



Vodafone's Response to the Independent Review of Administrative Law Panel's Call for Evidence

1. Introduction

- 1.1. Vodafone welcomes the opportunity to input into the Independent Review of Administrative Law panel's ("IRAL") Call for Evidence. As a global company in a sector which is subject to economic regulation, we have direct experience of judicial review ("JR").
- 1.2. JR plays a vital role in ensuring that there are appropriate checks and balances in place. It provides investment certainty, benefits consumers and improves public decision making. These checks and balances are more important now than ever, with the Covid-19 pandemic demonstrating how crucial access to telecoms networks is for businesses as well as individuals. Therefore we urge the Panel not to seek to restrict the grounds of review or impose additional hurdles to seeking JR as this risks higher prices for consumers for essential services such as broadband as well as long term damage to the UK's desirability as an investment environment.
- 1.3. The telecoms sector has recently been subject to reforms to the standard of appeals being changed from 'on the merits' to JR standards.¹ This means that any reforms to JR will have a direct and substantial impact on the telecoms sector. Decisions taken by Ofcom are massively important, impacting on fundamental resources such as spectrum and directly impacting the prices paid by consumers through market reviews. These decisions can significantly impact investment decisions - which are now more crucial than ever due to the effects of the pandemic leading to the public placing more reliance on telecoms networks. Therefore, any changes to the grounds of JR that will impact telecoms appeals should be subject to a separate line of enquiry and consultation process, which Vodafone would welcome the opportunity to respond to.
- 1.4. In this submission, we firstly set out why, in our view JR benefits consumers, and how it affords a vital protection which is necessary support future investment in the UK telecoms market. We then detail the knock on effect that further JR reforms could have on the telecoms sector and outline some proposals for a reform of the permission stage and ADR as mentioned above. We then respond to the questions raised in the call for evidence.

¹ Section 87 Digital Economy Act 2017 ("DEA") which entered into force on 31 July 2017 amended sections 192-196 of the Communications Act 2003 ("CA") by removing the requirement for appeals cases to be decided 'on the merits' and replaced it with a requirement that the Competition Appeal Tribunal ("CAT") apply the same principles as would be applied by a court on an application for JR (now section 194A CA 2003).



2. The availability of judicial review is vital to attract and support investment in UK telecoms

- 2.1. As mentioned above, JR fulfils an essential role in providing a check and balance on powers exercised by public authorities. A requirement that economic regulators such as Ofcom conduct a fair and open consultation before a final decision is made², and that consultees are provided with enough information³ gives stakeholders a fair opportunity to understand and respond to issues which affect future business decisions and investments. These examples are also not the result of statutory intervention, but previous JR's which have established well known principles which give companies (and investors) legitimate expectations and provide regulators with standards.
- 2.2. This is just one of the ways in which JR ensures that companies and investors have recourse to challenge decisions when they believe (in good faith) that they are incorrect. In our view reducing the oversight afforded by JR would increase perceptions in regulatory risk, which could lead investments being perceived as riskier - this would result in investors requiring a higher return to justify that risk and as a consequence would lead to consumers paying higher prices.⁴ As a major player in one of the UK's biggest industries at a time where access to next generation networks is vital to individuals as well as the economy - investment certainty matters. Therefore, we urge the panel not to the restrict grounds of review or impose additional hurdles to seeking JR.

3. The impact of judicial review reforms in telecoms

The current appeals process in telecoms

- 3.1. In the context of the telecoms sector, the regime for appeals is already sufficiently codified and further statutory intervention is unlikely to add clarity/certainty. The standard of review has recently changed in telecoms appeals to the CAT of those Ofcom decisions to which the appeals provisions in CA apply. It removed the requirement for appeals cases to be decided "on the merits", replacing it with a requirement that the CAT apply the same principles as would be applied by a court on an application for JR.
- 3.2. The effect of this is that changes to JR would flow through directly to the sector-specific appeals regime in telecoms. Decisions which are of 'legislative/quasi legislative importance' that cannot be challenged to the CAT are set out in schedule 8 CA – and these are subject only to JR. This includes decisions on spectrum allocation.

² R (Moseley) v Haringey LBC [2014] UKSC 56 [2014] 1 WLR 3947 at [25].

³ R (Help Refugees Ltd) v Secretary of State for the Home Department [2018] EWCA Civ 2098, at [90].

⁴ Where an investment is perceived as risky investors will require higher expected commercial returns to justify making that investment (known as the 'cost of capital'), which means economic regulators will have to allow higher prices. This is a well-accepted and understood trade-off – e.g. Ofcom allowing higher revenues for BT on fibre investments in order to incentivise investment.



The current system of appeals within telecoms is sufficiently clear

- 3.3. Telecoms markets are complicated and regulatory decisions can involve errors of law, fact and process. Any of these errors can fundamentally undermine regulatory decisions; they can result in measures – which have a massive effects on players in the market – being totally misconceived.
- 3.4. Given this, the current grounds of review are generally appropriate to ensure that telecoms operators are able to access an effective appeal mechanism to challenge public authorities' decisions which will impact their businesses and ultimately therefore consumers. In the context of economic regulation, incorrect decisions will result in consumer harm – either directly through higher prices or indirectly through damage to competition. The value of decisions being taken by economic regulators is genuinely very large indeed so enabling errors to be corrected results in hundreds of millions of pounds being returned to UK consumers through lower prices and increased efficiency.
- 3.5. The proportion of regulatory decisions being challenged is tiny. As a major player within the telecoms industry, Vodafone is affected by hundreds of decisions taken by Ofcom, however we have only ever challenged very few, this points to the current system striking the right balance which enables companies to challenge decisions in good faith which have a significant impact on their business decisions and investments. Changes to the JR grounds have a knock on effect on the telecoms industry (as well as others) which may not have been considered or contemplated by the panel or government. We therefore urge the panel to consider the implications of this and not to restrict grounds of review or impose additional hurdles to seeking JR.

4. Potential areas for reform: procedural aspects of JR

- 4.1. Whilst we think that fundamental reform is not required, there is scope to reform some procedural aspects such as:
- 4.1.1.introducing steps that require public authorities to constructively engage with complaints at an early stage, participate in ADR and settlement discussions. This would go further than the requirement set out in the pre action protocols, for example additional costs/ sanctions for parties that have not proactively considered early stage/ADR and discussions regarding settlement.

5. Questionnaire to Government Departments

Q1. Are there any comments you would like to make, in response to the questions asked in the above questionnaire for government departments and other public bodies?

- 5.1. We urge the panel to consider the benefits of JR; and to take evidence from a wide range of stakeholders. More broadly, we are worried that the questions *assume*:
- 5.1.1.good administration by public bodies; and



5.1.2.that JR is a problem to be fixed.

- 5.2. The reality, of course, is messier: no doubt most public bodies are trying to do a good job, but they can and do make mistakes, and JR is vital in fixing those mistakes.

Q2. In light of the IRAL's terms of reference, are there any improvements to the law on judicial review that you can suggest making that are not covered in your response to question (1)?

- 5.3. Yes. We would invite the Panel to consider ways in which the permission stage can better serve its functions. This could include a further amendment to the Rule 54.11A (1) Civil Procedure Rules which requires an oral hearing only where the court wishes to hear submissions when there are reasons of exceptional public interest which make it nevertheless appropriate to give permission. This would result in permission being considered on the papers, except for reasons of exceptional public interest.

- 5.4. We detail our proposals for constructive engagement/ ADR at paragraph 6.6 below.

6. Codification and clarity

Q3. Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?

- 6.1. As mentioned above, we do not see a compelling case for further codifying JR in statute, given the reforms which have already taken place in the telecoms sector. In a more general sense, there are already large parts of the law of JR which are already codified – for example, in the Senior Courts Act, the Civil Procedure Rules, and relevant Practice Directions. These rules clearly set out permission requirements, time limits and remedies available.

Q4. Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decision not be subject to judicial review? If so, which?

Q5. Is the process of i) making a Judicial Review claim, ii) responding to a Judicial Review claim and/or iii) appealing a Judicial Review decision to the Court of Appeal/ Supreme Court clear?

- 6.2. From a telecoms appeal perspective there is no lack of clarity in how to make or respond to an application for JR; or how to appeal a JR decision. As mentioned above, the CA sets out which decisions made by Ofcom which are subject to appeal. The Administrative Court



also publishes a JR guide which is continuously kept up to date (the most recent update being July 2020).⁵

7. Process and procedure

Q6. Do you think the current Judicial Review procedure strikes the right balance between enabling time for a claimant to lodge a claim, and ensuring effective government and good administration without too many delays?

- 7.1. Whilst there may be specific contexts such as urgent immigration decisions and public procurement where a shorter period can be justified, in our view the three-month period serves an important role in minimising the number of JR claims being brought. It is vital that those affected by public body decisions have time to review the decision and understand its implications and thereafter seek legal advice.
- 7.2. Therefore if this three month window is shortened it is likely to backfire and result in either 'protective' JRs being filed to avoid missing the deadline and/or risk that parties are not given sufficient time to engage with the public authority to try and agree a path forward which dispenses with the need for JR. In our view this is likely to result in the worst of both worlds: applications for JR increasing and the subsequent costs which arise as a result.

Q7. Are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied too leniently in the Courts?

Q8. Are the costs of Judicial Review claims proportionate? If not, how would proportionality best be achieved? Should standing be a consideration for the panel? How are unmeritorious claims currently treated? Should they be treated differently?

- 7.3. Costs are broadly proportionate in the current scheme.
- 7.4. The level of costs inherent in JR claims – even with a strong case - does constitute a disincentive to bringing JR claims. Budget pressures are tight even – perhaps especially – in large organisations and spending at the level to bring a JR is always closely scrutinised closely. Even where a claim appears strong, the prospect of losing (and the adverse costs consequences which would follow) is given serious consideration.

⁵ See

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/913526/HMCTS_Admin_Court_JRG_2020_Final_Web.pdf p 2.

Vodafone Limited
The Connection, Newbury,
Berkshire, RG14 2FN, United Kingdom

T +44 (0) 1635 33251
F +44 (0) 1635 682729
vodafone.co.uk



Q9. Are remedies granted as a result of a successful judicial review too inflexible? If so, does this inflexibility have additional undesirable consequences? Would alternative remedies be beneficial?

7.5. In our view the current approach to remedies works well.

Q10. What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?

7.6. The Pre-Action Protocol for JR⁶ sets out a code of good practice which requires claimants, among other things to try and settle the dispute without proceedings/ reduce the issues in dispute. We have always endeavoured to comply with this protocol and are not aware of concerns in the regulated sectors of claimants failing to comply with the protocol where compliance is reasonably possible, or not doing so in a good faith effort to settle the dispute.

Q11. Do you have any experience of settlement prior to trial? Do you have experience of settlement 'at the door of court'? If so, how often does this occur? If this happens often, why do you think this is so?

7.7. Public bodies should be more commercial on settlement. In our previous experience, for example in the restitution claim resulting directly from a JR of Ofcom's annual licence fees decision, Ofcom's unwillingness to engage constructively in settlement discussions resulted in further litigation when there was no apparent reason for not engaging more fully in settlement discussions. This also resulted in a substantial costs award being made against Ofcom.⁷

Q12. Do you think that there should be more of a role for Alternative Dispute Resolution (ADR) in Judicial Review proceedings? If so, what type of ADR would be best to be used?

7.8. As mentioned above, we invite the panel to look at what could be done to ensure that public authorities constructively engage with claimants or potential claimants. This could include costs consequences for public authorities who unreasonably refuse to engage in

⁶ See section 2 (c) of the Pre action protocol for JR: https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_jrv

⁷ Vodafone & ors v Ofcom [2019] EWHC [1234] (Comm), this was a restitution claim that resulted following the Court of Appeal's finding that the 2015 Regulations that Ofcom used to set the annual license fees were unlawful.



ADR; and encouraging or mandating public authorities to adhere to a form of ADR such as arbitration, on an urgent basis in light of the time limits for commencing proceedings.

- 7.9. We would also welcome greater transparency in regulatory and public decision-making generally. This should include the use of confidentiality rings.

Q13. Do you have experience of litigation where issues of standing have arisen? If so, do you think the rules of public interest standing are treated too leniently by the courts?

- 7.10. Vodafone does not have experience of this issue arising.