on Openreach's wholesale line rental (WLR) and local loop unbundling (LLU) charges as an example where Ofcom's decision making improved after the appeal<sup>43</sup>. In this case it was felt that, due to the points raised during appeal, Ofcom revised its approach to transparency in its decision making on price controls.
42. As with the costs, the wider benefits of the regime are difficult to quantify. However, an illustration was provided by Vodafone in its response to the first consultation<sup>44</sup>, which highlighted a specific Ofcom decision on mobile number portability in 2008 that would have resulted in a company cost of approximately £40 million if the decision had been implemented. If the cost to other mobile network operators (MNOs) was of a similar order, then the total cost to industry would have been around £200 million (based on the fact that there were four other mobile network operators in the UK at the time). The decision was subsequently overturned by the CAT due to a flawed consultation process (though MNOs still incurred a significant cost during the course of the appeal). The CAT found that Ofcom, in this instance, had failed to adequately investigate the arguments raised by stakeholders about the potential costs. Following a further review, an alternative course of action was followed that was less costly to Vodafone, in the region of £1 million. Therefore, in the context of the wider industry (i.e. including the other MNOs), the benefit (or cost saving) of the appeals system in this case was in the order of hundreds of millions of pounds (though this does not take into account the reduced benefits to consumers that resulted from the final decision).

### **IAQ4. Do you have any further quantitative and qualitative evidence on the wider benefits of the current appeals regime?**

43. It is also the opinion of many operators and service providers that the current process deters frivolous appeals given the legal costs and management time required to lodge and prosecute an appeal. Whilst the cost to appellants varies significantly between cases, anecdotal evidence suggests that the cost per appeal may range from just under £100,000 to a number of millions of pounds. The fact that a firm may be required to pay the other party's costs if an appeal fails also creates a disincentive to mount a spurious appeal, as does the potential reputational impact of being seen as frivolous by the CAT. However, as discussed in paragraphs 37-38 above, there is also an argument that the current regime incentivises firms to appeal Ofcom decisions regardless of the overall merits.
44. Many industry stakeholders believe that the current system is a well-understood and embedded regime, providing a degree of certainty about the appeals process in general. Some of the responses received during the first consultation have also suggested that the number of appeals could level-off or drop in the coming years, as communication providers and Ofcom have a large body of guidance and CAT decisions on which to draw on from the past several years. On the other hand, Ofcom disagrees with this view because it believes that under the current regime, bringing an appeal represents a weakly dominant strategy (i.e. the appellant is unlikely to be worse off if the CAT or CC

<sup>41</sup> A list of responses to the first consultation can be found on the DCMS website <http://www.culture.gov.uk/consultations/8050.aspx>

<sup>42</sup> As mentioned in paragraph 10, Ofcom's decision has been overturned four times but in one of these instances, the Tribunal's decision was overturned by the Court of Appeal.

<sup>43</sup> [http://www.culture.gov.uk/images/consultation\\_responses/FWR2011-BSkyB\\_\(Appeals\).pdf](http://www.culture.gov.uk/images/consultation_responses/FWR2011-BSkyB_(Appeals).pdf)

<sup>44</sup> [http://www.culture.gov.uk/images/consultation\\_responses/FWR2011-Vodafone\\_\(Appeals\).pdf](http://www.culture.gov.uk/images/consultation_responses/FWR2011-Vodafone_(Appeals).pdf)

rules against it). This means that the incentives to appeal commercially important decisions remain high.

**IAQ5. Do you have evidence as to whether or not the current appeals regime provides the right incentives for regulated firms?**

**IAQ6. Are there other benefits (either to industry or consumers) of the current regime that have not been considered?**

### *Risks and assumptions*

45. In addition to the revised EU Framework, it is important to consider the financial constraints within which Ofcom will need to operate in the coming years. As discussed above, as part of its funding agreement with Treasury, Ofcom will be required to implement a real-terms budget cut of 28% during the next four years. In order to meet the challenges of both its new responsibilities and the reduction in its budget following its latest spending settlement with Government, Ofcom will need to be able to use its resources more efficiently and an appeals process that is more burdensome than necessary may hinder this objective.

### Option 2 – Replace the current appeals mechanism with a judicial review which duly takes account of the merits

46. A judicial review is an appeals scrutiny procedure which, for the most part, focuses on the process by which a public authority (such as a regulator) made a decision. A judicial review does not generally look at the merits of the decision being challenged. It ensures that, at a minimum, the court gives due consideration to whether the regulator acted lawfully, followed the correct procedures, took relevant issues and evidence into account and generally acted in accordance with its statutory duties. A judicial review which only took these limited factors into account would not be appropriate for the most of the decisions that Ofcom takes with regards to the electronic communications market because those decisions are subject to Article 4 of the Framework Directive, which still requires the appeal body to ensure that the merits of the case are ‘duly taken into account’.

47. However, judicial review is not restricted to considering the narrow set of factors in the preceding paragraph. It has evolved and the courts have made it clear that it is sufficiently flexible to take the merits into account where it is necessary and appropriate to do so<sup>45</sup>. The Government therefore believes that judicial review is capable of duly taking into account the merits and so would be capable of meeting the requirements of Article 4 of the Framework Directive. Nevertheless, the Government considers that it would be necessary and desirable from the perspective of implementing Article 4 to make it clear in the legislation that the Article 4 test would apply.

48. This option would therefore involve the Government amending the appeals provisions under s192<sup>46</sup> of the Communications Act 2003 by removing the requirement for the case to be decided ‘on the merits’ and instead it would require the CAT to decide the case by applying the same principles that would be applied by a court on an application for judicial review, but also ensuring that the merits of the case are ‘duly taken into account’. It is in effect a system of ‘enhanced’ judicial review. The change will ensure that the requirements of Article 4 are fully met but not exceeded, whilst ensuring that industry’s rights of appeal are fully protected.

### *Costs*

49. There is no legislative precedent in the UK for having a statutory judicial review which expressly sets out that it must duly take into account the merits of the case. However, the Court of Appeal made clear in the T-Mobile case that there have been situations where the operation of the Human Rights Act has required the judicial review process to be sufficiently flexible to consider the merits of a case. Whilst the basic principles of judicial review (including its flexible nature) are well understood, the proposed changes represent a departure from a classic judicial review and may therefore create

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<sup>45</sup> As Lord Justice Jacob stated in the T Mobile case, “Accordingly I think there can be no doubt that just as JR was adapted because the Human Rights Act so required, so it can and must be adapted to comply with EU law and in particular Article 4 of the Directive.” A current judicial review in relation to the Digital Economy Act has also involved expert economic evidence being adduced.

<sup>46</sup> The legislative change would not affect the appeal mechanism under section 317 of the Communications Act 2003, which covers Ofcom’s exercise of Broadcasting Act powers for competition purposes.

uncertainty for an initial period, until it is fully established. The precise implication of the changes will only be fully understood by industry and Ofcom once they have been clarified by the courts, which could in turn result in higher levels of litigation as the legal boundaries of the new regime are tested. This could impose a direct cost on communication providers as well as Ofcom.

50. Given the potential uncertainty that arises from introducing a new regime, the costs and benefits to both Ofcom and industry are difficult to quantify. It is possible that there will be an initial transition cost that manifests itself in increased litigation on the standard of review, as communication providers and Ofcom seek clarity on the new regime. This could be a result of more CAT rulings being challenged in the Court of Appeal, in addition to industry and Ofcom raising more procedural points before they get to substantive hearing (as both sides try to establish what is within scope of the new procedure).
51. On the other hand, this will be counter-balanced by a reduction in costs due to the fact that the CAT and/or the Competition Commission will not be required to examine Ofcom's facts and analysis as extensively as they do under the current system. This cost saving will be applicable in both the short and long run and will represent a significant benefit for Ofcom, appellants and the appeal bodies because the detailed review of economic modelling and assumptions is the most costly aspect of the current appeals process.
52. In terms of the number of appeals, any appeal under the proposed judicial review standard could be brought under the current merits appeal standard (and vice versa), meaning that there will be no reduction relative to the baseline scenario. However, it is possible that the number of appeals will *increase* under the proposed regime because the reduced costs of bringing an appeal – as discussed in the previous paragraph – will make it more accessible to smaller firms (though obviously the decision to appeal is at the firm's discretion). Therefore, there will be costs associated with a higher number of appeals (in both the short and long term) in addition to a short-term cost increase that will be driven by more litigation on appeals that would have been heard anyway (for example due to more appeals going to the Court of Appeal following a CAT judgment).
53. As highlighted above, the costs to Ofcom of the current regime are around £1.9 million per year (the average of the past four years, as shown in Figure 1 above). The direct costs to industry of appeals are not known as such costs are confidential to the appellants. However, based on anecdotal evidence and responses to the first consultation, the costs seem to range from £100,000 to millions of pounds per appeal. Therefore, a range of £100,000 to £3,000,000 is assumed. The number of appeals referenced under part 2 of the Communications Act has averaged at around five per year since 2003<sup>47</sup>, suggesting that the (average) annual cost of these appeals to industry could lie within the range £500,000 - £15 million per year.

**IAQ7. Do you have more precise estimates on the current costs of appeals to communication providers?**

54. The timing of when the costs and benefits of option 2 accrue will partly depend on how long it takes for industry, Ofcom and the CAT to adjust to the new procedure. The timing of this 'transition' period is difficult to estimate; whilst one year is probably too optimistic it is unlikely that there would still be substantial legal uncertainty after 3 years. During that time, there will be an upward pressure on costs owing to the increased levels of litigation described above and possibly a higher number of appeals (driven by smaller firms). However, this will be tempered by the fact that the CAT will not be required to examine Ofcom's analysis as extensively as it does under the current regime, saving on both cost and time. Government and Ofcom expect the latter saving to be larger than the initial cost increase because the granular review of many substantive economic issues during the appeal process is by far the most time-consuming and costly aspect for both Ofcom and the appellants (and interveners). This means that both Ofcom and industry will benefit from the new regime immediately. Furthermore, in the long-run after the new appeals system has bedded in, there will be no cost associated with adjusting to the new regime, meaning that the annual benefit will increase.

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<sup>47</sup> Ofcom assumed its powers on 29 December 2003 (following a set-up phase from 1 April – 28 December) and during the period up to May 2011 there have been 39 appeals referenced under part 2 of the Communications Act (this excludes Pay TV and other broadcasting appeals, which would not be affected by the proposed reforms). Dividing this number over a period of 7.5 years gives approximately 5 appeals per year. This is reasonably consistent with the number of appeals since 2007, as highlighted in a report by Towerhouse Consulting ('Appeals from Ofcom decisions: Time for reform?', December 2010)

55. Table 3 below illustrates the possible cost savings that will arise from a judicial review which duly takes account of the merits. During the transition period, it is assumed that both Ofcom and industry will spend 20% less than they currently do on appeals. Afterwards, this reduction increases to 30% as there is no longer a cost in adjusting to the new regime. Both of these estimates are considered to be conservative. An alternative ‘worst-case’ scenario could see costs increasing during the transition period (for example by 10%) and then falling by 30% afterwards (from the current baseline). Whilst Government and Ofcom do not expect costs to increase in the short-term, it is illustrated to show that even under this scenario, there is still a net benefit to both industry and Ofcom over the long-run. Table 4 lists the assumptions that underpin the analysis and the justifications for doing so.

**Table 3: Annual profile of net benefit (constant prices £) for Ofcom and industry, relative to Option 1**

		Y <sub>0</sub>	Y <sub>1</sub>	Y <sub>2</sub>	Y <sub>3</sub>	Y <sub>4</sub>	Y <sub>5</sub>	Y <sub>6</sub>	Y <sub>7</sub>	Y <sub>8</sub>	Y <sub>9</sub>
<b>Scenario 1: Costs Savings Accrue Immediately</b>	<b>Ofcom</b>	380k	380k	380k	570k						
	<b>Industry</b>	1.5m	1.5m	1.5m	2.3m						
<b>Scenario 1 Total NPV</b>		£21.8 million									
<b>Scenario 2: Cost Savings Accrue after Transition</b>	<b>Ofcom</b>	-190k	-190k	-190k	570k						
	<b>Industry</b>	-775k	-775k	-775k	2.3m						
<b>Scenario 2 Total NPV</b>		£13.6 million									

Discount rate of 3.5% is used for calculating the net present value (NPV). In scenario 1, the annual transition benefit is assumed to be 20% of current spending on appeals for Ofcom (£1.9 million\*0.2=£380k) and industry (current estimates give a broad range of £500k - £15m – a mid-point of £7.75m is used; £7.75m\*0.2=£1.5m). In scenario 2, an annual transition cost of 10% of current spending is assumed (£1.9\*0.1=£190k for Ofcom and £7.75\*0.1=£775k for industry). In both scenarios, the longer-term annual benefit (cost saving) is assumed to be 30% of current spending on appeals for Ofcom (£1.9 million\*0.3=£570k) and industry (£7.75 million\*0.3=£2.3m)).

**Table 4: Assumptions and justifications underpinning the quantitative analysis**

<b>Assumption</b>	<b>Justification</b>
1. The length and cost of an appeal under option 2 will be reduced	The level of scrutiny and examination by the appeals body will not be as intensive as it is under the current system (though relative to other sectoral regulation, it will remain more rigorous).
2. There is a long run ‘steady-state’ number of appeals	Appeals are a feature of any regulatory system <sup>48</sup> and there are a number of similar decisions (market reviews and charge controls) that are taken every three years. However, in some years there will be more/less than the average
3. The steady-state number will <i>increase</i> under a judicial review which duly takes account of the merits	There have been no appeals launched in the past seven years that would be ‘disallowed’ under the proposed regime because the latter still requires the CAT to duly take into account the merits of an appeal. However, appeals will be less costly under option 2 (assumption 1) and so more accessible to smaller firms and consumer groups. This could increase the number of appeals brought.

<sup>48</sup> As a recent report on the appeals process found when collecting information from BT, “We’re not in a world where everything is appealed; or where nothing is appealed. Either end of that spectrum would say something more about how it’s working” (Towerhouse Consulting, ‘Appeals from Ofcom decisions: Time for a reform?’, December 2010).

<p>4. There will be a transition cost for up to a maximum of 3 years due to litigation on the standard of review</p>	<p>The proposed regime is unusual, as there is no direct precedent for a statutory judicial review of this nature. Therefore, communication providers are expected to test and establish legal boundaries in order clarify the scope of the new procedure. Three years is expected to be the maximum period needed, though it could well be shorter.</p>
<p>5. The short-term saving is greater than the initial cost increase, creating an immediate net benefit</p>	<p>In the transitional period, there are conflicting pressures on cost. On the one hand, costs will be reduced by having an appeals procedure with less granular scrutiny than is currently the case (assumption 1) but they will also be increased by having more appeals (assumption 3) and more procedural litigation (assumption 4). It has been assumed that the cost saving will more than offset the cost increase because the detailed review of economic and modelling assumptions is the most time-consuming and costly aspect of the appeal process.</p>
<p>6. <u>Scenario 1</u>: The long-term saving is greater than the short-term saving. The respective cost savings are 30% and 20% of current expenditure</p>	<p>In the long-run, once the new regime is fully established, there is less upward pressure on costs. There are still more appeals relative to the 'no change' baseline but there are no further costs associated with adjusting to the new regime.</p> <p>The percentage reductions cannot be perfectly forecast given the uncertainties in implementing the new regime. However, 20% in the short-run and 30% in the long-run are considered to be conservative.</p>
<p>7. <u>Scenario 2</u>: If there is a net annual cost during the 'transitional' period, there will be a 10% increase in costs during the first 1-3 years, whilst the longer-term benefit will a saving of 30% per year (from the current baseline)</p>	<p>The key assumption here is that the longer-term saving is greater than the short-term increase (i.e. 30% being greater than 10%). This is reasonable because in the transitional period, there are two upward pressures on cost (assumptions 3 and 4) but in the long-run there is only one (assumption 3).</p> <p>As above, the percentage reduction due to savings is considered to be conservative, but the scenario highlights the direct benefits to both Ofcom and industry in the long-run.</p>

**IAQ8. Do the above analysis and supporting assumptions seem reasonable? Do you have alternative estimates of the direct monetised costs and benefits of a judicial review which duly takes account of the merits?**

56. Of potentially great significance is the possibility that Ofcom implements a decision which is unnecessarily costly to industry and that – if the appeals regime was kept as it is – it would not incur. The example outlined above of industry saving hundreds of millions of pounds as a result of Ofcom changing its decision following a CAT ruling is an example of why an effective appeals regime is necessary<sup>49</sup>. However, it is very unlikely that this option will result in a less effective appeal mechanism in which such erroneous decisions are not capable of being appealed and overturned. In the example above, where Ofcom's consultation process was flawed, the proposed judicial review standard would still have likely led to the same outcome. Furthermore, given that option 2 still

<sup>49</sup> Though in this case it is important to note that the expected consumer benefits associated with the more expensive option were much higher.

requires an appeals regime that duly takes merits into account, the same appeals can still be brought to the CAT or the CC. Rather it is the scope of the review and the length of the appeal process that is likely to change, where the appeal body does not interrogate Ofcom's facts and analysis in as much detail as it does under the current regime. It will instead be able to focus more broadly on Ofcom's decision as a whole, with a view to identifying whether it is based on any material errors. This should result in the preparation of less extensive pleadings and shorter appeal hearings. In the long-run, this is likely to lead to a more streamlined and efficient appeals regime. This could potentially benefit industry, for example in the case of Mobile Number Portability, firms would not have incurred as high a cost if Ofcom's decision was overturned more quickly.

#### **IAQ9. Are there costs arising from the proposed reforms that have not been considered?**

##### *Benefits*

57. Whilst it will be a matter for the appeal bodies to decide what is necessary in any given case on its specific facts, Government anticipates that changing the standard of review to that required by Article 4 will result in appeals which are more focussed on material points, with a corresponding reduction in the need for and/or scope of oral examination and cross examination of factual and expert witnesses, leading to shorter hearings and more focussed pleadings than is presently the case.
58. As shown in Table 3, it is expected that the direct cost of appeals to both Ofcom and industry (legal costs, staff resource, management time etc.) will fall, even if the number of appeals increases relative to option 1 in the long run, because the CAT and/or the CC will not be required to examine Ofcom's facts and analysis as extensively as it does under the current regime. This represents a direct benefit to both Ofcom and industry. For example, a recent appeal of two Ofcom dispute determinations was originally lodged in April 2010 but not ultimately heard until a twelve day hearing in April 2011, with judgment still pending. In another case, Ofcom's appealed decision on the PPC (partial private circuit) dispute was published in October 2009<sup>50</sup> with the CAT judgment published 17 months after in March 2011. Under option 2, such appeals would not take as long to process and hear.
59. With regards to cost reductions, the direct benefits to industry are likely to apply especially to smaller operators, service providers and new market entrants. As discussed in paragraph 39, the high cost of bringing an appeal may be acting as a deterrent to small firms and/or consumer groups from appealing. Furthermore, larger incumbents are in a better position to use the appeals regime to slow down regulatory intervention that is sometimes directly advocated by small firms and new operators. By allowing the latter easier access to appeals, the CAT and the CC will be in a position to hear the views and evidence of SMEs in the communications sector. In addition, certain industry participants (such as entrants) benefiting from regulatory intervention would be able to receive these benefits sooner as Ofcom would be able to conclude its projects more quickly.

#### **IAQ10. Do you have any quantitative evidence on the impact of Option 2 on smaller operators and new market entrants?**

60. Whilst the direct benefits above are not insignificant, they are potentially an order of magnitude less than the likely benefits to consumers from having a more streamlined and efficient appeals procedure. If one considers the examples in Table 2, then this is clearly of much greater significance than the administrative and resource burdens associated with legal proceedings. Furthermore, the regulatory uncertainty that the current regime creates – for example delaying price controls and the resolution of disputes – will be addressed.
61. In quantifying the wider benefits to consumers it is worth considering that during the past five years, Ofcom has produced an average of 24 key decisions per year (ranging from 18 to 27) for the telecommunications sector<sup>51</sup>. It is unrealistic to assume that every single Ofcom decision was delayed and led to the levels of consumer harm identified in Table 2, given the variations in coverage and impact. Ofcom estimate that about one quarter to one third of decisions – 6 to 8 per year - are delayed (either due to Ofcom mitigating the risk of appeal or because it has insufficient resources to regulate in a timely manner) *and* result in significant consumer detriment. The costs to consumers in

<sup>50</sup> [http://stakeholders.ofcom.org.uk/binaries/consultations/draft\\_deter\\_ppc/PPC\\_final\\_determination.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/draft_deter_ppc/PPC_final_determination.pdf)

<sup>51</sup> Source: Ofcom Annual Reports 2005/06 – 2009/10 (Ofcom's Key Decisions – Directions of Regulatory Change for Telecoms)

Table 2 range from £160,000 - £20 million, meaning that the total benefit of eliminating such delays to consumers lies within a range of £960,000 - £160 million per year. If one disregards the Pay TV case (as it would not be affected by the proposed change to the appeals regime under section 192) and assumes that 'typical' consumer benefits are £2 million - £3 million (as in the silent calls and mobile mis-selling cases) then the annual benefit of option 2 consumers is in the order of **£12 million - £24 million per year**<sup>52</sup>. This estimate – which is assumed to take effect as soon as option 2 is implemented - represents the benefits to consumers of having Ofcom make more timely interventions and does not take into account the benefits of increasing regulatory certainty to firms (for example removing uncertainties in price controls, as discussed in paragraph 34).

62. It is also important to note that these benefits will apply to business users of communication services, as well as consumers. Around two thirds of UK businesses (65%) own or rent a mobile service, whilst take-up of fixed-line services and internet and data services stands at more than 88% and 72% respectively. Telecommunications are considered by the majority of firms to be an important means of improving efficiency, driving business forward and ensuring competitiveness. The average spend on telecommunication services by UK firms is around £2,000 per year (small companies - fewer than ten employees - spend slightly less at about £1,300 per year)<sup>53</sup> and there are 2.1 million registered businesses in the UK (the total number of registered and unregistered enterprises is around 4.5 million)<sup>54</sup>. Therefore, if reforms to the telecommunications appeals system improve the regulatory environment and result in better outcomes for business consumers – for example lower prices and/or a more competitive market – the benefit to UK firms will be significant.
63. In addition, this option mitigates the risk associated with implementing the revised EU Framework Directive, which requires Ofcom to conduct market reviews every 3 years (instead of 4-5) and engage in a more detailed and time consuming dialogue with the European Commission whilst conducting market reviews. By having an appeals process which is more in line with the requirements of the Directive, option 2 will allow Ofcom to carry out its reviews within the timeframe set by the EU whilst avoiding any potential regulatory gridlock, as any appeal decision that is needed for a review to conclude will be completed in the time needed.

#### **IAQ11. Are there benefits arising from the proposed reforms that have not been considered?**

##### *Risks and assumptions*

64. A number of communication providers believe that the current process acts as an incentive for Ofcom to ensure that its decisions are supported by detailed analysis and comprehensively informed (and evaluated). They have concerns that reducing the standard of appeal would lead to lower quality decisions being made and could result in regulatory gaps (creating uncertainty). Furthermore, given that the system has now been in place for more than seven years, some communication providers argue that the CAT has developed effective processes for adjudicating these types of appeals and has also built up a body of case law that they understand and can comply with. There were some responses from industry to the first consultation which suggested that communication providers appealing Ofcom decisions have a useful body of guidance by which to come to an informed decision and this may need to be built up again under a new regime.
65. Ofcom's Competition Act powers will still be subject to a full appeal on the merits, meaning there would be a dichotomy between the two standards of appeal. Some stakeholders have suggested that this may encourage Ofcom to use its regulatory powers rather than its competition powers (in order to avoid more rigorous scrutiny). It should be noted that BIS is currently consulting on changes to the competition regime (where changes to some form of judicial review are an option), meaning this risk could be mitigated in the near future<sup>55</sup>. However, even if two standards of appeal exist, Ofcom will be required to investigate complaints under whichever framework the complaint is brought to them and/or whichever framework is most appropriate depending on the specific cases. With regards to its powers, there is a clear legal definition as to what Ofcom can do under the Competition Act and what

<sup>52</sup> The lower bound is calculated by multiplying £2 million by 6 delayed decisions per year and the upper bound is calculated by multiplying £3 million by 8 delayed decisions per year.

<sup>53</sup> Ofcom, 'The Business Consumer Experience' (7 December 2010)

<sup>54</sup> BIS, 'Business Population Estimates for the UK and Regions 2010' (May 2011)  
[http://stats.bis.gov.uk/ed/bpe/BPE\\_2010\\_-\\_Statistical\\_Release.pdf](http://stats.bis.gov.uk/ed/bpe/BPE_2010_-_Statistical_Release.pdf)

<sup>55</sup> <http://www.bis.gov.uk/Consultations/competition-regime-for-growth?cat=open>

it can do under the Communications Act. Furthermore, Ofcom's decision to proceed using its regulatory powers – rather than its competition powers – can be challenged to the CAT.

66. The wider benefits of option 2 (i.e. benefits to consumers and the sector as a whole from Ofcom devoting more resources to policy and enforcement work, in addition to remedies being more timely) depend on the assumption that a more streamlined process will still ensure that an Ofcom decision is overturned when it has made an error. However, this assumption should hold because the proposed regime does not limit the type of appeal that can be launched; instead it changes the nature and scope of the review by the appeal bodies, which should result in a streamlining of the process. Furthermore, the appeals regime will remain more robust and scrupulous than for other economic regulators, where there is no legislative requirement for a judicial review to take account of the merits, but where regulated companies still enjoy adequate access to justice.
67. Some communication providers – in their response to the first consultation – highlighted the potential for regulatory uncertainty in the wider market during the transition period. If firms do not have the necessary amount of certainty and confidence in the regulatory environment in which they operate, it can have a knock-on effect on economic outcomes such as investment and research and development. The Office for National Statistics estimates that about £6 billion worth of investment was made in the telecommunications sector in 2009<sup>56</sup>, whilst R&D spending amounted to more than £1 billion (7% of total R&D performed by UK businesses)<sup>57</sup>. Therefore even a very small marginal reduction caused by initial regulatory uncertainty would have a huge impact both on the sector itself and the wider UK economy that relies on the communication services it provides. In this respect, it will be necessary under Option 2 to ensure that firms are given the clarity and understanding that they require about the new legislative and judicial framework.

#### **IAQ12. Are there other risks associated with Option 2 that have not been identified?**

##### Preferred option

68. Based on the evidence outlined above and in the context of meeting the new market review requirements of the revised EU Framework Directive, the Government's preferred option is to have an appeals framework in the electronic communications sector that allows for a judicial review which duly takes account of the merits. This is consistent with the Government's commitment to end gold-plating, in addition to one of the recommendations in the most recent report by ECTA, which recommended that national ministries within Europe should "streamline appeals proceedings"<sup>58</sup>. In addition to the direct savings made from having a more efficient appeals process, the wider benefits to consumers and the market in general are likely to be significantly greater.

#### **IAQ13. Do you have any other evidence to improve the analysis of the options that have been assessed?**

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<sup>56</sup> ONS, Annual Business Survey, Net Capital Expenditure for the Telecommunications Sector (SIC 61)

<sup>57</sup> ONS, Statistical Bulletin: UK Business Enterprise Research and Development 2009 (December 2010)

<sup>58</sup> ECTA Regulatory Scorecard 2009

## Specific Impact Tests

### Competition

As indicated in the main evidence base, option 2 should allow Ofcom to devote more resources to policy and enforcement work and will also allow the regulator's remedies to be implemented in a more timely fashion. The direct benefits to competition will depend on the intervention being considered by a more streamlined appeals regime and whether it facilitates the promotion of competition. However, since the promotion of competition is one of Ofcom's statutory duties, the regulatory interventions implemented in a more timely fashion will in many cases directly promote competition.

### Small Firms

Bringing the appeals regime into line with the requirements of European legislation should mean that appeals are less costly to bring. As discussed in the main evidence base, this would likely benefit small firms that are often put off at present from lodging appeals, given the costs involved. Furthermore, given the potential benefits to competition there may be indirect effects if timely interventions lead to lower barriers to entry in certain communications markets.

Furthermore, as discussed in the analysis of option 2, any improvement in the regulatory environment for electronic communications will result in better outcomes for business consumers (e.g. in the form of lower prices or more innovative products, which can improve efficiency, productivity and competitiveness). The overwhelming majority (99%) of the 4.5 million enterprises in the UK are small and Ofcom data indicates that 64% of small firms use a mobile service, 88% use a landline service and 72% access the internet<sup>59</sup>.

### Justice Impact Test

The Government's preferred option will have a direct impact on the Competition Appeal Tribunal (CAT), which is responsible for hearing the majority of appeals under the Communications Act. The impact on the CAT is likely to be the same as it is for both Ofcom and industry. In the short-term (up to a maximum of 3 years), there may be a direct cost incurred as stakeholders test the boundaries of the new regime, with procedural arguments in the CAT and possibly some appeals brought to the Court of Appeal. There may also be a greater number of appeals to hear if smaller operators start to bring appeals as well. However, in both the short and long run, the CAT will not be required to review appeals to the same level of scrutiny and examination as it has during the past seven years, which will reduce the amount of resource required to hear appeals. It is not currently possible to quantify this given that a statutory judicial review of precisely this nature is without precedent. However, there is likely to be a net benefit in the long-run for the reasons set out in the main evidence base (see Tables 3 and 4).

## **IAQ14. Do you have any evidence on the resource implications of the proposed reforms to the CAT?**

### Other Specific Impact Tests

#### *Other environment/ rural proofing*

After an initial screening it has been deemed that no significant impact is anticipated on the environment and rural proofing.

#### *Race, disability and gender equality*

After an initial screening it has been deemed that no significant impact is anticipated on race, disability or gender equality.

<sup>59</sup> <http://stakeholders.ofcom.org.uk/binaries/research/statistics/2010/consumer-experience-data.pdf>

### *Other tests*

Other specific impact tests have been considered including Legal Aid, Sustainable Development and Carbon Assessment. Again, after initial screening, it has been deemed that no significant impact is anticipated.

## Annexes

Annex 1 should be used to set out the Post Implementation Review Plan as detailed below. Further annexes may be added where the Specific Impact Tests yield information relevant to an overall understanding of policy options.

### Annex 1: Post Implementation Review (PIR) Plan

A PIR should be undertaken, usually three to five years after implementation of the policy, but exceptionally a longer period may be more appropriate. If the policy is subject to a sunset clause, the review should be carried out sufficiently early that any renewal or amendment to legislation can be enacted before the expiry date. A PIR should examine the extent to which the implemented regulations have achieved their objectives, assess their costs and benefits and identify whether they are having any unintended consequences. Please set out the PIR Plan as detailed below. If there is no plan to do a PIR please provide reasons below.

**Basis of the review:** [The basis of the review could be statutory (forming part of the legislation), i.e. a sunset clause or a duty to review, or there could be a political commitment to review (PIR)];

The right of appeal in the electronic communications sector is required by European law, specifically under the EU Framework Directive. The Directives of the Framework have review provisions in them which require the Commission to periodically review the functioning of the Directive and report to the European Parliament and the Council. The UK will therefore be required to provide the Commission with information on the effectiveness of the appeals regime when the EC conducts a review. It will also carry out its own review of implementation at that time. The PIR would be expected to take place within the standard 3 – 5 year timeframe, by May 2016 at the latest. The timing of such a review, and the nature of the review itself, would also be influenced by the Commission's intentions.

**Review objective:** [Is it intended as a proportionate check that regulation is operating as expected to tackle the problem of concern?; or as a wider exploration of the policy approach taken?; or as a link from policy objective to outcome?]

The objective is to review the effective implementation of the provisions of the EU Electronic Communications Framework, including the right of appeal. The Framework is intended to raise standards of regulation and competition across all 27 European Member State communication markets.

**Review approach and rationale:** [e.g. describe here the review approach (in-depth evaluation, scope review of monitoring data, scan of stakeholder views, etc.) and the rationale that made choosing such an approach]

The UK Government will review the effectiveness of the appeals system at the same time as it is required to provide information to the Commission for their review. This method of review is chosen so as to avoid an unnecessary burden on the Government, stakeholders and Ofcom. The form that the review will take is not yet known.

**Baseline:** [The current (baseline) position against which the change introduced by the legislation can be measured]

The review will use the do nothing or 'no change' options detailed in the Impact Assessment as a baseline against which the change introduced by the legislation can be measured.

**Success criteria:** [Criteria showing achievement of the policy objectives as set out in the final impact assessment; criteria for modifying or replacing the policy if it does not achieve its objectives]

The review will evaluate whether the appeals regime is helping to deliver the main aims of the EU Framework and Communications Act to UK users and businesses, for example raising the standards of regulation and competition.

**Monitoring information arrangements:** [Provide further details of the planned/existing arrangements in place that will allow a systematic collection of monitoring information for future policy review]

Each year, Ofcom submits information to the European Commission and the European Competitive Telecommunications Association (ECTA) as part of a regular assessment of electronic communications regulation across Europe. ECTA produces an annual scorecard, part of which examines the effectiveness of a country's appeal procedure, whilst the European Commission publishes an annual report on the implementation of the telecoms regulatory framework in Member States (including provisions relevant to appeals). Together with the evidence and analysis that Ofcom regularly produces in market reviews and publications (e.g. Communications Market Report), this information will feed into the above review.

**Reasons for not planning a review:** [If there is no plan to do a PIR please provide reasons here]

Not Applicable