

**General policy on information gathering
- Under the Communications Act 2003,
Wireless Telegraphy Act 2006, and
Postal Services Act 2011 Protection of
small businesses when purchasing
goods and services**

UKCTA Response to Ofcom Consultation

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Contents

1. Executive summary	4
2. Context: Ofcom's information-gathering powers.....	7
Introduction	7
Ofcom's information gathering powers.....	8
Ofcom's current policy for information gathering.....	8
Ofcom's new policy proposals are opaque in their logic but seem to raise costs.....	10
3. Problems	12
Not all information-gathering causes any difficulty	12
Problems that arise in relation to individual requests.....	13
No clarity as to legal basis.....	13
Proportionality	14
Failure to consider the burden imposed on recipients.....	15
Problems that arise due to lack of coordination between requests	16
Information requests often overlap or arrive simultaneously	17
The same information may be gathered by Ofcom many times	19
Problems with Ofcom's approach to information-gathering	21
Going fishing	22
Confirmation bias.....	23
New problems arising from the 2015 policy proposals	24
Reduced incentives for voluntary disclosure	24
Reduced use of draft information requests.....	26
4. Solutions.....	27
Improving individual requests	27
A new precedent format with legal clarity and impact assessment.....	28
Empower the Procedural Officer to deal with requests	29
Litigation	31
Improving coordination	31
Fewer, more expert and arms-length approvers of requests.....	32

Improved Ofcom internal governance.....	34
Transparency of information-requests: publishing a ‘high-level’ log	34
Improving Ofcom’s approach.....	34
A renewed focus on evidence-led decision making.....	35
Mapping Ofcom’s processes more closely onto market studies under competition law	36
5. Annex: Relevant European and UK legislation.....	38
The Communications Act 2003	38
The Framework Directive.....	42
The Competition Act 1998	44

1. Executive summary

- 1.1 While some parts of Ofcom's information-gathering work well, others seem to be a source of recurrent problems. This submission identifies some significant problems with Ofcom's existing approach to information-gathering and the proposed amendments in Ofcom's consultation.
- 1.2 We don't think that the current proposal to make some changes at the margins is the right approach:
 - (a) All of Ofcom's changes seem to move in a single direction: information requests will be more frequent, there will be less open dialogue between Ofcom and stakeholders, and the burden on stakeholders to comply with requests can only increase.
 - (b) In addition, the opportunity cost of Ofcom's proposed approach is high – thinking about information requests is always on the back-burner, and we might not have another focused discussion about improving information-gathering for many years.
- 1.3 Two specific problems we think emerge from Ofcom's proposal are that:
 - (a) The shift towards compulsory information requests may reduce incentives on stakeholders for voluntary information disclosure; and
 - (b) Ofcom's plan to move away from using draft information requests in some cases may weaken Ofcom's overall policy objectives by removing an important dialogue point before a request becomes legally compulsory. This may lead to more costly, less predictable escalations between Ofcom and stakeholders.
- 1.4 Being specific about the problems, we have also identified some solutions. All of them would help, and some could be transformative. All of them are affordable, and some of the best ideas would cost Ofcom absolutely nothing (or save time and money) if implemented. Our suggested solutions include:
 - (a) Urging Ofcom to continue to improve individual information requests by ensuring that they are subject to rigorous internal scrutiny and quality control;

- (b) Suggesting that Ofcom adopt a clearer and better model information request document with clear guidance about what the request relates to and Ofcom's framework for issuing and processing a request;
 - (c) Extending the jurisdiction of the Procedural Officer to deal with concerns raised by stakeholders about information requests;
 - (d) Improving the way Ofcom co-ordinates information requests (e.g. enabling each project team to be more aware of the actions of the other project teams);
 - (e) Having a smaller group of expert individuals within Ofcom designated to approve information requests on an arms-length basis;
 - (f) Improving Ofcom's internal governance by requiring all Groups to report once a year on the extent of information gathering that they impose on stakeholders;
 - (g) Improving transparency by publishing a 'high-level' log of information requests (i.e. which may include the total number of information requests and the policy area to which the requests relate);
 - (h) Generally shifting Ofcom's focus towards an 'evidence-led' approach by creating a renewed focus on testing a falsifiable hypothesis rather than simply gathering raw data, and mapping Ofcom's processes more closely to market studies under competition law.
- 1.5 All of our organisations work in sectors where disruptive innovation is the norm. When someone has an idea about how to improve outcomes, or use information technology to improve transparency or coordinate processes, then that innovation is brought to market and adopted rapidly.
- 1.6 We think Ofcom should have the same willingness to challenge itself. Information-gathering to support Ofcom's work hasn't changed in a decade. While much of it is unproblematic, in a few important policy areas, it's created low-level friction with the sector. Recently, that friction has grown, with escalation a risk for all sides. Now is the time for Ofcom

to engage constructively with the sector to tackle problems and issues head on.

- 1.7 We look forward to the chance to discuss this submission with you and to engage with you on these important issues.

2. Context: Ofcom's information-gathering powers

Introduction

- 2.1 The European Framework, and the Communications Act 2003, provide Ofcom with an extensive range of legal powers as the UK's national regulatory authority for electronic communications. These powers include giving Ofcom the power to require information to be provided by those it regulates.
- 2.2 Information can be obtained that Ofcom considers is necessary for the carrying out of its functions under the European Framework (both in relation to policy work and enforcement – specifically when resolving disputes) and in relation to spectrum policy.¹ Penalties for failure to provide information can be severe.
- 2.3 In keeping with the pioneering role played by the UK in developing processes and structures for economic regulation, Ofcom's approach to information-gathering has been innovative in some important respects. It adopted and continued Oftel's approach (now mirrored by a number of other economic regulators) of providing information requests in draft form most of the time, enabling recipients to comment on issues such as the nature and scale of available information and the likely period needed to fulfil a request. It was quick to adopt electronic filing (on fixed digital media and in due course, via email) and the use of tools such as spreadsheets so that information could be transferred and analysed quickly and easily.
- 2.4 In 2005, Ofcom published its policy regarding the use of its information-gathering powers. Since that time, concerns have been raised directly with Ofcom, and to public bodies to which Ofcom is accountable, about the scale and scope of Ofcom's use of its information-gathering powers. This has culminated in the Ofcom consultation which sets out a new draft statement of policy on Ofcom's approach.
- 2.5 In this section we briefly summarize the legal framework within which Ofcom operates and the current Ofcom policy regarding information

¹ Section 135 of the Communications Act 2003 and sections 32, 32A and 32B of the Wireless Telegraphy Act 2006.

gathering. We also survey Ofcom's proposed changes, as set out in the consultation document.

Ofcom's information gathering powers

- 2.6 We acknowledge that obtaining accurate and timely information is critical to Ofcom's work. The statutory power to obtain information is a common tool of policy development that has been used extensively by Ofcom, for example, when it is conducting market reviews, setting the general conditions, or investigating alleged contraventions of regulatory conditions.
- 2.7 In accordance with its general duties, Ofcom's information-gathering must be undertaken having regard to the principles under which regulatory activities should be transparent accountable, proportionate, consistent, targeted only at cases in which action is needed, and any other principles appearing to Ofcom to represent the principles of best regulatory practice.² These obligations, read in conjunction with the Framework Directive (and other parts of the European Framework) provide that Ofcom must not engage in information gathering processes that are not proportionate or which would impose undue burdens on CPs.
- 2.8 Section 145 of the Communications Act 2003 places an obligation on Ofcom to publish a statement of policy explaining how it will use its information-gathering powers.
- 2.9 A summary of the relevant provisions set out in the Annex.

Ofcom's current policy for information gathering

- 2.10 Sections 135 and 137 of the Communications Act require that information requests by Ofcom must be proportionate and the persons to whom the request are made must be given a reasonable period to provide information. Ofcom's policy set in 2005 provides that, wherever possible, Ofcom must draw from existing information sources to avoid unnecessary duplication of efforts and to minimise the burden placed on those from whom information is requested.

² Section 3(3) Communications Act 2003.

- 2.11 Although Ofcom has used information-gathering powers extensively pursuant to this policy, there has also been periodic disquiet amongst stakeholders about the burden imposed, particularly at peak periods or when Ofcom opts to explore issues on the boundaries of its responsibilities.
- 2.12 It is not only those regulated by Ofcom who have expressed concerns in this area. For example, the House of Lords Select Committee on Economic Regulators noted that:

Ofcom has well established and clear systems for requesting information, but we are concerned over the nature and volume of information requested. Practical problems can arise in respect of the quantity of information requested in tight timescales. BT echoed these comments saying that they “believe that Ofcom’s information requests are not always proportionate to the issues it is seeking to address and while Ofcom is often willing to discuss ad hoc or investigation-driven information requests, we remain concerned about the burden of providing information and extent of our ex ante regulatory reporting requirements”³ [emphasis added]

- 2.13 In 2012, these concerns crystallized in the form of a letter from us to two of Ofcom’s most senior officials (the heads of the Competition and Consumer Groups⁴) (the ‘UKCTA letter’). Many of the concerns that are described in this submission repeat the precise concerns that were raised in the UKCTA letter. We have cited extracts from this letter where relevant.
- 2.14 Over the past few years, there has been a significant increase in the level of concern about the way in which Ofcom has approached information-gathering, particularly in relation to regulation that Ofcom considers might be needed in competitive retail markets.

³ First report session, 2006-2007, HL Paper 189-I at page 50. Please see: <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldrgltrs/189/189i.pdf>

⁴ Ofcom is organised into ‘Groups’, these being the largest organisational units of Ofcom’s internal structure. During the period considered in this submission, Ofcom has always had a ‘Competition Group’ (that manages market reviews and competition-related proceedings including enforcement of competition law and access disputes), a ‘Spectrum Policy Group’ (that manages spectrum policy issues) and, for most of the time, has had a ‘Consumer Group’ (that is further divided into a ‘Consumer Policy’ team that handles rule-setting and a ‘Consumer Enforcement’ team that enforces rules for consumer protection).

2.15 Section 3 considers the problems with the current approach in more detail.

Ofcom's new policy proposals are opaque in their logic but seem to raise costs

2.16 With the above considerations in mind, we welcome the opportunity to review and comment on Ofcom's draft statement of policy on its future approach to information gathering processes.

2.17 Ofcom describes its proposals as being, in summary, to:

- (a) *Set out in more detail how we will go about issuing notices requiring information to be provided.*
- (b) *State that we will, as a general rule, seek to obtain information using our statutory information gathering powers, and we will generally seek to use our statutory powers to confirm or verify information provided to us on a voluntary basis in order to ensure that our evidence base is robust, complete and non-biased.*
- (c) *State that Ofcom will assess on a case-by-case basis whether it is appropriate to send a statutory information request in draft form to the person holding the relevant information. Our starting presumption will be that we will not issue the request in draft form unless there is a clear benefit from doing so. We may issue sequenced information requests, first to help us identify the information we should ask for and then to ask for it.*

2.18 Ofcom describes itself as drawing on:

10 years of experience of exercising our statutory information gathering powers and [that] ... now is an appropriate time to ensure that our approach to the exercise of these powers is fit for purpose having regard to both the demands on Ofcom in terms of ensuring that our regulatory activities remain robust and evidenced based and the burden placed on stakeholders of locating and providing information requested. This draft guidance modifies our policy in certain respects reflecting this experience.

2.19 There is no transparency regarding the evidence drawn, or lessons gleaned, from this experience. For example, there is no analysis of how many information requests Ofcom has issued, whether the number has

risen or fallen (and if so, in which areas of Ofcom's work), whether response times are falling or rising, whether Ofcom has adapted its approach over time – and if so, what the results have been, and so on. It is not clear whether Ofcom has any evidence upon which it bases its judgements about how its policy ought to change.

2.20 This lack of transparency matters, because Ofcom is proposing some changes to its approach:

- (a) Moving away from inviting or accepting information on a voluntary basis (Ofcom's new policy is that all such information will trigger a statutory information request);
- (b) No longer routinely issuing information requests in draft form; and
- (c) Being more explicit that sometimes, Ofcom will issue an information request about what information is available, simply to inform the exercise of further information-gathering.

2.21 We are concerned that these changes are all in a single direction: information requests will be more frequent, there will be fewer occasions on which Ofcom is open to a dialogue concerning the scope and nature of information requests and Ofcom anticipates more 'exploratory' missions where it does not know in advance what information it is seeking, but will proceed in sequence, focusing its efforts with each iteration.

2.22 The common thread to these changes is that they all increase the likely compliance burden on both stakeholders and Ofcom. It would be very helpful (and perhaps, legally necessary) for there to be some sense of why Ofcom feels this is the right way to go. For example, what are the benefits that Ofcom sees arising that make these increased costs worth imposing on consumers? What is Ofcom trying to achieve with its changes? Why has it chosen to change those aspects of the policy, and not others?

2.23 We analyse the impact of these changes, and make submissions concerning them, in the sections that follow.

3. Problems

Not all information-gathering causes any difficulty

- 3.1 We understand how important information-gathering is to Ofcom's work. We want to see a position reached in which the use of information-gathering by Ofcom is smooth, predictable and uneventful. For many parts of Ofcom's work, this is already the case, with Ofcom using its information-gathering powers in ways that do not cause undue difficulty or raise concerns about legal over-reach – for example, in relation to market reviews, or when Ofcom gathers information that is used to prepare the Communications Markets family of reports.
- 3.2 Information-gathering goes relatively smoothly in these cases because the information requests are part of a coherent larger scheme of work, flagged in the Annual Plan and Ofcom generally notifies communications providers ahead of time that information requests are imminent. This means that we are afforded the opportunity to allocate resources to deal with those requests and few of us report difficulty in meeting Ofcom's requests.
- 3.3 A common element to market reviews and the Communication Market Reports is that the reasons for the information requests and analytical framework that they support are well-understood. The statutory role that Ofcom plays is clear.
- 3.4 When this is not the case – for example, when Ofcom has not got a specific problem in mind that it is seeking to address, but instead is generally exploring markets with a view to looking for possible problems, the focus tends to be wider (and hence, the burden greater) but the case for requiring information is correspondingly weaker. As a result, it can be harder to see such requests as proportionate.
- 3.5 This is a particular problem in Ofcom's regulation of retail markets, where the analytical framework for deciding when to intervene is ambiguous, and the role played by information-gathering is sometimes unclear. Sometimes Ofcom seems to be looking to build a case to do something that it appears it has already decided it wishes to do. The risk of regulatory error in these cases is particularly high.

- 3.6 A different set of issues arise with information-gathering in relation to enforcement. In an adversarial environment, the risk of polarised or tense stand-offs over information can arise, particularly if the basis for the investigation is unclear. More broadly, sometimes Ofcom does not appear to distinguish between how it approaches information-gathering in relation to enforcement and how it uses information requests to assess general industry compliance. For example, Ofcom simply re-uses information requests from an enforcement programme to the wider industry.
- 3.7 The remainder of this section considers these problems in more detail. We consider first problems that arise within individual information requests, then consider how problems can arise in relation to lack of coordination between information requests. Finally, we consider problems that are linked to Ofcom's approach to information-gathering.

Problems that arise in relation to individual requests

- 3.8 The first set of problems are those which can arise in relation to individual requests.

No clarity as to legal basis

- 3.9 As noted above, and also in the Annex, Ofcom's information-gathering powers are broadly framed and allow Ofcom a degree of discretion as to how it determines what information it ought to secure using those powers to enable it to perform its statutory objectives. However, those powers are not open-ended.
- 3.10 Ofcom's information requests typically set out only a cursory or high-level statement about the legal purpose for which the request is issued. However, these statements often fail to provide us with enough information to properly understand the legal context and basis for the request, nor justify the allocation of resources to respond to the request.
- 3.11 While many information requests are laudably clear, a significant minority are not – and it is not common for information requests to list, specifically, the purpose (by reference to the list in section 135(3)) for which the information is required. Some requests lack any clear information about the use to which the information is to be put, once

Ofcom has it, which makes it impossible for any assessment of whether making an information request is proportionate to that use.

- 3.12 An important but often overlooked point is that an information request must request *information*. It differs in this respect from Ofcom's power to require information or documents in relation to an investigation under competition law.⁵ Ofcom routinely sets out 'information requests' that are not requests for information, but are, in fact, descriptions of a class of documents that Ofcom wishes the recipient to produce. While some stakeholders have the time and resources to identify and consider whether these questions may be inappropriate, inevitably, some do not or find it easier to acquiesce than argue the point.

Proportionality

- 3.13 A related concern that arises when there is an ambiguous legal basis for an information request is that the recipient cannot establish whether or not the information request is proportionate to Ofcom's objective or planned use (because that objective or use is not clearly spelled out).
- 3.14 As set out above, the principle of proportionality is an essential legal element of lawful information-gathering, expressly recognised under European and UK law.⁶
- 3.15 In accordance with that legal framework, the requirement of proportionality demands that the steps taken are no more than is reasonably necessary to achieve a lawful objective – and where there are a range of options available to Ofcom to secure a particular objective, Ofcom adopts the least burdensome choice.
- 3.16 When information-gathering, Ofcom often has a choice between issuing an information request and seeking that information from another, more apposite source. Ofcom can and sometimes does use consultants who are able to engage with industry to build up a picture of how particular processes work, or understand the flow of funds or services through the supply chain. These studies are often far less intrusive than extensive statutory information requests.

⁵ Competition Act 1998, section 26.

⁶ Sections 3(3) and 137(3) of the Communications Act 2003 and Recital 41 of the Framework Directive.

- 3.17 More generally, it is common for information requests to ask for information (such as marketing material, consumer terms and conditions, and so on) that is publicly available via our websites or other easily-accessed sources. Sometimes Ofcom seems ready to, in effect, outsource consumer research by requesting research that has been done by operators themselves to understand their customers and their attitudes. A more proportionate approach might be for Ofcom to put more resources into gathering information directly from consumers, who are a better source of information about their own preferences and choices than the providers, or using specialist consultants to assist Ofcom in developing its own understanding. That can leave statutory information-gathering as a tool to be used in those cases where there is a specific statutory issue to be resolved (such as whether to set a general condition).

Failure to consider the burden imposed on recipients

- 3.18 Information requests can vary in size and their impact on recipients. But every request requires devoting the time of specialist legal and/or regulatory staff (or external advisers) to understand the nature and scope of the request, and ensure that it receives the right level of attention. More detailed requests require us to ensure that we have the relevant staff and information available to respond to within the given timeframe.
- 3.19 These burdens are material. Apart from the most cursory requests, Ofcom's information requests routinely require the creation of a project team within our organisations and divert important internal resources from 'business-as-usual' activities. For larger requests, a larger team is required, and in some cases, skilled individuals from some or all of the following teams are required: technical; regulatory; legal; financial; and operational/management. This is in addition to the governance requirements (demanding time and attention from senior management) associated with ensuring that the information has been checked as being accurate and compliant (particularly in light of the penalties for failing to fulfil a request properly). A large request can take hundreds of person-days to complete, and divert a number of senior individuals away from other, business-critical tasks.

- 3.20 As far as we can discern, in its routine planning for the issuing of information requests, Ofcom undertakes no quantified assessment at all of the burden imposed by the recipient of an information request, either in general terms or in the case of individual requests.
- 3.21 Instead, Ofcom issues the request in draft form and then leaves it to the recipient to explain why any undue burden may arise. As discussed above, it is Ofcom's responsibility to ensure that information requests are proportionate. We consider that Ofcom's current approach may fall short of fulfilling that duty. It is, we think, obvious that the proposed change to remove the role played by draft information requests is likely to make this problem worse, not better.
- 3.22 Ofcom has been asked to pay more care to consider the burden imposed by information requests many times over the past decade. For example, in May 2012, the UKCTA letter noted that:

At the last meeting between UKCTA and members of the Ofcom Consumer Policy and Enforcement teams, chaired by Chris Taylor, UKCTA members were advised that a raft of Ofcom initiatives were scheduled to commence in the coming months (between now and the Olympics), in some cases, with numerous initiatives running in parallel. These workloads come at a time when providers are already in the midst of responding to Ofcom's major Consumer Switching and Non-Geographic Numbering Consultations and two significant information requests (with the first of the Narrowband Requests not far behind).

- 3.23 We discuss Ofcom's response to the letter below. However, we note with disappointment that no specific change to Ofcom's approach seems to have resulted from the UKCTA letter and the concern remains a significant one amongst stakeholders.

Problems that arise due to lack of coordination between requests

- 3.24 A second category of problems arises in relation to Ofcom's aggregate information-gathering program.
- 3.25 Ofcom does not appear to coordinate information requests at any level:

- (a) Between different project teams working in the same Group or work programme;
 - (b) Between Groups or work programmes; nor
 - (c) Across Ofcom generally.
- 3.26 Many of the pressures that affect the timing of Ofcom's work affect all work programmes in parallel ways:
- (a) Much of Ofcom's work tends to be published in three peak periods: just before Easter, just before the summer break and just before the year-end break. Given the project life-cycle, that means that there are common periods when many teams within Ofcom are all, at the same time, looking to gather information for particular projects at the same time.
 - (b) Major initiatives are often proposed and/or announced in the draft and final Annual Plans that trigger new activity across Groups or work programmes.
 - (c) External factors that affect Ofcom's work tend to be common (such as the 'purdah' during an election period, or the hiatus of policy work during, for example, the Olympics).

Information requests often overlap or arrive simultaneously

- 3.27 It is common for information requests to arrive in an unplanned and unpredictable sequence, with periods of relative inactivity and then, sporadically, bursts of activity in which information requests from different parts of Ofcom overlap in time. In addition, there are often long (and, at times, unexplained) delays between Ofcom issuing draft and final information requests.
- 3.28 There is no mechanism for individual teams to be aware of whether and to what extent other teams in Ofcom are engaged in information-gathering. Even if there was visibility of what other teams were doing, there is no contingency built into case team or policy project team work plans to accommodate delays to information-gathering in order to stagger requests.
- 3.29 As a result, Ofcom's current practice is that teams simply issue requests at a time, and a frequency, that is driven by the needs of each individual

project. The outcome of this *ad hoc* approach is that we have found many times that we must respond to a number of independently formed information requests (sometimes even requesting the same information in a different format) at the most busy or difficult times of the year.

- 3.30 Ofcom departments appear oblivious to these other requests. In addition, there appears to be no consideration of the fact that we generally find it harder to source suitable expert commercial personnel available to respond to these requests during the holiday periods.
- 3.31 This practice – and the lack of any coordinating mechanism – has been raised repeatedly with Ofcom. For example, the UKCTA letter not only made this point; it did so in the context of citing the long-standing and repeated nature of stakeholder concerns in this area:

It is UKCTA's experience that Ofcom's Competition and Consumer Groups do not appear to be co-ordinating their information requests and consultations and the frequency and disruptiveness of inquiries from Ofcom's case teams is growing. We understand that this point has been raised with Ofcom before, on numerous occasions but our members have seen no discernible improvement in Ofcom's planning. When setting consultation periods or information request dates, where possible, Ofcom should consider the other regulatory initiatives that CPs are focused on so that response deadlines are realistic. It would also be helpful if Ofcom could afford industry the same flexibility that it grants itself when setting deadlines. All too often, Ofcom publication dates slip and when the consultation is released (more often than not just before a holiday period begins), the deadline for response clashes with other publications or information requests that have been issued in the meantime, and CPs must then beg extensions, especially if resources (importantly from the wider businesses) are tight over a holiday period.

[...]

UKCTA is also troubled by the lack of co-ordination in Ofcom's information gathering activities. At any given time, our members can be dealing with a number of formal information requests from different divisions of Ofcom. ... You will be aware that because the sanctions for failing to respond to an information request carries such a severe penalty (now an increased fine of £2 million), recipients must prioritise responses to those requests, diverting

finite resources away from consultation responses or commercial activities. As highlighted above, UKCTA members are concerned that this lack of co-ordination does not lead to good policy development.

- 3.32 On 5 July 2012 Ofcom provided a response to the UKCTA letter. On the issue of timing of information requests, Ofcom responded that:

***Timing of formal information requests:** Following some discussions with UKCTA a few years ago, Ofcom instituted a system for coordinating the sending of formal information requests to stakeholders. Teams at Ofcom would log the intended dates and deadlines for formal information requests and, where clashes and overlaps were spotted, would discuss to see where it may be possible to re-sequence the work so that teams having to respond to these requests would not have to face multiple requests with concurrent deadlines. While it may not always be possible to re-phase in this way, feedback from UKCTA members was very positive in that the system generally lessened the extent of simultaneous demands. Due to Ofcom restructuring, this system had lapsed. This was not intended and the system has now been reinstituted.*

- 3.33 While there have been some improvements by Ofcom, particularly by encouraging a more co-ordinated approach to issuing information requests, some of the concerns raised in the UKCTA letter still continue today. We urge Ofcom to continue to improve in this area.

The same information may be gathered by Ofcom many times

- 3.34 Both Ofcom's existing and proposed statement of policy state that:

Ofcom holds a significant amount of in-house information and collects a wide range of data on various aspects of the industry. Wherever possible, Ofcom will draw from existing information sources to avoid unnecessary duplication of effort and to minimise the burden placed on those from whom information is requested. [...] However, despite this comprehensive evidence base there will

remain specific areas where it is necessary to collect additional information.⁷

- 3.35 This does not ring true to us. As far as any of us are aware, and reflecting many discussions on this issue over the past 10 years with Ofcom officials, it is simply not accurate to describe Ofcom as having a ‘comprehensive evidence base’. Ofcom has a lot of information, particularly in relation to the Consumer Market Reports (‘CMRs’). But this statement masks the fact that Ofcom does not appear to retain or centrally manage *any* of the information that it gathers about the firms it regulates, other than in relation to the CMRs. Information arrives, generally by email, to the person who has issued the information request. It is used by the team for whose benefit it has been obtained. And that is where the matter ends - there is no established protocol for the handling of this information in any other way, beyond Ofcom’s general obligations of confidentiality. While we acknowledge that Ofcom can only use information for a specific purpose, Ofcom does have the ability to consider whether the information it already holds is sufficient and obtain consent to use pre-existing information for alternative purposes.
- 3.36 This means that all information gathered for policy projects (including market reviews), investigations and disputes is generally treated as a single-use resource. Shared information repositories (such as SharePoint sites) are generally established on a project-specific basis; the default within Ofcom IT systems is that access to project files is limited to the teams assigned to work on that project, not generally made available to all colleagues; and there is no generally-available way for individual project teams to know what other project teams have done.
- 3.37 As a result, it is common for Ofcom information requests to ask for information that has already been provided to Ofcom – even within the same Group or work programme. In fact, it is routine for large commercial players to find that some forms of basic information (such as revenues, customer numbers, service or call volumes and so on) to be requested as part of the launch of nearly every major new initiative,

⁷ The proposed amendment is to delete the following text (at the ellipsis in the extract):
‘Where appropriate, Ofcom will confirm with the source of the information that the information is still up to date and is relevant in the context in which it is to be used.’

particularly where that information is to be calibrated with other, new information in the form of a spreadsheet. This reflects the fact - as it appears to those outside Ofcom - that it may be easier for Ofcom teams to issue an information request to their stakeholders (who are legally compelled to provide the information) than to obtain it from their colleagues (who are not).

3.38 Ofcom officials have tended to be indifferent when asked about whether it might be possible to avoid asking again for the same information. We have been told that:

- (a) *'It isn't possible for individual Ofcom teams to know what information has been gathered previously – there is no central depository of it'*
- (b) *'Information that has previously been gathered may be limited by law in the uses to which it can be put and so would need to be 're-gathered' in any event'*
- (c) *'This policy project has a slightly different set of concerns or questions to all previous work in this area and so a slightly different spreadsheet or format is what is needed on this occasion'*
- (d) *'What's the big deal? If you've already given us the information previously, just identify exactly to whom, where and when you provided that information and confirm that the answer to the question is exactly the same and if we accept that, then that will be sufficient.'*⁸

3.39 Ofcom does not appear to recognise the inconsistency in telling us that it expects that we should have detailed records of information already provided when Ofcom itself does not.

Problems with Ofcom's approach to information-gathering

3.40 Finally, there are problems that relate to the strategic approach or mind-set that Ofcom takes to information-gathering, particularly in contexts where the legal basis for Ofcom's involvement is uncertain or unclear,

⁸ These are not direct quotes – they are indicative summaries synthesising recurring points made to us by Ofcom officials.

the analytical framework that Ofcom is adopting is unclear or the project is one that appears to be exploratory.

Going fishing

- 3.41 It is obviously not appropriate to use information-gathering powers (or any other powers) to go on a ‘fishing expedition’, but some Ofcom information requests appear to come close to violating, or violate, this principle. There have been times when Ofcom has used its statutory powers to seek detailed information from stakeholders when it has no particular immediate or direct concern statutory concern, but is instead ‘horizon scanning’ or engaged in a ‘strategic review’.
- 3.42 This issue generally does not arise in relation to Ofcom’s enforcement of general conditions, where there is a legal requirement that information-gathering only occur in relation to a matter in respect of which Ofcom has received a complaint (or acting on its own initiative) and where it has a reason to suspect a contravention has occurred.⁹ And some policy projects have a relatively tightly defined connection between the nature of the project and the information that is required – market reviews, for example – and in these cases, the process tends to run smoothly and without material concerns about over-reach.
- 3.43 But there is a particular concern in relation to Ofcom’s work in retail markets, where Ofcom has developed an approach based on improving outcomes, rather than responding to particular problems. We see a clear distinction between circumstances where Ofcom is testing a hypothesis in relation to a specific and identified problem, and a situation where Ofcom has a broadly defined sense that there *might* be a material problem in relation to which its duties are engaged and that if there is, regulation *might* be required.
- 3.44 It may be that our concerns on this point are misplaced, and in fact, the issue is a problem of transparency: that is, Ofcom does have a specific concern in mind, but the vague language of the information request does not enable us to understand that concern. In that case, a sharper focus on transparency would be helpful.

⁹ This mirrors the corresponding requirement under UK competition law in relation to investigations into possible infringements of the Chapter 1 or Chapter 2 prohibitions.

- 3.45 But in other cases, Ofcom seems to be seeking evidence not to test a hypothesis concerning a regulatory proposal dealing with an existing problem, but to enable it to *find* new problems that might require further intervention by Ofcom. One recent information request, accompanied by dozens of substantial, multi-part questions and accompanying spreadsheets to be completed – imposing substantial costs on all recipients – cited as its rationale:

‘Investigating consumers’ experiences of [the aspect of service Ofcom is interested in] ... identification of what, if any, difficulties consumers face ... [and] where any difficulties are identified, understanding their nature and magnitude and ... exploring what, if any ... interventions ... might be appropriate’

- 3.46 This seems to us to reveal Ofcom’s thinking to be at a stage *prior* to the point at which an information request is the appropriate legal mechanism. More specifically, these are cases where there are no reasonable grounds yet for suspecting that regulation would do more good than harm – let alone be necessary. In those cases, other ways to obtain information might be more appropriate, such as a call for inputs.

Confirmation bias

- 3.47 Confirmation bias is the well-observed tendency of organisations and individuals to pay greater attention to information that confirms a pre-conception and to pay less attention to contradictory or conflicting evidence that muddies this picture.
- 3.48 Institutions – including regulators – are well-documented to be at risk of confirmation bias.
- 3.49 Confirmation bias is a problem most acutely in projects where the basis for Ofcom’s intervention is poorly-defined or Ofcom struggles to explain exactly what role regulation can or should play – it is looking to understand whether the market could ‘perform better’. Often these initiatives begin with a large information-gathering exercise, with Ofcom not yet in a position to be clear precisely what problems it believes engage its statutory role. For example, the activities of UK economic regulators in competitive retail markets are a source of particular focus because there is a growing body of evidence that regulatory errors (particularly ‘Type I’ errors, intervening where it would have been better

to do nothing) can undermine competition and be a substantial source of harm to consumers.¹⁰ At the same time, Ofcom has stepped up its efforts to understand how these complex and dynamic markets function, with a view to improving outcomes for consumers.

- 3.50 A related problem has been Ofcom ‘exporting’ information request formats (and even individual questions) from one context to another in ways that reveal Ofcom to be starting from an assumption of commonality where no such assumption is warranted. For example, it is sometimes clear from the form of an information request that Ofcom has generalised highly specific facts from one technology, network or platform as forming a template to understand all technologies, networks or platforms. The picture that is revealed is skewed by Ofcom’s preconceptions.
- 3.51 It would be better if Ofcom put more effort into thinking about what it wanted to get out of information-gathering, and put effort into planning information-gathering as an element of the strategic policy development process, rather than an easy step to take as busy work before the team is forced to confront the question of why and for what purpose Ofcom is running the project. Information-gathering in that scenario tends to be poorly-planned and is likely to impose unnecessary costs.

New problems arising from the 2015 policy proposals

- 3.52 Finally, we have identified two issues that are specific to Ofcom’s new policy proposals.

Reduced incentives for voluntary disclosure

- 3.53 Ofcom’s new approach is that from now on, information provided on a voluntary basis will be the subject of a compulsory statutory request:

Beyond our enforcement and dispute resolution functions, we are responsible in a number of contexts for reviewing markets and considering the necessity of regulatory actions – for instance, in conducting market reviews under the 2003 Act, in exercising our spectrum management functions under the 2006 Act, or in considering how to carry out our functions in a manner that will

¹⁰ See, for example, the provisional findings of the Competition and Markets Authority in relation to energy markets at paragraphs 137 – 140.

secure the provision of a universal postal service under the 2011 Act. In exercising those types of functions, we often benefit from the provision of information from stakeholders on a voluntary basis and from a constructive dialogue in relation to a range of issues. We welcome that engagement from stakeholders in what are often complex, technical matters and want it to continue in future. In order to ensure that our evidence base is robust, complete and non-biased we will, however, generally seek to obtain all necessary information using our statutory powers. Where information that is potentially material to our decision making has already been provided on a voluntary basis, we will generally use our statutory powers to confirm the completeness and accuracy of that information. Further, where we have been told that such information is not available, we will generally use our statutory powers to obtain formal confirmation of this.

- 3.54 This reasoning commits a basic policy design error: it assumes a static analysis, rather than anticipating the result of stakeholders. If ‘voluntary disclosure’ is good, the reasoning runs, why isn’t ‘voluntary disclosure plus a statutory information request’ even better? After all, it means that Ofcom will be able to assure itself that the information is ‘robust, complete and non-biased’. What could be bad about that?
- 3.55 But this analysis misses the bigger question: not how today’s processes will be affected by this change, but how it will affect *future* behaviour by stakeholders.
- 3.56 The obvious effect of this policy, if it were to be implemented, is that stakeholders will be less likely to provide information to Ofcom on a voluntary basis. It risks undermining the informal and constructive dialogue between Ofcom and stakeholders and may reduce stakeholders’ confidence and trust in the regulatory process. The benefits of giving Ofcom information may be hard to discern – but the costs of complying with a follow-up request that, by design, seeks to dig deeply into the records of the business to ensure that Ofcom can verify the information’s ‘completeness’ may be material and specific. There is reputational risk, too, in the event that Ofcom takes the (unfalsifiable) view that ‘something’ remains to be discovered.
- 3.57 There is an unrecognised and implausible premise to Ofcom’s approach: that information comes in only one ‘good’ flavour, which is ‘robust, complete and non-biased’ and that Ofcom’s objective should be

to filter out any information that doesn't meet this standard, paying attention only to the information that does. In fact, it is almost never the case that these characteristics can be established *ex ante* in relation to information, either by Ofcom or the holders of the information themselves.

- 3.58 To ensure that information provided meets this very high standard, Ofcom seems to be suggesting that it needs to rely on formal requests because those requests carry more weight. However, Ofcom needs to balance the risks and benefits of a formal approach and recognise that the formal approach may not be appropriate in all circumstances. Taking a formal approach in every case may have precisely the opposite effect than is intended: making it less likely, not more likely, that Ofcom will have access to the widest available evidence set when taking critical decisions.

Reduced use of draft information requests

- 3.59 Ofcom's plan to move away from using draft information requests in some (but not all) cases seems to us to be at risk of making some of the issues we have raised in this submission worse.
- 3.60 We are concerned that by moving away from using draft information requests, there will be fewer opportunities to raise concerns about a request before the issue becomes one that is a matter of legal compulsion (and hence, before Ofcom still has freedom and discretion to take on board concerns without having to, for example, withdraw a previously-made final and binding information request).
- 3.61 The delay involved in providing an information request in draft form is extremely modest – the vast majority of comments are provided within the requested three working day window. Nor is the burden of taking account of those comments a significant drain on Ofcom's resources, particularly given that the issues raised often (we understand) help the Ofcom teams to focus their requests and make them more effective.
- 3.62 So in summary, this change seems likely to lead to more costly, less predictable escalations between Ofcom and stakeholders, with no particular benefit.

4. Solutions

- 4.1 This section explores ways that Ofcom might be able to improve its use of its information-gathering.
- 4.2 We have only explored options that:
 - (a) Are realistic and within Ofcom's legal power to undertake. Everything described in this section is within Ofcom's reach or discretion. None require legislative change.
 - (b) Involve a plausible commitment of resources. The solutions we describe are not all costless (although some are), but nor are they disproportionate – particularly given that Ofcom's costs as a sector regulator are ultimately borne by the industry, not the taxpayer.
 - (c) Are likely to be effective. We think any of them (individually or, even better, a number of them in combination) would work to achieve the desired outcome: a better and smoother relationship with stakeholders without compromising Ofcom's ability to secure the information it needs to perform its statutory functions.

Improving individual requests

- 4.3 It should be obvious that at least in a substantial minority of cases, individual information requests are issued that ought to be subject to more rigorous internal scrutiny and quality control – either before they are issued or on review in the event that they are issued.
- 4.4 Preventing problems is better and less costly than fixing them. It would be good if Ofcom teams were encouraged to think more carefully before issuing information requests, and to treat the exercise of information-gathering powers as a matter to be undertaken only after due consideration of whether it is necessary to do so.
- 4.5 We hope that Ofcom recognises that improving information requests is best undertaken as a dialogue with the stakeholders who deal with most information requests. We are not seeking for Ofcom to re-commit itself to doing things under the *existing* process more effectively (which was the outcome of the UKCTA letter in 2012). Instead, we hope for tangible changes to the process, or new processes, that create 'nudges' that will

help Ofcom teams change their behaviours in ways that are more closely aligned with Ofcom's statutory responsibilities.

A new precedent format with legal clarity and impact assessment

- 4.6 A simple starting point would be to adopt a clearer and better model document, that covers both the externally facing elements of the request (such as the information that Ofcom is seeking) but also provides a framework for Ofcom teams to work through the issues that ought to be front of mind in deciding whether to issue a request.
- 4.7 This is long overdue. The form of Ofcom's information-gathering requests is, in broad terms, the same as Ofcom inherited from Oftel.
- 4.8 A starting point might be, for example, clear guidance about the level of detail required to set out the link between the statutory function being performed by Ofcom and the information being gathered. This would be a simple and effective step that would improve the information-gathering process substantially. Today, Ofcom project teams themselves have no need to turn their minds to precisely which basis on which they are obtaining information because the issue plays little if any role in getting a request approved and issued.
- 4.9 It would also be useful to have a clear statement of policy from Ofcom about the governance of information requests. Who in Ofcom is empowered to make information requests? What is the process for issuing requests? Who has sign-off on such requests? These matters are not covered in either the old or the new policy, and there is no reason not to be open about them.
- 4.10 A new model document could nudge Ofcom teams to think about elements that are frequently overlooked because there is literally no place for them in Ofcom's thinking, such as:
 - (a) An estimate of the costs associated with fulfilling the request. Ofcom has deep expertise in understanding how much it costs to provide information – for example, it is able to quickly and precisely estimate its own costs in meeting requests under the Freedom of Information Act 2000. This expertise is never deployed to support information-gathering because there is nowhere in the creation of

the information request that a team is expected to write down what it thinks the cost imposed on the recipient would be.

- (b) Any information about alternative sources of the same information that have been considered and rejected. For example, could this information be obtained from consumers directly? From other parties such as other regulators? In many cases, these alternatives might reasonably be higher-cost (and hence, not proportionate) ways of obtaining that information – which makes it clear that the IR is appropriately made.
- (c) A statement by the Ofcom official issuing the request that he or she had made reasonable efforts to establish that the information was not already held by Ofcom
- (d) A statement by the Ofcom official issuing the request that he or she is satisfied that gathering the information is necessary for the conduct of Ofcom's functions.

4.11 We do not think it would be a good idea for Ofcom to attempt to undertake an impact assessment ('IA') for every information request – and this does not seem to be required as a matter of law (since undoubtedly some minor information requests are unlikely to constitute decisions that are 'important' in the sense defined in section 7 of the Communications Act 2003). But that does not mean that a large information request could never to be the subject of an IA. Nor is there anything about information-gathering that excludes the operation of section 7. In some cases, an IA could help Ofcom to ensure that it was considering the right information and decide whether the information request was, for example, necessary and/or proportionate.

Empower the Procedural Officer to deal with requests

- 4.12 A second and simple change that Ofcom can make, with immediate effect and at no direct cost, would be to extend the jurisdiction of the Procedural Officer to deal with concerns raised about statutory information requests issued under Ofcom's sectoral powers.
- 4.13 The Procedural Officer currently hears matters related to the exercise of the closely-related powers under competition law. Her remit extends to complaints about the procedures followed during the course of an

Ofcom investigation under the Competition Act 1998. As the relevant terms of reference note:

The Procedural Officer is independent from the Ofcom investigation, case team and decision makers, and will not have been involved in the investigation (other than as Procedural Officer). The role of the Procedural Officer is intended to ensure that procedural issues can be addressed quickly, efficiently and cost effectively, and independently of the case team.¹¹

- 4.14 Based on the points raised in this submission, we think it ought to be obvious that there would be benefit in having an escalation path for concerns about information requests issued under the Communications Act 2003 that mirrors this role.¹² In fact, most of the issues raised in this submission (and certainly all those in relation to individual information requests) might be dealt with by this change by itself.
- 4.15 As far as we can see, there is no bar to Ofcom establishing an additional, discretionary role for the Procedural Officer:
- (a) Ofcom already has discretionary jurisdictions exercised by named individuals to address particular stakeholder concerns: for example, the Consultation Champion.¹³
 - (b) Ofcom has previously established bodies such as the Office of the Telecommunications Adjudicator (and its successor) as extra-statutory elements of the regulatory regime.
- 4.16 Amending the Procedural Officer's jurisdiction in this way would create no direct costs to Ofcom.

¹¹ See paragraph 4 of the Procedural Officer terms of reference (PO TOR), available at http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/complaints-disputes/procedural_officer.pdf.

¹² There would be one material difference, which is that by taking on this role, the Procedural Officer would be taking a view about the 'scope' of information requests in a way that she is explicitly not required to do in relation to the scope of requests for documents and/or information under the Competition Act 1998 (see paragraph 7 of the PO TOR). Nevertheless, given the benefits to information-gathering that might accrue, this seems a step worth taking.

¹³ A 'person within Ofcom will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. Ofcom's Consultation Champion will also be the main person to contact with views on the way we run our consultations.' (see Ofcom's Consultation Guidelines).

Litigation

- 4.17 Ultimately, a 'solution' to Ofcom's over-use of information requests, and one that we anticipate that stakeholders may consider if no other solutions are adopted, is litigation.
- 4.18 Ofcom's decisions to issue information requests are, in some circumstances, subject to merits review in the CAT. Other forms of information-gathering are subject to judicial review.
- 4.19 While litigation can be resource-intensive, and we'd prefer to see other approaches set out in this submission tried instead, there are some virtues of litigation:
- (a) It would produce clarity about the nature of Ofcom's powers and the constraints on them imposed by requirements such as reasonableness and proportionality, that are somewhat unclear.
 - (b) It would deliver an arms-length review of Ofcom's current approach (at least in relation to the appealed request(s)).
 - (c) We expect that any adverse decision would change Ofcom's behaviour decisively; and
 - (d) It would produce decisions that could be analysed to establish principles of more general application that could improve the degree of legal certainty in relation to these powers.

Improving coordination

- 4.20 Separate from the steps taken to improve individual requests, there are some simple steps that Ofcom could do to improve the way in which information requests are coordinated.
- 4.21 We don't think the answer is a single 'Information Request Issuing Department' in Ofcom. But some simple things could be done to enable each project team to be more aware of the actions of other project teams, and hence, to better able to judge whether they need to undertake further information-gathering and if so, whether that is likely to be best done immediately or staggered to reduce the costs imposed on industry and hence, consumers.

Fewer, more expert and arms-length approvers of requests

4.22 Currently, there are many individuals within Ofcom empowered to sign information requests, and each brings their own judgement and experience to the question of whether information requests are appropriate. Generally, they are the senior individuals directly responsible for or sponsoring the project – that is, they are aligned, in an institutional sense, with the team proposing the use of statutory information-gathering powers. For example:

- (a) The Director of Consumer Policy generally approves information requests relating to consumer policy projects;
- (b) The Director of Consumer Enforcement generally approves information requests relating to consumer enforcement investigations; and
- (c) The relevant Competition Policy Director or Spectrum Policy Director generally approves information requests relating to his or her own projects in the competition policy or spectrum policy work programme.

4.23 It is well-recognised in regulatory institutional design that creating internal points for genuine arms-length review and challenge represents best practice and is likely to raise the quality of decision-making. The CMA, Ofgem and the FCA have all adopted this principle in designing their internal governance processes.¹⁴

4.24 Why not have fewer, more expert individuals taking approval decisions within Ofcom, with an arms-length principle operating so that individuals approving information requests are *not* those who are directly responsible for the relevant project?

4.25 This would likely be resource-positive for Ofcom:

- (a) By aggregating information-request approvals in fewer sites within the organisation, teams navigate a simpler process with clearer requirements.

¹⁴ For example, please see: “Transparency of Ofgem data – a statement of our policy”, dated 25 March 2014, paragraph 4.9 which sets out the Information Request Process which is to be followed.

(https://www.ofgem.gov.uk/sites/default/files/docs/2014/03/transparency_of_ofgem_data_-_a_statement_of_our_policy.pdf)

- (b) There are likely to be economies of scale and quality benefits associated with having fewer, more expert individuals involved in taking these decisions. For example, because they take those decisions more frequently than the larger group of today's approvers, they are likely to have a higher level of understanding of the issues relating to information-gathering specifically. It would be more cost-efficient to train those individuals to a higher standard, and the benefit of doing so would be delivered on a wider basis, if each of them were dealing with a larger proportion of Ofcom's total information-request output.
- (c) There would be spill-over benefits in terms of noticing issues like repetition and inconsistency, since the individuals would serve as a 'corporate memory' on these issues.

4.26 It would not be sufficient just to keep the same group of people in place as approvers but institute a 'don't mark your own homework' principle: that could mean teams roaming Ofcom, searching out senior decision-makers with perhaps little understanding of the specific issues relating to the project to secure a signature to get a request issued. That could make the existing problems worse. What is needed is a decision to invest in expertise, creating champions of high-quality information-gathering who would prevent poor-quality decisions on information-gathering with as much zeal as Ofcom shows to avoiding poor-quality work on financial modelling, legal review, economic reasoning or technical analysis. In all of those areas, systems of rigorous peer-review are embedded as part of the way that Ofcom delivers its work. This is conceptually similar to the approach taken to dealing with Freedom of Information Act 2000 requests, where individual teams do not seek to develop their own subject-matter mastery over freedom of information issues, but rely on a group of colleagues who have specialist skills in relation to information requests.

4.27 These could be Legal Directors (and of course, lawyers have skills relevant to this task) but it isn't a question of solely 'legal sign-off' – what is needed is an assessment of questions like operational necessity, the burden imposed on stakeholders and the reasonableness and proportionality. That means being prepared to challenge teams on the *policy* judgements underpinning a request and so these are decisions

that call for operational management control to be exercised, not simply legal review.

Improved Ofcom internal governance

- 4.28 There are other improvements to Ofcom governance that would also have a positive impact.
- 4.29 For example, Ofcom could improve the visibility of information-gathering at Board level, by asking all Groups to report once a year on the aggregate extent of information-gathering that they impose on stakeholders. That report would create an annual opportunity to consider and have a strategic discussion about, for example, whether steps to reduce duplication or costs imposed on stakeholders might be appropriate, or to increase the effectiveness of information-gathering.

Transparency of information-requests: publishing a ‘high-level’ log

- 4.30 Another easily-made change that could have a big positive impact would be for Ofcom to publish a ‘high-level’ log of all information requests made via Ofcom’s website. That would provide an immediate step-change in the degree of transparency about information-gathering.
- 4.31 We suggest that the log may include information about the total number of information requests issued by Ofcom and the policy area to which the information requests relate (e.g. by category, number of questions and class of recipient (‘mobile operator’, ‘fixed service provider’, etc.) Ofcom could either publish the log on an on-going basis or periodically (e.g. quarterly or annually).

Improving Ofcom’s approach

- 4.32 Finally, there are some important steps that Ofcom could take in relation to information-gathering that would help address some of the concerns we have about mission-creep and the over-use of information-gathering powers in more exploratory proceedings.

A renewed focus on evidence-led decision making

- 4.33 We think it would be helpful if Ofcom renewed its commitment to an approach to information-gathering that was based on the idea of testing a falsifiable hypothesis, rather than simply gathering raw data.
- 4.34 This is particularly important in some of the most contested areas of Ofcom's work in retail markets. For example, Ofcom's described its strategic rationale in 2015 for increasing its work to empower consumers in the future:

Increasing complexity may reduce consumers' ability to achieve the best deals in the market because they may struggle effectively to assess the information available to them. There is a risk that consumers simply feel overwhelmed by the issues and information they need to take into account when assessing their choices and opt not to shop around but to stick with the packages or services that they are getting from their current provider. Alternatively, they may decide that the gains from switching are not sufficient to justify both the increasing time and effort required to reach a decision. As a result, consumers may not bother to engage with the choices available to them or not make good choices for their own particular circumstances.

- 4.35 Without expressing a view about the merits of the issue, we note that this type of reasoning depends on Ofcom's view of what *might* be happening in the market. This type of reasoning can be difficult – sometimes impossible – to test against the evidence. Any inconsistent information can be made to fit somewhere in this picture and, if explained away, will not disprove the theory of harm (in this case, that 'increasing complexity' is a problem).¹⁵
- 4.36 The risk is that Ofcom creates a self-reinforcing internal logic with a set of statements about the market that cannot be tested against any objective evidence. This type of reasoning can (as one stakeholder recently put it) 'take on a life of its own' – leaving Ofcom vulnerable to confirmation bias and the risk of regulatory failure.¹⁶

¹⁵ A subject about which the organisations who are authors of this submission have a range of views.

¹⁶ VM SRDC submission paragraph 137.

- 4.37 Information-gathering has an obvious role to play in avoiding this problem, and we see real value in Ofcom treating information-gathering not as an exercise in ‘hoovering up data’, but a targeted effort to confirm or falsify specific hypotheses – ideally, under circumstances where Ofcom is prepared to challenge or vary its own view of what is happening in the market to fit the facts, not the other way round.

Mapping Ofcom’s processes more closely onto market studies under competition law

- 4.38 We invite Ofcom to consider the relationship between the approach taken to information-gathering in regulatory policy projects and the approach taken to information-gathering in the closely analogous process of conducting a market study under competition law.
- 4.39 In a market study, the CMA is considering the question of whether a given market might work more effectively. This has some obvious analogies with the way in which Ofcom conducts, for example, a consumer policy project designed to understand whether a particular competitive retail market might perform better for consumers, compared to a counterfactual status quo.
- 4.40 Critically, however, the point at which the CMA acquires the use of its information-gathering powers is also the point at which it becomes bound by a set timetable. From that point, it is committed either to:
- (a) Move to a market investigation reference, within six months; or
 - (b) Conclude its market study, within twelve months.
- 4.41 Ofcom’s policy projects also involve the compulsory obtaining of information under statutory powers but they do not have these types of time limits.
- 4.42 This timetable brings a level of clarity and specificity to market studies that sometimes feels to be lacking in Ofcom’s processes, with some of the major policy initiatives lasting over many years. Ofcom’s processes do not require project teams to either reach a positive conclusion that regulation is warranted or conclude that it is not warranted. As a result, there is a risk that information-gathering can become a kind of default option – a course that involves doing something (‘we’re monitoring events and gathering information’) without coming to any conclusion.

5. Annex: Relevant European and UK legislation

The Communications Act 2003

5.1 In summary, the key provisions are as follows:

- (a) Ofcom may make an information request, subject to certain limitations
- (b) Powers for requesting information are exercised by Ofcom for a number of reasons, including in relation to investigations on breach of conditions, to carry out market reviews, and to set general conditions.
- (c) Ofcom also powers to require the provision of information for related purposes.]
- (d) Ofcom cannot request information unless:
 - (1) it describes the information that requires and give reason for requiring the particular information; and
 - (2) The request for information is proportionate to the use to which the information is be put to use).
- (e) A person that fails to respond to an information request is guilty of an offence.
- (f) Ofcom is required to prepare a policy statement on how it will exercise its power under s 135.

5.2 Section 135 is not including in schedule 8 of the Act (decisions by Ofcom that cannot be challenged), meaning that a decision to issue an information request can be the subject of an appeal on the merits to the CAT (s.192).

5.3 The statutory provisions are:

135 Information required for purposes of Chapter 1 functions

- (1) *OFCOM may require a person falling within subsection (2) to provide them with all such information as they consider necessary for the purpose of carrying out their functions under this Chapter.*
- (2) *The persons falling within this subsection are—*
 - (a) *a communications provider;*

- (b) *a person who has been a communications provider;*
 - (c) *a person who makes, or has made, any associated facilities available to others;*
 - (d) *a person, other than a communications provider, to whom a universal service condition applies or has applied;*
 - (e) *a person who supplies electronic communications apparatus;*
 - (f) *a person not falling within the preceding paragraphs who appears to OFCOM to have information required by them for the purpose of carrying out their functions under this Chapter.*
- (3) *The information that may be required by OFCOM under subsection (1) includes, in particular, information that they require for any one or more of the following purposes—*
- (a) *ascertaining whether a contravention of a condition or other requirement set or imposed by or under this Chapter has occurred or is occurring;*
 - (b) *ascertaining or verifying the charges payable by a person under section 38;*
 - (c) *ascertaining whether a provision of a condition set under section 45 which is for the time being in force continues to be effective for the purpose for which it was made;*
 - (d) *ascertaining or verifying amounts payable by virtue of a condition falling within section 51(1)(d);*
 - (e) *making a designation in accordance with regulations made under section 66;*
 - (f) *carrying out a review under section 66 or 70;*
 - (g) *identifying markets and carrying out market analyses in accordance with, or for the purposes of, any provision of this Chapter;*
 - (i) *considering a matter in exercise of that duty;*
 - (ia) *preparing a report under section 124F;*
 - (ib) *carrying out an assessment, taking steps or providing a report under section 124G;*
 - (ic) *preparing a report under section 134A;*
 - (id) *preparing a report under section 134C;*
 - (ie) *assessing the security of a public electronic communications network or a public electronic communications service;*
 - (if) *assessing the availability of a public electronic communications network;*
 - (ig) *identifying electronic communications apparatus that is suitable for shared use;*
 - (j) *statistical purposes connected with the carrying out of any of OFCOM's functions under this Chapter.*

- (3A) *The descriptions of information that a person may be required to provide under subsection (1) include, in particular—*
- (a) *information concerning future developments of an electronic communications network or electronic communications service that could have an impact on the wholesale services made available by the person to competitors, and*
 - (b) *if a market power determination made in relation to a wholesale market is in force in the person's case, accounting data relating to any retail market associated with the wholesale market.*
- (4) *A person required to provide information under this section must provide it in such manner and within such reasonable period as may be specified by OFCOM.*
- (5) *The powers in this section are subject to the limitations in section 137.*

136 Information required for related purposes

- (1) *OFCOM may require—*
- (a) *a communications provider, or*
 - (b) *a person who makes associated facilities available to others,*
- to provide OFCOM with all such information as they consider necessary for the purpose specified in subsection (2).*
- (2) *That purpose is the carrying out—*
- (a) *with a view to publication, and*
 - (b) *in the interest of the end-users of public electronic communications services,*
- of comparative overviews of the quality and prices of such services.*
- (3) *OFCOM may also require—*
- (a) *a communications provider, or*
 - (b) *a person who makes associated facilities available to others,*
- to provide them, for use for such statistical purposes as they think fit, with information relating to any electronic communications network, electronic communications service or associated facilities.*
- (4) *A person required to provide information under this section must provide it in such manner and within such reasonable period as may be specified by OFCOM.*
- (5) *The powers in this section are subject to the limitations in section 137.*

137 Restrictions on imposing information requirements

- (1) *This section limits the purposes for which, and manner in which, information may be required under sections 135 and 136.*
- (2) *OFCOM are not to require the provision of information for the purpose of ascertaining whether a contravention of a general condition has occurred, or is occurring, unless—*
 - (a) *the requirement is imposed for the purpose of investigating a matter about which OFCOM have received a complaint;*
 - (b) *the requirement is imposed for the purposes of an investigation that OFCOM have decided to carry out into whether or not the general condition in question has been complied with;*
 - (c) *the condition in question is one which OFCOM have reason to suspect is one that has been or is being contravened;*
 - (d) *the condition in question is one falling within section 51(1)(d); or*
 - (e) *the condition in question is one relating to the effective and efficient use of telephone numbers.*
- (2A) *OFCOM are not to require the provision of information for a purpose specified in section 135(3)(ie) or (if) unless—*
 - (a) *the requirement is imposed for the purpose of investigating a matter about which OFCOM have received a complaint;*
 - (b) *the requirement is imposed for the purposes of an investigation that OFCOM have decided to carry out into whether or not an obligation under section 105A has been complied with; or*
 - (c) *OFCOM have reason to suspect that an obligation under section 105A has been or is being contravened.*
- (3) *OFCOM are not to require the provision of information under section 135 or 136 except—*
 - (a) *by a demand for the information that describes the required information and sets out OFCOM's reasons for requiring it; and*
 - (b) *where the making of a demand for the information is proportionate to the use to which the information is to be put in the carrying out of OFCOM's functions.*
- (4) *The reasons for requiring information for statistical purposes under section 135 or 136 must set out the statistical purposes for which the information is required.*

- (5) *Except in the case of a demand made in the manner authorised by subsection (6), a demand for information required under section 135 or 136 must be contained in a notice served on the person from whom the information is required.*
- (6) *In the case of information required by OFCOM for the purpose of ascertaining who is liable to charges under section 38, the demand may—*
 - (a) *be made by being published in such manner as OFCOM consider appropriate for bringing it to the attention of the persons who are described in the demand as the persons from whom the information is required; and*
 - (b) *take the form of a general demand for a person so described to provide information when specified conditions relevant to his liability to such charges are satisfied in his case.*

The Framework Directive

5.4 In summary, the key provisions for these purposes are:

- (a) Ofcom should gather information from market players in order to carry out their task effectively. Ofcom may also gather information on behalf of the Commission.]
- (b) CPs are required to provide information promptly upon request and to the timescale and level of detail required by Ofcom
- (c) The information request from Ofcom needs to be proportionate to the performance of the task.
- (d) Information requests should be proportionate and not impose an undue burden on undertakings

5.5 The relevant parts of the Framework Directive referred to above are:

Article 5 - Provision of information

- (1) *Member States shall ensure that undertakings providing electronic communications networks and services provide all the information, including financial information, necessary for national regulatory authorities to ensure conformity with the provisions of, or decisions made in accordance with, this Directive and the Specific Directives. In particular, national regulatory authorities shall have the power to require those undertakings to submit information*

concerning future network or service developments that could have an impact on the wholesale services that they make available to competitors.

- (2) Undertakings with significant market power on wholesale markets may also be required to submit accounting data on the retail markets that are associated with those wholesale markets. Undertakings shall provide such information promptly upon request and in conformity with the timescales and level of detail required by the national regulatory authority. The information requested by the national regulatory authority shall be proportionate to the performance of that task. The national regulatory authority shall give the reasons justifying its request for information and shall treat the information in accordance with paragraph 3.*
- (3) Member States shall ensure that national regulatory authorities provide the Commission, after a reasoned request, with the information necessary for it to carry out its tasks under the Treaty. The information requested by the Commission shall be proportionate to the performance of those tasks. Where the information provided refers to information previously provided by undertakings at the request of the national regulatory authority, such undertakings shall be informed thereof. To the extent necessary, and unless the authority that provides the information has made an explicit and reasoned request to the contrary, the Commission shall make the information provided available to another such authority in another Member State.*
- (4) Subject to the requirements of paragraph 3, Member States shall ensure that the information submitted to one national regulatory authority can be made available to another such authority in the same or different Member State, after a substantiated request, where necessary to allow either authority to fulfil its responsibilities under Community law.*
- (5) Where information is considered confidential by a national regulatory authority in accordance with Community and national rules on business confidentiality, the Commission and the national regulatory authorities concerned shall ensure such confidentiality.*

- (6) *Member States shall ensure that, acting in accordance with national rules on public access to information and subject to Community and national rules on business confidentiality, national regulatory authorities publish such information as would contribute to an open and competitive market.*
- (7) *National regulatory authorities shall publish the terms of public access to information as referred to in paragraph 4, including procedures for obtaining such access.*

Recital 13: National regulatory authorities need to gather information from market players in order to carry out their tasks effectively. Such information may also need to be gathered on behalf of the Commission, to allow it to fulfil its obligations under Community law. Requests for information should be proportionate and not impose an undue burden on undertakings. Information gathered by national regulatory authorities should be publicly available, except in so far as it is confidential in accordance with national rules on public access to information and subject to Community and national law on business confidentiality.

The Competition Act 1998

5.6 In summary the key provisions for these purposes are:

- (a) Ofcom has powers to investigate suspected anti-competitive behaviour (infringement of chapter I or chapter II prohibition).
- (b) These provisions allow the economic regulator (Ofcom) to require the production of specified documents or specified information when carrying out investigations
- (c) Failure to comply with an information request under s 26 – carries a penalty of up to £30,000 and/or daily penalty of up to £15,000

5.7 The relevant statutory provisions in relation to information-gathering is:

26.— Investigations: powers to require documents and information

- (1) *For the purposes of an investigation, the CMA may require any person to produce to it a specified document, or to*

- provide it with specified information, which it considers relates to any matter relevant to the investigation.*
- (2) *The power conferred by subsection (1) is to be exercised by a notice in writing.*
 - (3) *A notice under subsection (2) must indicate—*
 - (a) *the subject matter and purpose of the investigation;*
 - and*
 - (b) *the nature of the offences created by [sections 43 and 44](#)*
 - (4) *In subsection (1) “specified” means —*
 - (a) *specified, or described, in the notice; or*
 - (b) *falling within a category which is specified, or described, in the notice.*
 - (5) *The CMA may also specify in the notice—*
 - (a) *the time and place at which any document is to be produced or any information is to be provided;*
 - (b) *the manner and form in which it is to be produced or provided.*
 - (6) *The power under this section to require a person to produce a document includes power—*
 - (a) *if the document is produced—*
 - (i) *to take copies of it or extracts from it;*
 - (ii) *to require him, or any person who is a present or past officer of his, or is or was at any time employed by him, to provide an explanation of the document;*
 - (b) *if the document is not produced, to require him to state, to the best of his knowledge and belief, where it is.*