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By email only to: [switching@ofcom.org.uk](mailto:switching@ofcom.org.uk)

## Telefónica UK's response to Ofcom's *Quick, easy and reliable switching* Consultation

### Introduction

1. We welcome the opportunity to respond to Ofcom's *Quick, easy and reliable switching* Consultation. As Telefónica UK (TUK) is not active in the supply of fixed voice and broadband services, our response focuses on Ofcom's proposals for amending the information requirements for the mobile switching process.
2. Ofcom proposes requiring losing providers to supply residential customers with information regarding the impact of a switch on *other services* they have with them, including bundled services and additional support services. As with other information regarding impacts of switching, this information must be provided in a durable medium.
3. Recognising that information about the impact of switching on other services tends to be too complex to present as part of a PAC text, Ofcom suggests that providers can meet this requirement by including links in PAC texts that direct customers to personalised webpages or online accounts and then presenting this information on these online locations.
4. When customers are not able to access information provided on such online locations (because they do not have internet access or otherwise), Ofcom expects providers to supply the information via an alternative channel.

### **Do customers need additional switching information?**

5. Ofcom considers that customers should receive information about the impact of switching on other services – in addition to core information such as ETCs and outstanding credit – as part of the switching process. We disagree. Customers are already given this information when they sign up to their services. Moreover, Ofcom has not presented evidence that shows that the core information supplied as part of responses to PAC requests fails to support customers to take informed decisions. For instance, by establishing that customers consider themselves insufficiently informed when switching. Hence, it is not clear to us that requiring the provision of information about impacts of switching on other services will benefit consumers and the decisions they take.
6. We evaluated the complaints that our customers submit to us. [Confidential &lt;] This evidence is not consistent with the current Auto Switch process falling short in terms of the information about impacts of switching provided to consumers. Quite the opposite, it suggests that Auto Switch works well and that core information is far more important for consumers.
7. Ofcom must have regard with its approach on impact assessment. On this topic, Ofcom previously recognised that the option of not regulating should always be considered, that regulation should not involve the imposition of unnecessary burdens, and that it should carry out an impact assessment when proposing anything relating to carrying out its statutory duties.<sup>1</sup> Applying these considerations should lead Ofcom to conduct an impact assessment that covers the aspects that Ofcom itself identified. This concerns good regulatory practice. As part of an impact assessment, Ofcom should account for customers already having received relevant information via T&Cs and Contract Summary when they sign up with a provider.
8. Ofcom's proposal seems to originate from its overly rigid interpretation of its 'express consent' definition (which we discuss next). If Ofcom were to interpret express consent in a more reasonable way (as we think it should), it will likely take a different view on the benefits of and need for its proposals.
9. In reference to paragraph 6.36 of the Consultation, Ofcom should consider other, new requirements, under the EECC which will need to be implemented in the round, in particular, the requirement to provide documentation in accessible formats. Therefore, the gaining provider will already be under a requirement to make these available to a customer who requires them as part of the on-boarding journey. Setting this information out within the Switching Information is unnecessary, the customer will

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<sup>1</sup> See Ofcom's (2005) "*Better Policy Making: Ofcom's approach to Impact Assessment*", Consultation.

know whether they are signed up to receive support services from a provider and the fact that they will lose the support by moving provider is obvious.

### **Ofcom's interpretation of express consent is flawed**

10. The EECC requires that providers do not port numbers or switch end-users without the end-users' explicit consent. To meet this requirement, Ofcom "*introduced new switching rules, which apply to mobile and fixed services, for gaining providers to: take all reasonable steps to ensure they do not switch customers, without their express consent (GC C7.9a); and ensure a customer is authorised to request a switch and intends to enter into a contract for the switched services (GC C7.9b.*" as part of its 2020 EECC Statement.<sup>2</sup>
11. Ofcom defined express consent in relation to providers obtaining consent in a manner which enables customers to make an informed choice.<sup>3</sup>
12. Applying its definition of express consent, Ofcom notes that "*... the decision on the part of a customer to switch services involves both: a decision to accept a contract for new services with a gaining provider; and a decision to cancel a contract for services with the losing provider.*"<sup>4</sup> Ofcom then continues "*It follows from these two decisions that in order for a customer to make an informed choice about whether to switch their services, and therefore be in a position to give their express consent to a switch, the customer needs to have been given information about both: the new services they are taking with the gaining provider; and **the consequences of their decision to cancel their services with the losing provider.***"[emphasis added]<sup>5</sup>
13. Whilst we accept that informing customers about the consequences of their decision to cancel existing services is a valid objective, we are concerned that Ofcom applies its definition of express consent too rigidly by not having regard either to the role of particular information in supporting informed switching decisions or to the trade-offs in delivering against this and other policy objectives. We note that Ofcom's definition of explicit consent, and how it applies this definition to mobile switching requirements, is ultimately a matter for courts to decide on.
14. Ofcom previously applied the notion of informed consent. This notion recognised that customers can make informed switching decisions when they have not been given information about the impacts of switching on other bundled services as long as they were provided with the core switching information. It thus considered that the supply of core information is key to supporting informed decisions.

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<sup>2</sup> Paragraph 6.4 of Ofcom's *Quick, easy and reliable switching* Consultation, 2021.

<sup>3</sup> Paragraph 6.5 of Ofcom's *Quick, easy and reliable switching* Consultation, 2021.

<sup>4</sup> Paragraph 6.7 of Ofcom's *Quick, easy and reliable switching* Consultation, 2021.

<sup>5</sup> Paragraph 6.8 of Ofcom's *Quick, easy and reliable switching* Consultation, 2021.

15. Ofcom departs from this notion of informed consent by now taking the view that express consent requires customers to be provided with all information about the impacts of switching, including implications for additional services. It thus presumes that customers can only take informed decisions when being provided with both core and non-core information.
16. We regard Ofcom's interpretation of express consent as overly strict.
  - It is not clear that provision of information about impacts of switching on additional services supports better informed decisions. It is not uncommon for consumers to struggle with processing information and the supply of more information can thus have an adverse impact on the regard that consumers have of core information. Also, it can lead to customers deciding to not progress their switch because they are overwhelmed by the amount of information they must process.
  - Requiring the provision of additional information may have adverse impacts on delivering against other objectives of Ofcom's switching regime (such as the one-day requirement and the one-stop objective of Auto-Switch).
  - Ofcom should be mindful of both the benefits and costs of its proposals, ideally by evaluating them as part of an impact assessment (see paragraph 7 above).

### **Providers cannot meet the proposed requirements**

17. The Auto-Switch process requires that PAC (including switching information) be sent to the customer within one minute of the PAC request being made. This requirement applies independent of the method through which the PAC is requested (text, phone, online account).
18. When customers request a PAC by text or phone and presuming that the PAC text includes a link to an online location where information about impact on other services is presented, providers cannot ensure that customers are able to access this online location (and thus can review additional information) as customers may not have internet access (through smartphone or fixed access) at that point in time. Without internet access, there is no way for customers that use these methods to request a PAC to review this additional information.
19. This means that the only way for providers to meet the proposed requirement is to identify all customers without internet access and to provide them with the additional information by a durable medium within the one minute required by the Auto-Switch process. This is problematic for at least two reasons.
  - i. We are not aware of an alternative channel that allows providing additional information within such a short time window. A letter would take days to arrive (up to two weeks in

the case of letter in braille), and a text – as Ofcom acknowledges – is not suitable for effectively supplying this information.

- ii. It will be very difficult for providers to establish which customers do not have internet access when using text or phone to request PAC. Yes, providers are able to reasonably predict whether customers have internet access (e.g. we sold customers a smartphone and they use their data allowance) but they cannot guarantee their prediction is accurate. For instance, the circumstances of customers may have changed (different phone or broken smartphone), configuration may not allow accessing an embedded link, and customers may have sufficient connection for requesting a PAC by phone or text yet not for internet access.

20. In all, there are no reasonable steps that providers can take to respond to PAC requests within one minute whilst ensuring Ofcom's definition of express consent is met. This means that providers cannot deliver against the combination of existing and proposed switching requirements.

#### **How Ofcom could withdraw and amend its proposals**

21. It would be an error for Ofcom to proceed with its proposals knowing that providers are not able to meet them. It should withdraw or amend its proposals.
22. As explained in paragraphs 5-9 above, the need for providers to supply information about the impact of switching on other services is not clear to us. Ofcom's proposal to require this information to be provided seems to originate from its overly rigid interpretation of consent. We recommend that Ofcom revisits the need for its proposal.
23. Ofcom could amend its proposals and/or provide clarity on what the responsibilities of providers are. It could decide to require providers to supply information about impact of switching on other services on an online location directed to by a link in the PAC text and by a letter on customer request whilst making it clear that providers are not responsible for all customers having had access to the required information when switching. This would hold providers responsible for taking the reasonable steps to meet the requirements but not for guaranteeing that *all customers* who switch had access to *all information*. This alternative requires Ofcom to provide clarity on what reasonable steps would be.

#### **Practical points for Ofcom's consideration**

24. Ofcom observes that providers already utilise presenting information about the impact of a switch through links embedded in texts to provide customers with additional information regarding the impact of a switch, and are permitted to provide ECNs by text with additional information accessible through a

link embedded in this text. Whilst these observations are valid, these should not be regarded as meaning that providers can easily implement for the proposed requirements.

25. Ofcom seems to suggest that it will be straightforward for providers to deliver against the proposed requirements as they already have systems and processes in place to supply switching information to their customers. The reality will likely prove more challenging.
26. We will have to make changes to our systems to fully comply with the proposed requirements. At present, we provide customers with a text (soon after the sending of the PAC text which contains Switching Information and a link to switching pages and online account) which sets out information about impact of switch on additional services. This does not however include for information about Extras, family tariffs and relay service for hearing-impaired individuals. Hence, we would have to combine the different sources of information and come up with a way of presenting personalised relevant information on an online location or through an alternative medium. We anticipate this to be feasible yet requiring careful planning.
27. [CONFIDENTIAL ✂].
28. Possibly outside the scope of this Consultation but Ofcom should consider what the implications of its rigid interpretation of express consent are for gaining providers. For instance, what does it mean for the level of authentication that gaining providers must achieve? If providers need to go beyond what they currently do in terms of verifying the identity of customers and their consent with the switch (for instance in relation to vulnerable customers who do not have the authority to provide consent), then this would be a substantial risk.
29. Ofcom proposes that only residential customers need to be given additional information as business customers are better equipped to manage their communications services than residential customers. Whilst this may be true for most business customers, Ofcom should have regard to the practical implications for providers when residential vs business customers are subject to differing information requirements. [CONFIDENTIAL ✂].
30. Ofcom indicates that information other than charges and credit balance may need to be included in the body of the text in some cases. It gives the example of additional support services being of vital importance to customers and warranting for the impact of switch on such services is included as part of the text. Whilst sympathetic to this suggestion and setting aside the fact that this information is unnecessary as customers will be aware of it, we anticipate that the practical challenges of identifying when to include additional information in text and how to present this information will be significant. We recommend that Ofcom give further thought about and specify a potential requirement in more detail.