

Response to Ofcom consultation

Response to Ofcom consultation: “Consumer switching - A consultation on proposals to change the processes for switching fixed voice and broadband providers on the Openreach copper network”

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Please note that questions where the authors have no view or expertise have been left unanswered.

Question 4: Do you agree there is lack of competitive neutrality from having multiple processes? Please provide any evidence you have to support your views.

Yes. Because the distinction between different systems (e.g. MPF vs WLR) is itself a consequence of the regulated market for fixed voice and broadband in the UK – these are remedies to promote competition, not distinctive services. This is a regulated market and it is appropriate for Ofcom to ensure that the various services it has facilitated in its opening up of the market can compete with one another on a rational basis, not on the basis of technological arrangements unknown to consumers. Indeed, as suggested in passing in the document, the consumer is very unlikely to know anything about the relationship between the provider and Openreach – an observation of marketing to consumers will disclose no direct or indirect mention of metallic paths

Question 5: Do you agree with our assessment of Problem 1: Multiple switching processes? If not, please explain why you disagree.

Yes.

Question 6: Do you agree that the current switching processes are likely to become less reliable in the future? Please explain your answer and provide any evidence you have to support your views.

Yes. Caller line identification is not a sustainable model for a world where voice calls may be much less significant than they were in the 20th century.

Question 7: Do you agree with our assessment of Problem 2: Back end system deficiencies? If not, please state why you disagree.

It would be good to know more about why some MPF providers do not support what appears to be the optimal system for MPF-MPF switching. Is there a reasonable explanation which is not anti-competitive? If not, could Ofcom require it of MPF providers?

Question 9: Is there further action you think could be taken to help tackle slamming (e.g. preventative measures to stop it from occurring or enforcement activities after it has happened to act as a deterrent) under the existing processes? Please explain your answer.

Options include a burden of proof on GP for explicit consent, adequate fines, use of the criminal law (reference to appropriate authorities). As the Directive states, this is primarily a law enforcement issue.

There is also an issue of how significant the problem of slamming is. This is important as an overestimate of the problem affects the way in which the different options are weighed by Ofcom. Should the risk of slamming be less serious than stated, then the need to build a system that prevents it is less pressing, and other considerations can be prioritised.

The number of actual investigations is small and the estimate of the scale of the problem is based in part on survey work. However, the key question (1A: Have your landline phone or broadband services been switched to another supplier in the past 12 months without the consent or knowledge of anyone in the household?) could be explained by a number of factors other than slamming – i.e. misunderstanding of the question, changes in the branding or ownership of a provider, poor communication within a household. Furthermore, of those reported in the survey of having allegedly experienced slamming, very few have any evidence.

Question 10: Do you think it would be more appropriate to introduce stronger upfront consumer protections within the switching process or continue with the current reliance on enforcement to tackle slamming? Please explain your answer.

Since consumer protection tends to increase switching costs by increasing the time it takes to switch, the more promising way to tackle slamming would be to rely on enforcement. Enforcement could be combined with standardised compensation to consumers who had been slammed, adding to the cost of the firm doing the slamming.

Question 13: Do you agree with our assessment of Problem 5 Unnecessary switching costs/hassle? If not, please explain why.

Yes.

Question 15: Do you agree with our assessment that a prohibition on reactive save activity under the LPL process would be difficult to enforce effectively? Can you suggest how enforcement of a prohibition on reactive save may be made effective?

Yes.

Question 16: Are there other enhancements that you think should be included in the Enhanced NoT specification to help protect consumers both now and in the future? Please explain your answer and provide any supporting evidence.

If, as suggested in the answer to question 10 above, GP is liable to pay compensation to any slammed consumer as well as possibly liable for a fine or compensating the LP for its costs, you need to consider the issue of burden of proof. If you require the GP to demonstrate that this was an honest mistake and not a slam, then they would need to decide themselves how good records they would keep (perhaps subject to guidance from Ofcom on what constitutes adequate recordkeeping)

Question 17: Do you think strengthening record keeping obligations for consent validation would increase protection against slamming? Would this be adequate to safeguard consumers now and in the future? Please explain your answer and provide any supporting evidence.

This analysis fails to take account of the interests of consumers and the existence of other call-recording requirements. There is no estimate provided of the cost of recording nor information on what section of the market is comprised of providers who do not already record.

Question 18: Do you think that the introduction a requirement to include specific information about early termination charges (ETC) and/or minimum contract periods (MCPs) in bills should form part of the enhancements to the current NoT process? What are the likely costs and benefits of such an approach? Please provide any evidence to support your answer.

It would seem a best practice that consumers are informed about the charges they will face and that is the duty of the current provider to ensure that this information is available in a clear and

transparent way. Ofcom should require very convincing evidence for this being excessively costly. The argument that some consumers do not look at their bills is not convincing. That is their choice and they should live with any consequences. In 6.18, you note that 21% of broadband users do not look at their bill. That must mean that 79% at least sometime do. Why should they be deprived of valuable information about the price they are paying for the service? This would be a simple mandate with beneficial consequences for consumers and for effective competition.

Question 20: How can Ofcom best address competition concerns relating to reactive save activity through enhancements to the MAC process? What are the likely costs and benefits of such an approach? Please provide any evidence to support your answer.

The simplest way to avoid the problems with the MAC process is to abolish it. Ofcom's work provides consistent and well-argued reasons for why the MAC process (and indeed any other LPL system) can harm competition.

Question 23: Are there any particular data protection and/or privacy related issues that you think would need to be considered under the GPL TxC and/or the GPL TPV options? Are these issues likely to be significantly different to the issues that need to be considered under the current processes? Please explain your answer.

Such a database would be a powerful source of information on UK residents, perhaps one of the most complete. As well as its value for marketing purposes, it could be used for other purposes (e.g. enforcement of copyright law), alongside the common problems with databases of exceeding authorised access for personal or financial gain. Although there are legal provisions of general application, it would be better to build in a high level of protection (e.g. 'privacy by design'), including an audit trail and a closed list of acceptable uses of the database.

Question 30: Do you agree with our assessment of the options regarding multiple switching processes? If not, please explain why you disagree.

Yes

Question 33: Do you agree with our assessment of the options regarding back end processes? If not, please explain why you disagree.

It is not clear whether this is truly a problem of technological neutrality or a lack of cooperation on the part of providers (e.g. MPF to MPF problem discussed here and elsewhere).

Question 34: Do you agree with our assessment of the options regarding consumer consent? If not, please explain why you disagree.

Yes. However, the approach to slamming in general seems a bit odd. Is it not fairly easy to assess whether slamming has occurred? What is the chance that the firm made an "honest" mistake? If this chance is slight, then any draconian punishment should quickly put an end to it and would have no significant adverse effect on well-run firms nor on the entry decision of a well run firm. The fear of illegal activities has not prevented other jurisdictions from introducing workable systems and policing breaches through complaints and investigations. There is a danger that what is essentially a fraudulent element is used in order to reduce competition. The two should be solved separately; slamming (where it actually exists) through enforcement combined with compensation to consumers to ensure that they maintain trust in the switching process, and competition by a change from LPL to GPL.

Question 35: Do you agree with our assessment of the options regarding the implications of switching? If not, please explain why you disagree.

No. The assessment understates the risks of the LP engaging in a version of mis-selling and footnote 246 looks very optimistic. According to paragraph 7.70, "The LP has a strong incentive to make the consumer aware of the implications of switching." Even if we thought this could be policed, is it

reasonable to require the LP to offer a balanced view of the available offerings? The task of a sales force is to sell the product not to advise customers where the best deal might be. Independent advice should be provided by independent organisations, either Ofcom or one of the consumer organisations. In addition, if full information is provided to consumers (see question 18, above), the need for an additional contact with the LP is lessened.

Moreover, if the sales force has to provide balanced advice which could be monitored, surely this would have to be extensively scripted and hence waste a considerable amount of consumer time going through the prepared script, with associated switching costs increasing greatly. If the firms are to provide advice, the assessment of the implication for switching should be in terms of the ease with which compliance with an Ofcom standard could be monitored and achieved. With this in mind, it is hard to see any of the options could be better than amber.

Question 36: Do you agree with our assessment of the options regarding unnecessary switching costs/hassle? If not, please explain why you disagree.

Yes.

Question 37: Do you agree with our assessment of the options regarding reactive save activity? If not, please explain why you disagree.

Broadly speaking, although we would take a stronger (critical) view of 1a and 1b. That competition harm may only arise for those using the MAC process is true, but this then implies a potentially unequal treatment of different groups of consumers and the MAC is a feature for a significant group of customers (and may grow). You would need to explain why this form of discrimination would have positive overall welfare effects.

Question 38: Do you agree that we should discard options 1a (status quo), 1b (enhanced NoT and MAC unharmonised) and 2a (enhanced NoT harmonised) on the basis that they fail to adequately address the current and anticipated future problems? If not, please provide your reasoning.

We would agree on 1a and 1b and would have added 3a and 3b for very similar reasons, i.e. their likely adverse effect on competition combined with other ways with fewer competition concerns to achieving the same consumer benefits. We would not exclude 2a at this stage as with anti-slamming enforcement and better use of existing processes it is actually feasible. However, if there are other reasons (or sufficiently useful benefits) associated with taking a 'universal' options (e.g. 2b), then it is appropriate to consider them as more appropriate than 2a.

Question 39: Do you think that the payment of a TPV fee for each sale is likely to be a significant barrier to entry for smaller CPs? Please provide any supporting evidence.

Yes, this is a concern, and a reason to approach TPV with caution.

Question 40: We welcome stakeholder views on whether the additional cost of the TPV option over the GPL TxC option is justified due to the superior protection against slamming?

It is difficult to be certain about this (see answers on slamming above).

Question 41: Do you agree with our assessment that the TPV option should be preferred to the USN option. If not, please provide your reasoning.

The merit of TPV is that it provides protection against slamming. However it is a complex system, especially for a large jurisdiction with a high number of operators, as in the UK (compared with, for example, Ireland). It should only be introduced if other GP-led systems are not possible; it is better than a LP-led system, but one of the more complex GP-led options.

Question 42: Do you agree with our assessment that the TPV option is pro-competitive relative to the LPL TxC option? If not, please explain why you disagree.

Absolutely, but we do not see why competition concerns have not already removed options 3a and 3b.

Question 43: Do you agree that the TPV is the most proportionate way to deal with the problems identified? If not, please provide your reasoning.

Not necessarily. It is one of a number of solutions but also carries its own risks.

Question 44: Do you have any other comments on our option assessment?

In assessing the outlined options, it might be worthwhile for Ofcom to step back from the issue-by-issue analysis of chapter 7 to focus more directly on the competition issues. Think of each of the options as providing some form of vertical restraint and apply relevant competition law provisions.

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