# Ofcom: Consumer Switching – Next steps and call for inputs

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## Consultation response from the ESRC Centre for Competition Policy

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The response to this consultation response has been drafted by Prof Morten Hviid with contributions from the other named authors. The document has been edited following discussions held in the Centre and it has the broad agreement of the group of contributors.

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# Consultation Response

With the consultation, Ofcom rightly aim to streamline consumer switching and to move firmly to a "Gainer led" switching process. This is to be welcomed.

Ofcom correctly identify the main challenges for each of the three broad options:

Losing Provider Led switching: the main problem is reactive saves. This issue is particularly relevant with products such as communication services broadly defined because the value of a consumer to a provider varies across consumers, it varies in a manner which would be assessed the same by all providers [i.e. providers would broadly agree on which consumer profile constitutes a valuable consumer and which constitutes a costly consumer], and there is asymmetric information about these values, so that the current provider is the only one really able to assess the net contribution to profits from an individual consumer. With these industries so technology driven, it would strain credibility if one was to assume that the current providers had not developed the software necessary to make this assessment. Reactive save then ensures that the firm making the new offer will get an adverse selection of the customers to which the offer is targeted, thereby reducing the viability of the offer. If the current provider has sufficiently strong information and consumers focused on the monetary benefits of switching, reactive save has the potential to completely eradicate competition. Note that the focus here is not on direct consumer benefit but indirect consumer benefits from supporting competition. Where consumers are only motivated by savings, the effect of the LPL method will be similar to so called meet-or-release clauses, where the current provider can choose to retain a current customer who has been offered a better deal by meeting that better offer, or to release the customer from their current contractual agreement. Interestingly, the "meet-or-release clause" is so far the only clause to attract competition law attention at the EU level, where clauses of this kind are also referred to as the "English clause". In Hoffmannn-La Roche[1] the "meet-or-release clause" was found to aggravate the exploitation of the dominant position in an abusive way by allowing Hoffman-La Roche to identify its competitors more easily as a result of the clauses.[2]

Cease and Re-provide [Consumer led switching]: Having consumers organising the switch could reasonably be expected to add to switching costs. There is also the chance that the consumer is without provision for a period of time between cancelling one contract and starting a new one. Finally this is likely to prevent number portability, something which is valued by some customers. Overall, it would appear very likely that this will stifle switching and hence competition in the market.

Gaining Provider Led: The key concern expressed in the document is that some consumers may inadvertently be switched when they did not wish for this to happen. Rather emotively, this is referred to as "slamming". Even if slamming was not much of a real problem, it could still have an effect if there was widespread fear that this may occur, preventing consumers from contacting potential providers for a quote. While slamming may be a problem, the remedy also appears to be straightforward. It is entirely clear who the victim is and that the victim should first of all be

[1] Case 85/76 Hoffmann-La Roche & Co AG v EC Commission [1979] ECR 461 paras 107-108.

[2] The clauses are also mentioned in paragraph 129 of the new EC Commission guidelines on vertical restraints [EC Guidelines on Vertical Restraints OJ (2010/C 130/01)]: "A so-called 'English clause', requiring the buyer to report any better offer and allowing him only to accept such an offer when the supplier does not match it, can be expected to have the same effect as a single branding obligation, especially when the buyer has to reveal who makes the better offer."

returned to the pre-slamming state at no cost. In addition, to ensure that incentives are shaped correctly, and because there appear to be no excuse for the slamming occurring, the victim should be awarded additional and substantial compensation.

*Q.1 Do you agree with our characterisation of the switching processes and practices for the networks and services in scope for this phase of work? Are there aspects of such processes that you consider have significant consequences for consumers' experiences of switching or the functioning of markets?*

Ofcom correctly identify the main challenges for each of the three broad options: LPL and C&R have obvious adverse effect on competition while the main concern for GPL is easy to remedy.

*Q.2 Do you consider that the eight issues that we identified in section 4 in relation to switches on the Openreach network are relevant for the networks and services in scope for this phase of work? If so, to what extent are they relevant and why? Are there other issues we should also consider?*

Regarding (i): A basic presumption should be that the simpler the switching process, the better it is for consumers and the more likely it is they will switch supplier thereby fostering effective competition. We know from preliminary research that we have conducted that individuals in the energy market who do not switch over-estimate the time and hassle of switching compared to individuals who have completed a switching process. Having multiple switching processes across suppliers potentially creates confusion and may lead to individuals considering switching to be more difficult/time consuming than it actually is.

Also, if a single switching process can be provided for a bundle of telecoms services, it may be possible for a consumer to take advantage of 'economies of scale' in switching. Consider that there is a fixed cost of switching a package of services and that there is a similar fixed cost of switching each service individually. It may be the case that for each service separately, the benefits of switching supplier do not exceed the cost of switching a single supplier. However, if all the services are combined together into a bundle with a single switching cost, the combined benefits of switching all the services together may exceed the fixed switching cost and, hence, bundling will facilitate switching.

Regarding (ii): We agree with Ofcom's analysis. On the point of reactive save, preliminary research on energy indicates that energy consumers dislike the unsolicited phone calls associated with reactive save techniques. Individuals who were considering switching were more likely to switch if they had received an unsolicited offer from their existing supplier than if they were not contacted or initiated contact with their existing supplier themselves. The implication in this industry would be that the losing provider would have a much better chance of persuading a valuable consumer to stay under LPL than GPL.

Regarding (iii): In a parallel to switching bank, one could put the onus on the gaining provider to help the prospective consumer to ascertain such switching costs – consumers should have the necessary information available but may need support in identifying it. The one possible problem is that if the gaining provider is given a duty to conduct a lengthy interview with the prospective customer, this would increase switching costs and stifle competition. Making sure that consumers have a period in which they can regret the change may be sufficient to incentivise the gaining provider to ensure that the consumer is aware of the pertinent facts.

Regarding (iv): See above. To the extent that the problem is significant, it is easily remedied – combine restoring the consumer to the ex-ante situation with substantial compensation [because the companies can take steps to eradicate this problem completely, Ofcom should not be afraid of making this really substantial], possibly even to the point where the consumer might see being slammed as winning the lottery.

Regarding (v): Key issue is whether the error can be avoided. If it can, the answer is the same as for slamming. If not it becomes an issue of risk sharing – and although it may be appropriate to shift the risk to the gaining provider and have them pay for restoring the consumer to their ex-ante position, other than an acknowledgement of causing the error any additional compensation should be modest to zero.

Regarding (vi): There must be a risk, particularly with C&R that the consumer is without services for a period of time. This is one reason why C&R is not that attractive an option. When switching bundles and in particular when the switch is to create a bigger bundle, overlap or loss of services may be inevitable, but it may also be seen as the cost of getting ones bundle better aligned.

A key issue for Ofgem to analyse further is the ease with which loss of services can be avoided by the gaining provider. If they could easily prevent this, then the remedy is the same as for slamming.

Regarding (vii): We interpret 'Lack of platform neutrality' to relate to the inability of different platforms' IT systems to 'talk to each other' to enable a switch of supplier. As we have discussed previously, any process which increases the switching costs faced by consumers is likely to reduce switching. Hence, a technical issue that requires a consumer to follow a C&R process can be a barrier to switching and is undesirable.

In relation to the switch from an LPL to GPL system, there may be an increased incentive for the LP to cite technical reasons for being unable to deliver a 'clean' switching process which avoids a C&R process. Under an LPL system, the LP can rely on reactive save techniques to aid customer retention, however, once GPL reduces the opportunity for reactive save the LP may seek other ways to make the switching process less consumer friendly and, hence, retain consumers. Ofcom should be suitably sceptical of claims that a 'clean' GPL process cannot be delivered on technical grounds.

Where there is a legitimate technical difficulty in enabling a GPL process to occur, the question is who should pay for the investment required to overcome the technical obstacle? The answer to this question is not altogether clear since it could result in one firm being able to request activities that would increase the costs of a rival.

Regarding (viii): See comments above. Reactive saves are problematic but if they genuinely save consumers money, ruling them out would also be problematic. If the industry wants to retain the opportunity to engage in this, maybe the ownership of the call-patterns of a consumer should be vested with that consumer.

*Q.3 Could the current switching processes for the networks and services in scope be modified to result in a better experience for or protection of consumers, and/or more effective competition? If so, why and how should they be modified? Are any modifications in your view available that might be implemented relatively quickly and easily? What risks and costs might be associated with these revisions or modifications?*

A wholesale move to GPL would benefit competition and in the long run consumers.

*Q.4 Is there anything that you consider is relevant to the switching of networks and services in scope for this phase of work that we have not set out in this document?*

No