



**OFCOM'S CONSULTATION: "MAKING SWITCHING EASIER AND MORE RELIABLE FOR CONSUMERS - PROPOSALS TO REFORM LANDLINE, BROADBAND AND PAY TV SWITCHING BETWEEN DIFFERENT PLATFORMS" OF 29 JULY 2016**

**RESPONSE BY SKY**

**EXECUTIVE SUMMARY**

**Significant new regulation of switching in the UK telecoms and pay TV sectors is not needed**

1. Ofcom's consultation proposes significant new regulation of processes used by consumers to switch suppliers in the UK telecommunications and pay TV sectors. This regulation is not needed, and Ofcom should not proceed with these proposals.
2. Sky is well placed to comment on these issues given that, fundamentally, they are about serving consumers' interests. Sky has a strong track record in delivering first class service to consumers, and we put our customers at the heart of everything we do. Our commitment to first class service is reflected in outcomes such as the high 'net promoter scores' given to Sky by our customers, and the fact that Sky consistently generates significantly fewer complaints to Ofcom than its rivals across broadband, telephony and pay TV services.
3. Sky is a strong supporter of easy switching, so that customers get the right service at the right price for them, from the provider they prefer – recognising firms' legitimate right to compete strongly to attract and retain customers in a highly competitive consumer marketplace.
4. The switching processes examined by Ofcom serve consumers well today. They are used by millions of UK households every year, to 'vote with their feet' and change their provider of fixed line telecoms services and/or pay TV, or to cancel their pay TV subscription. Indeed, the very ease with which consumers can do so is reflected in the intense competition among the major players in the sector – BT, Virgin Media, Sky, TalkTalk and (increasingly) Vodafone – to win customers away from each other. The evidence of the intensity of this competition is plain for all to see. These are not sectors in which a lack of rivalry for customers is a key competition concern – as it has been in other sectors, such as energy and retail banking, where switching has been a focus.
5. And, overall, consumer satisfaction with switching in the communications and pay TV sectors is high. Ofcom's own evidence – consistent with all past evidence – indicates that 84% of those who have switched provider found the process easy or very easy, and there is good reason to believe that this is a significant underestimate. Research undertaken by Ofcom in 2015 shows that 91% of consumers switching pay TV provider found the process to be easy. These figures should not be surprising because the processes that exist today are easy to use, work well, and customer understanding of them is high.
6. So why does Ofcom propose the imposition of highly burdensome new regulation in this area?
7. Ofcom believes that it has identified a number of 'difficulties' with current processes that justify intervention. However, the evidence that Ofcom seeks to rely on to support its conclusions about the scale of these problems is flimsy, and riddled with significant flaws. Indeed, the poor quality of the evidence cited by Ofcom and the way in which Ofcom interprets it, give rise to a firm impression that Ofcom is attempting to justify an intention to regulate, rather than responding to genuine, significant

problems faced by consumers that emerge from a careful consideration of the available evidence.

8. When considered objectively, the evidence gathered by Ofcom confirms the view that existing processes work well in the vast majority of cases, and that the 'difficulties' identified by Ofcom are not material impediments to switching by consumers. This does not mean that these processes are perfect, and work properly 100% of the time. However, that is an unrealistic standard to judge real-world processes against. As Ofcom's own guidance says:

*Sometimes the fact that a market is working imperfectly is used to justify taking action. But no market ever works perfectly, while the effects of...regulation and its unintended consequences, may be worse than the effects of the imperfect market".*

The same can be said of switching processes.

9. The fact is that the 'difficulties' that Ofcom identifies in the consultation do not materially impede switching by consumers, and regulatory intervention is not needed to fix them.

#### **Any issues that exist can be addressed more proportionately than via Ofcom's proposals**

10. Sky's firm view is that issues with switching processes should be identified and fixed, in the interests of consumers. However, any solutions adopted must be proportionate to the nature and scale of the problems they face, and should leverage firms' expertise in developing solutions to customer service issues rather than being devised by consultants with little regard to their cost or effectiveness, and imposed by Ofcom.
11. The evidence clearly shows that most such issues are small in scale, and do not impede switching in the UK telecommunications and pay TV sectors. Accordingly, any solutions to those issues should be carefully targeted and cheap to implement.

#### **If implemented, Ofcom's proposals would do more harm than good**

12. Ofcom has a duty to ensure that any new regulation is a "proportionate" remedy to the problem that it has identified. This means, among other things, that the regulation should be an effective remedy, and that its benefits should outweigh its costs. The specific proposals that Ofcom puts forward in the Consultation, however, fail that test.
13. Ofcom's proposals are targeted first and foremost at the problem of unwanted breaks in service when consumers switch supplier. One of Ofcom's two proposals for remedying this issue – and Ofcom's preferred option - is to require the introduction of 'gaining provider led' (GPL) switching. There is readily available evidence on the effectiveness of GPL switching on preventing unwanted breaks in service. This evidence shows that switches following GPL processes today experience higher levels of unwanted breaks in service than those that use other processes.
14. In other words, Ofcom's proposal to impose GPL switching on a wide range of switches that today use other processes would be an ineffective remedy to the issue of unwanted breaks in service.
15. Notwithstanding the fact that loss of service when switching does not appear to be as significant an issue as Ofcom believes, Ofcom's evidence is insufficient to determine the key causes of unwanted breaks in service. In effect, Ofcom's proposals seek to 'paper over the cracks' on this issue, by requiring existing service providers to keep their service running until the new service is working properly. It would be a better long term remedy to determine clearly the reasons that unwanted breaks in service occur, and focus on addressing them directly. In any case, costly changes to switching processes are not required in order to implement a simple rule that an old service cannot be switched off until the new service is working properly.

16. Ofcom has also carried out an assessment of the costs and benefits of its two proposals. Even on its own analysis, the magnitude of the benefits delivered by its proposed intervention is astonishingly small - a maximum of 0.02% of annual industry turnover. This is a clear reflection of the small scale of the 'problems' that Ofcom has identified.
17. Yet even these small estimates of the value of the benefits from its proposals are exaggerated, and fail to take into account a range of clear detriments to consumers that would arise if Ofcom's proposals were implemented. In particular (without being exhaustive):
  - many pay TV switches would take longer;
  - fewer consumers would receive retention offers, or make savings on their charges via 'right sizing' (i.e., changing a subscriber's package to better suit their needs), resulting in unnecessary switches that are a burden to consumers; and
  - there would be a greater incidence of consumers having to unwind switches that they have initiated upon finding out the consequences of leaving their existing provider - for example, that they would lose a service they value when they switch.
18. In the same vein, Ofcom's estimates of the cost of its proposals are an order of magnitude too low. Both of Ofcom's proposals would require firms operating in the sector to develop and implement a system that enables them to communicate in real time (for example, while a customer is on the phone), to undertake actions such as confirming a customer's details or rearranging an installation appointment. This new IT system would need to be able to operate seamlessly with all major firms' diverse existing customer management systems. Implementation and operation of such a new IT system is bound to be expensive, and Ofcom's view that this would cost no more than £1.4m in implementation costs and £0.3m operational expenditure per year is not credible. Moorhouse Consulting, who are experts in advising firms on the implementation of projects of this type, estimate that it would cost Sky alone £[•] in up-front costs and a further £[•] operational expenditure per year to implement Ofcom's proposals.
19. Given the highly competitive nature of retail markets for telecoms and pay TV services in the UK it is inevitable that the bulk of these costs would be passed on to consumers.
20. Accordingly, Ofcom's proposals would fail any reasonably constructed cost benefit assessment. If implemented, they would do more harm to consumers' interests than good.

#### **Ofcom's proposed regulation of all pay TV services is unlawful, inadequately reasoned and unjustified**

21. Ofcom proposes to regulate switching and cancellation of all pay TV services including when that is the only service being switched or cancelled. Ofcom, however, does not have the legal power to do so. Ofcom's misinterpretation of the law on this issue is compounded by its failure to provide adequate explanation for, or justification of, such a significant proposed extension of regulation in its consultation.

#### **Ofcom should not proceed with its proposals**

22. Ofcom's proposals are bad policy. They are a disproportionate response to any genuine issues that exist in relation to cross platform switching, switching of triple play bundles, switching of pay TV services, or cancelling pay TV services. They are, furthermore, manifestly incompatible with Ofcom's regulatory duties, and principle of operating with a bias against intervention, a point that is exemplified by the fact that - contrary to all relevant guidance - Ofcom has failed to consider the option of not intervening.
23. Ofcom should not proceed with its proposals. Instead, it should work with operators in the sector to identify low cost, well targeted ways of improving existing switching processes for consumers.



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**RESPONSE BY SKY**

**SECTION 1: INTRODUCTION**

1.1 This submission provides Sky's response to Ofcom's consultation entitled 'Making switching easier and more reliable for consumers – proposals to reform landline, broadband and pay TV switching between different platforms' published on 29 July 2016 ("Consultation").<sup>1</sup> It comprises the following sections:

- Section 2: The framework governing Ofcom's proposals for new regulation
- Section 3: Ofcom's proposal to regulate switching of all pay TV services is unlawful, inadequately reasoned and unjustified
- Section 4: Ofcom has failed to take account of the relevant context
- Section 5: Ofcom's proposed interventions are not necessary
- Section 6: Ofcom's proposals are not proportionate
- Section 7: Ofcom's proposals are not consistent with contract and consumer laws
- Section 8: Summary and conclusion

1.2 It is accompanied by three expert reports:

- (a) A report by Charles Rivers Associated International ("CRA") on Ofcom's analysis of the value of benefits to consumers from its proposals. CRA has extensive experience advising clients on competition and regulatory policy matters, including in the communications and pay TV sectors. Their report is attached at Annex 2;
- (b) A report by an independent expert statistician, Philip Malivoire, on Ofcom's 2015 consumer survey. Mr Malivoire has over thirty years' experience of quantitative research, and has acted as an independent expert on consumer research in High Court cases. His report is attached at Annex 3; and
- (c) A report by Moorhouse Consulting Ltd ("Moorhouse") on the cost implications of Ofcom's proposals. Moorhouse specialise in advising firms on managing large-scale change programmes and are therefore well placed on advise on this issue. Their report is attached at Annex 4.<sup>2</sup>

1.3 Sky is a strong supporter of easy switching so that consumers get the right service at the right price for them, from the provider they prefer - recognising firms' legitimate right to compete strongly to attract and retain customers in a highly competitive consumer market.

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<sup>1</sup> All references to paragraphs, figures, annexes and footnotes are to those in the Consultation unless stated otherwise.

<sup>2</sup> In addition to these three annexes, there are three further annexes as follows: Annex 1 (Relevant examples of firms' consumer marketing), Annex 5 (Economic analysis of the effect of switching costs on competition) and Annex 6, (Comments on Ofcom's 2015 consumer survey).

- 1.4 Sky is well placed to comment on these issues given that, fundamentally, they are about serving consumers' interests. Sky has a strong track record in delivering first class service to consumers, and we put our customers at the heart of everything we do. Our commitment to first class service is reflected in outcomes such as the high 'net promoter scores' given to Sky by our customers, and the fact that Sky consistently generates significantly fewer complaints to Ofcom than its rivals across broadband, telephony and pay TV services.<sup>3</sup> Sky regards excellence in consumer service as one of its key competitive strengths.
- 1.5 Although the Consultation is positioned as relating to switching providers, throughout this response we discuss both switching and cancellations. We include the latter because in practice Ofcom proposes new regulation of cancellation of services. In the context of communications services, almost all cancellations are likely to occur as part of a switch from one provider to another. The same is not true for pay TV. In the case of pay TV, consumers have the alternative available to them of cancelling their pay TV subscription and relying instead on a mix of free-to-air television and non-subscription pay content services (such as DVDs, or paid-for on demand services) and/or 'pay TV lite' services (such as Netflix, Amazon and NOW TV). Accordingly, Ofcom's proposed new regulation is not limited to 'switching' in the sense of moving from one supplier of a particular service to another supplier of the same service. This point is not acknowledged in the Consultation, which lacks transparency as a result.
- 1.6 Sky also notes that BT has a significant base of pay TV subscribers on Sky's DTH satellite platform, and it bundles its pay TV services delivered via satellite with its fixed broadband and telephony services, as well as providing its pay TV services on a standalone basis. This situation is not considered in the Consultation. As set out in detail in this response, Ofcom's proposals for significant new regulation of switching processes do not meet its legal obligations to ensure that those proposals are necessary and proportionate, and its proposals to regulate switching and cancellation of pay TV services are unlawful. Without prejudice to these fundamental points, however, if Ofcom proceeds with its proposals it must ensure that they are implemented in a consistent way. There is no sound reason why they should not also apply to BT's pay TV services provided via Sky's DTH satellite platform and bundles of services that include those pay TV services.

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<sup>3</sup> See, for example, the latest telecoms and pay TV complaints (Q2, April to June), Ofcom, 28 September 2016. (<http://stakeholders.ofcom.org.uk/market-data-research/other/telecoms-research/complaints/Q2-2016/>)

## SECTION 2: THE FRAMEWORK GOVERNING OFCOM'S PROPOSALS FOR NEW REGULATION

2.1 Ofcom's duties under the Communications Act 2003 (the "Act") taken together with its regulatory principles set a clear framework that Ofcom must follow when considering the imposition of new or additional regulation.

2.2 At Section 2 of the Consultation, Ofcom recognises that it must act pursuant to its general duties set out in section 3 of the Act.<sup>4</sup> In doing so, Ofcom must have regard to a number of factors set out in section 3(3) and 3(4) of the Act. Accordingly:

*"(3) ... OFCOM must have regard, in all cases, to –  
(a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and  
(b) any other principles appearing to OFCOM to represent the best regulatory practice."*  
(Emphasis added.)

2.3 Ofcom neglects, however, to refer to a number of important matters to which it must have regard under section 3(4) of the Act in performing its duties. In particular,

*"the desirability of promoting and facilitating the development and use of effective forms of self-regulation; and the desirability of encouraging investment and innovation in relevant markets".*

2.4 As noted above, section 3(3) of the Act requires Ofcom to demonstrate that any proposals for new regulation are (among other things) proportionate. The Competition Appeal Tribunal ("CAT") has indicated that the concept of proportionality should be interpreted as meaning that proposed regulation:

- (a) must be effective in achieving the legitimate aim in question;
- (b) must be no more onerous than required to achieve the aim;
- (c) must be the least onerous, if there is a choice of equally effective measures; and
- (d) must not produce adverse effects which are disproportionate to the aim pursued.<sup>5</sup>

### Duty to conduct an impact assessment

2.5 Section 7 of the Act imposes a duty on Ofcom to carry out an assessment of the impact of important proposals. The standard to which such assessments must be carried out has been established in a number of appeals against decisions by Ofcom as follows:

*"it is... incumbent on OFCOM ... to conduct their assessment with appropriate care, attention and accuracy so that their results are soundly based and can withstand... profound and rigorous scrutiny".<sup>6</sup>*

### Ofcom's regulatory principles

2.6 Ofcom's approach to regulation is also governed by its regulatory principles. These state that Ofcom will:

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<sup>4</sup> Paragraphs 2.14 – 2.17.

<sup>5</sup> Paragraph 137, *Tesco plc v Competition Commission* [2009] CAT 6.

<sup>6</sup> Paragraph 46, *Vodafone Limited v Office of Communications* [2008] CAT 22.



- operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required;
- strive to ensure its interventions will be evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome; and
- always seek the least intrusive regulatory mechanisms to achieve its policy objectives.<sup>7</sup>

2.7 The requirements of section 3 of the Act and these principles provide a clear framework for assessing whether it is appropriate for Ofcom to impose new or additional regulation. Ofcom must (i) first determine whether there are particular problems faced by consumers when switching suppliers, and/or cancelling services which justify intervention; and (ii) if it is found that this is the case, consider potential solutions to such problems with an open mind to all possible alternatives (including the possibility that the best option may be not to intervene); and (iii) implement the least onerous of those solutions, only where such intervention would not be disproportionate. In short, any new regulation must be (i) necessary and (ii) proportionate. The burden of proof rests with Ofcom to demonstrate to an appropriate standard that its proposals meet these criteria.

2.8 Furthermore, in applying this framework, Ofcom's starting point should be the need to operate with a bias against regulation, as set out in its regulatory principles, and Ofcom must take due account of the desirability of promoting self-regulation.

2.9 Sections 5 and 6 of this submission provide an assessment of Ofcom's proposed new regulation of switching and cancellation processes, and the evidence and analysis on which Ofcom relies in support of a conclusion that such new regulation is necessary and proportionate, against the requirements of this framework. As set out in detail in those sections: (i) Ofcom manifestly fails to meet its legal duties to ensure that proposed regulation is necessary and proportionate, (ii) its assessment of the impact of its proposals does not meet the legal requirements of such assessments, and (iii) Ofcom has not acted in accord with its regulatory principles – in particular, it has not acted with a bias against regulation.

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<sup>7</sup> 'Ofcom's regulatory principles'. (<https://www.ofcom.org.uk/about-ofcom/what-is-ofcom>).

### SECTION 3: OFCOM'S PROPOSAL TO REGULATE SWITCHING OF ALL PAY TV SERVICES IS UNLAWFUL, INADEQUATELY REASONED AND UNJUSTIFIED

3.1 Ofcom proposes to regulate switching and cancellation of all pay TV services including when that is the only service being switched (i.e., where pay TV is switched on a standalone basis) or cancelled. However Ofcom does not have the legal power to do so. Ofcom's assertion that it has the power to do so is: (i) inconsistent with the Common Regulatory Framework ("CRF"); (ii) a mischaracterisation of domestic legislation; and (iii) a misinterpretation of the *Hilversum* judgment. Ofcom has, moreover, failed to provide adequate reasoning or any justification for its proposal to extend regulation of switching and cancellation to all pay TV services.

#### Ofcom's position is not compatible with the Common Regulatory Framework or implementing domestic legislation

3.2 Ofcom's fundamental assertion is that it has the legal power to regulate the switching and cancellation of pay TV services because it considers that those services fall within the definition of an electronic communications service ("ECS").<sup>8</sup> This assertion is not compatible with either the Common Regulatory Framework ("CRF") or the implementing domestic legislation.

3.3 Ofcom's powers to regulate switching of telecommunications services are derived from the CRF. The purpose and scope of the CRF is clearly set out in the Framework Directive, which differentiates between the regulation of transmission and the regulation of content.<sup>9</sup> To stress this distinction, the CRF identifies services falling outside the scope of the CRF, which include broadcasting content and web-based content.<sup>10</sup>

3.4 The exclusion of content services from the scope of the CRF is most clearly set out in the Access Directive:

*"services providing content such as the offer for sale of a package of sound or television*

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<sup>8</sup> This is implicit in paragraph 2.28 of the Consultation.

<sup>9</sup> Recital 5, Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (the "Framework Directive"). See also recital 2, Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (the "Access Directive") and recital 20, Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (the "Authorisation Directive").  
*"The convergence of the telecommunications, media and information technology sectors means all transmission networks and services should be covered by a single regulatory framework. That regulatory framework consists of this Directive and four specific Directives [...] It is necessary to separate the regulation of transmission from the regulation of content. This framework does not therefore cover the content of services delivered over electronic communications networks using electronic communications services, such as broadcasting content, financial services and certain information society services, and is therefore without prejudice to measures taken at Community or national level in respect of such services, in compliance with Community law, in order to promote cultural and linguistic diversity and to ensure the defence of media pluralism. The content of television programmes is covered by Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. The separation between the regulation of transmission and the regulation of content does not prejudice the taking into account of the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection"* (emphasis added). (Recital 5, Framework Directive).

<sup>10</sup> *"The definition of information society service in Article 1 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules of information society services spans a wide range of economic activities which take place on-line. Most of these activities are not covered by the scope of this Directive because they do not consist wholly or mainly in the conveyance of signals on electronic communications networks. Voice telephony and electronic mail conveyance services are covered by this Directive. The same undertaking, for example an Internet service provider, can offer both an electronic communications service, such as access to the Internet, and services not covered under this Directive, such as the provision of web-based content"* (emphasis added). (Recital 10, Framework Directive).

*broadcasting content are not covered by the common regulatory framework for electronic communications networks and services.”<sup>11</sup>*

3.5 The Act, which transposes the CRF, echoes this distinction between transmission and content, defining an ECS as:

*“a service consisting in, or having as its principal feature, the conveyance by means of an electronic communications network of signals, except in so far as it is a content service.”<sup>12</sup>*  
(Emphasis added.)

3.6 Ofcom asserts that a service will be an ECS if it includes the conveyance of signals on an electronic communications network.<sup>13</sup> This is manifestly incorrect and a misapplication of the law.

3.7 In order for a service to be deemed an ECS, and therefore within Ofcom’s power to regulate, Ofcom must be able to answer one of two questions affirmatively:

- (a) Does the service consist entirely in the conveyance of signals by means of an electronic communications network? or
- (b) Does the service have as its principal feature the conveyance of signals by means of an electronic communications network?

3.8 Ofcom must also be able to answer one further question in the negative:

- (a) Is the service in question a content service?

#### **Ofcom’s position is not supported by the case law**

3.9 Ofcom cites case law relating to the definition of an ECS in support of its assertion. However, there is nothing in the applicable case law that changes the legal test. In fact, the case law simply provides further guidance as to how to apply the test.

3.10 In the 2013 *Hilversum*<sup>14</sup> case cited by Ofcom, the question raised was whether Article 2(c) of the Framework Directive must be interpreted as meaning that a service consisting in the supply of free to air (“FTA”) radio and television channels via a basic cable package falls within the definition of an ECS.

3.11 In considering the question before it, the Court of Justice of the European Union (“CJEU”) noted the definitions set out in Articles 2(a) and 2(c) of the Framework Directive, the fact that Recital 5 specifies that the regulation of transmission should be separated from the regulation of content, and that the CRF does not cover the content of services delivered over electronic communications networks using an ECS, such as broadcasting content.

3.12 The CJEU noted (as highlighted by Ofcom), that a basic cable package would fall within the definition of ECS only in so far as that service includes the conveyance of signals on the cable network.<sup>15</sup> However, in

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<sup>11</sup> Recital 2, Access Directive.

<sup>12</sup> Section 32(2) Communications Act 2003. “Content service” is subsequently defined by section 32(7) as “so much of any service as consists in one or both of the following – (a) the provision of material with a view to its being comprised in signals conveyed by means of an electronic communications network; (b) the exercise of editorial control over the contents of signals conveyed by means of such a network”.

<sup>13</sup> Paragraph 2.28.

<sup>14</sup> Case C-518/11 *UPC Nederland BV v Gemeente Hilversum*, Judgment of 7 November 2013 (“*Hilversum*”).

<sup>15</sup> See paragraph 44, *Hilversum*.

its final conclusion, and the operative part of the judgment, the CJEU notes that the service in question would only fall within the scope of an ECS in so far as that service entailed primarily the transmission of television content on a cable distribution network to the receiving terminal of the final consumer.<sup>16</sup> Accordingly, if the primary purpose of the service in question had been anything other than the transmission of television content (i.e. the conveyance of signals), it would not have been an ECS.

- 3.13 *Hilversum* concerned the transmission of FTA television and radio content via a cable network, where UPC did not produce or exercise editorial control over the content in question.<sup>17</sup> The facts of *Hilversum* are not comparable to pay TV services like Sky's, where Sky both produces and has editorial control over content within its service. Therefore not only has Ofcom incorrectly summarised the *Hilversum* judgment (as shown above) but Ofcom has also erred in its application of that judgment to pay services such as Sky's.

### **Pay TV content services are not Electronic Communications Services**

- 3.14 To regulate the switching of pay TV services as an ECS Ofcom must satisfy itself of the following:
- (a) that the service in question is not a content service. Both the CRF and the Act are clear – where a pay TV service is a content service, it is not an ECS. According to the case law, where a service includes content produced by the service provider and/or content over which the service provider has editorial responsibility that service is a content service, and is therefore excluded from the definition of an ECS<sup>18</sup>;
  - (b) that the service is wholly or mainly an ECS. Where a number of services (some of which are an ECS and some of which are neither an ECS nor a content service) are combined, Ofcom must satisfy itself that the ECS element of the service is the principal feature of that service. If not, the overall service cannot be deemed an ECS.
- 3.15 It is clear, therefore, from the legislation and the case law that the status of each relevant service (as an ECS or otherwise) must be determined on a case by case basis. Ofcom has, however, made no attempt to conduct such an assessment and has failed therefore to show that it has jurisdiction to regulate pay TV services in the way it purports to in the Consultation.
- 3.16 Had Ofcom undertaken such an analysis, it would become readily apparent that content services like Sky's pay TV service do not fall within the scope of the definition of an ECS. Ofcom does not therefore have the power to regulate such services.

### **Ofcom's decision to apply its proposals to pay TV is inconsistent with its practice to date**

- 3.17 As discussed above, Ofcom's assertion that it has the power to regulate switching and cancellation of pay TV services is based on an (incorrect) interpretation of the judgment in *Hilversum*, which is now over three years old. Ofcom provides no explanation at all as to why it only now takes the view that *Hilversum* warrants a significant change in its approach to regulation of pay TV services, having not taken such a view previously.
- 3.18 To date, Ofcom's practice has been inconsistent with the view set out in the Consultation. In particular, Ofcom has drafted and enforced the General Conditions, which apply to providers of an ECS, on the basis that they do not apply to pay TV services. The position in the Consultation therefore is inconsistent

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<sup>16</sup> See paragraph 47, *Ibid.*

<sup>17</sup> See paragraph 43, *Ibid.*

<sup>18</sup> See further the Advocate General's opinion at paragraph 35 in Case C-475/12 – *UPC DTH Sarl v Nemzeti Media – es Hirkozlesku Hatosag Elnokhelyettese.*

with Ofcom's approach to the General Conditions and is demonstrative of the lack of consideration Ofcom has given to its position and the consequences of its assertion that all pay TV services that include the conveyance of signals are an ECS.

- 3.19 Given the significance of this change in approach by Ofcom, in line with Ofcom's regulatory principle of transparency, Sky would have expected Ofcom to have set out its position carefully and thoroughly, including addressing any inconsistencies with its approach to the issue to date. Ofcom, however, fails to address the inconsistency of its proposals with its practice to date, or to consider the wider implications of an assertion that it regards pay TV services as an ECS.

**Ofcom fails (i) to explain its decision to include switching and cancellation of pay TV services on a standalone basis within the scope of its proposals and (ii) to provide adequate justification for that proposal**

- 3.20 Ofcom's decision to include switching and cancellation of pay TV services on a standalone basis within the scope of its proposals was taken at a late stage in the current process; for several years, and until very recently, Ofcom's current workstream was stated as being targeted at switching of bundles of services or, more recently, triple play services.<sup>19</sup> For example, Ofcom's annual plan for 2016/17 states:

*"Improving consumers' ability to switch: Following our work to improve switching processes on BT and KCom's copper networks, we are considering whether we need to improve processes for switching mobile and triple-play services."*<sup>20</sup>

- 3.21 Indeed, an update to Ofcom's Annual Plan published as late as August 2016 (i.e., after the Consultation was published) refers to the activity under which the current Consultation has been published as "*Triple Play Switching*"<sup>21</sup>.

- 3.22 Given the significance of such a decision to extend the scope of this workstream to standalone pay TV switching and cancellation, Sky expected Ofcom to provide a careful and thorough justification of its decision in the Consultation, including by reference to the legal framework. Astonishingly, no explanation at all is provided. Indeed, equally astonishingly, nowhere in the Consultation does Ofcom actually indicate clearly that it intends its proposals to apply to switching of pay TV on a standalone basis.<sup>22</sup> Whilst, as discussed above, Ofcom asserts (briefly and erroneously) that it has the legal power to regulate switching of pay TV services, no justification is provided for Ofcom's proposal to exercise that putative power.

- 3.23 Not only does such an approach fly in the face of Ofcom's commitment to be transparent in its deliberation, it is poor administrative practice giving rise to significant regulatory uncertainty for those regulated by Ofcom.

- 3.24 The fact that a decision was taken late in the day to include switching and cancellation of pay TV services on a standalone basis in the scope of the Consultation also is evident in the section of the Consultation that sets out Ofcom's assessment of the difficulties faced by consumers when switching supplier and/or cancelling their service. Again, Sky's expectation when informed by Ofcom that it proposed to include switching of pay TV services on a standalone basis within the scope of its proposals

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<sup>19</sup> Sky was only informed of this decision indirectly, as a result of a statement included towards the end of a letter of 18 July (i.e., shortly before publication of the Consultation) requesting permission to use information gathered for a different purpose for the current inquiry.

<sup>20</sup> Page 18.

<sup>21</sup> Page 3, 'Ofcom Programme of Work 2016/17 - Q2 Update', 12 August 2016. ([https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0030/74856/1617\\_programme\\_of\\_work\\_q2\\_update.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0030/74856/1617_programme_of_work_q2_update.pdf))

<sup>22</sup> The closest Ofcom comes in the Consultation is one of the consultation questions, where it asks on page 50: "*Do you agree that the proposals should apply to all cross-platform services [sic], whether provided in a bundle or on a standalone basis?*"

was that Ofcom would provide clear evidence of significant problems faced by consumers when undertaking such switches and/or cancelling their pay TV services.

- 3.25 As set out in more detail in Section 5 of this response, below, discussion of whether any of the 'difficulties' said by Ofcom to be faced by consumers when switching supplier apply to switching or cancellation of pay TV services on a standalone basis is virtually non-existent. As a result, Ofcom's proposal to apply its proposed new regulation to switching and cancellation of pay TV on a standalone basis is not only unlawful but also unjustified.

## SECTION 4: OFCOM HAS FAILED TO TAKE ACCOUNT OF THE RELEVANT CONTEXT

- 4.1 The Consultation contains virtually no contextual information or analysis. It is focused entirely on (i) consideration of potential difficulties with switching and cancellation processes in relation to communications and pay TV services, and (ii) potential solutions to those difficulties.<sup>23</sup>
- 4.2 This is surprising. A proper consideration of the relevant context is critical to a sound appreciation of the need for regulatory intervention. A failure to place issues in their relevant context is apt to lead to a distorted perspective on them, giving rise to proposals for intervention that are at best unnecessary and at worst harmful to consumers and businesses.
- 4.3 In the following sub-sections, we comment on a number of features of the communications and pay TV sectors that are relevant to the current Consultation, to which Ofcom has failed to have regard, as follows:
- Ofcom's proposals relate to highly competitive sectors;
  - switching and cancellation are straightforward;
  - there is significant switching and cancellation activity;
  - Ofcom's own evidence shows that cross platform switching processes work well; and
  - consumers are empowered.

### Ofcom's proposals relate to highly competitive sectors

- 4.4 The most important fact about the UK communications and pay TV sectors relevant to Ofcom's analysis is that they are intensely competitive at the retail level.<sup>24</sup>
- 4.5 UK consumers are served by four major retailers of fixed line communications services (BT, Virgin Media, Sky and TalkTalk), each of which currently provides pay TV, fixed line telephony and fixed broadband services. (Both BT and Sky also provide services under alternative brands (PlusNet and NOW TV).) BT, Virgin Media and TalkTalk today also provide mobile telephony services, with Sky due to launch a mobile telephony service later in the year. Vodafone is also increasingly active as a provider of fixed line telecommunications services, in addition to its large mobile telephony business.
- 4.6 Ofcom deemed the retail market for fixed line telephony services to be effectively competitive in 2009. Since then, retail market competition has intensified significantly, both in relation to fixed line telephony, and in relation to bundles of communications services and pay TV. In particular, over the past four years, competition for triple play customers has become a key focus of competition among the four main players in the UK.
- 4.7 In 2012 the Competition Commission asserted that the putative retail market for pay TV services was not competitive.<sup>25</sup> Even if the Competition Commission's assertion was correct at the time (which Sky does not accept), it is plain that there have been significant changes in the sector since then and that those changes have resulted in significantly increased competition at the retail level. In particular, BT

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<sup>23</sup> The document begins with an introduction and explanation of the legal framework. Thereafter, following a short description of "current switching arrangements", Ofcom proceeds to an identification of "Key difficulties and deterrents" followed by proposing "Options for reform", and the assessment of the proposed options.

<sup>24</sup> As Ofcom is aware, Sky has considerable concerns about competition in the provision of 'superfast' broadband services. However, these problems are principally the result of BT's vertical integration and the level of its wholesale charges for GEA services.

<sup>25</sup> Paragraph 20, 'Movies on pay TV market investigation A report on the supply and acquisition of subscription pay-TV movie rights and services', Competition Commission, August 2012. ([https://assets.publishing.service.gov.uk/media/5519492940f0b614040001ca/main\\_report.pdf](https://assets.publishing.service.gov.uk/media/5519492940f0b614040001ca/main_report.pdf))

and TalkTalk only launched their YouView-based IPTV pay TV services in 2012, which enables them to offer fully-fledged pay TV propositions. In addition, new OTT services, particularly Netflix and Amazon have increased retail competition in the sector. Providers of pay TV services in the UK have always faced intense competition from a strong FTA television sector, and continue to do so. Finally, consumers' ability to purchase content on-demand has grown substantially over the past four years.

- 4.8 Competition for customers is the fundamental focus of retail competition among BT, Virgin Media, Sky and TalkTalk (and, increasingly, Vodafone). Each of these companies' overall business contain lines of business with substantial fixed costs, which means that a key way of driving growth in profitability is by growing their customer bases, and thereby growing revenue. The performance of firms operating in this sector is constantly evaluated on the basis of their success in growing their subscriber bases. Moreover, growth in take-up of communications products and pay TV is relatively slow, which means that the principal way that these companies can grow their subscriber bases is by gaining customers from rivals.<sup>26</sup>
- 4.9 There is copious evidence available about the intensity of this competition, most notably from the high levels of marketing and constant stream of deep offers made by companies in this sector. A selection of recent advertising from the five operators described above is included in Annex 1. There is no evidence at all of these companies simply aiming to maintain their existing customer bases, and not actively competing to win customers away from rivals.
- 4.10 The intensity of competition for customers in the sector has significant implications for Ofcom's analysis.

***Firms have strong incentives to make it easy for consumers to join their service***

- 4.11 Firms' desires to increase their subscriber bases, by winning customers away from rivals, provides strong incentives to make it as easy as possible for consumers to join their service – which is a key element of the switching process. Firms operating in this sector have interests that are aligned with Ofcom's policy objective of making switching easy and reliable for consumers.
- 4.12 In principle, it might be argued that similar incentives drive firms to make it as difficult as possible for consumers to leave their service. There are, however, a number of important constraints on doing so, notably:
- legal: there are significant legal constraints on the actions that firms are permitted to take to prevent customers leaving their service including consumer protection laws which require contractual terms to be fair<sup>27</sup> and General Condition 9.3 in relation to electronic communications services which, without prejudice to any initial commitment period, requires providers to ensure that their conditions or procedures for contract termination do not act as disincentives for consumers who want to change provider;
  - reputational impact: firms that make it difficult for customers to leave their service face a significant risk of their actions being publicly exposed, generating adverse publicity. Such adverse publicity can have a detrimental impact on firms' brand, and make it harder to attract new customers; and
  - a desire to win customers back in future: firms that provide existing customers with a poor experience when they leave are likely to have little prospect of winning back those customers in the future.

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<sup>26</sup> The potential exception to this is in relation to 'superfast' broadband services, where the relative nascence of these services means that driving growth in take-up is a key part of competition.

<sup>27</sup> See, for example, Part 2, Consumer Rights Act 2015.



***Intervention in relation to switching normally arises when it is a key contributor to ineffective competition***

- 4.13 Intervention in relation to switching suppliers is normally a key focus of regulatory activity where switching problems are an important contributor to ineffective competition. For example, measures on switching supplier were included in the European Telecommunications Framework because, at its inception, a key focus of that framework was the promotion of competition in a sector dominated by former state-owned monopolies. There was a real fear that incumbents could frustrate the development of retail competition by making it difficult for customers to switch to new entrants.
- 4.14 In the UK, a focus on switching in other sectors has been part of a broader concern about weak competition between firms for customers. For example, issues related to switching featured prominently in the CMA's market reviews of both the energy and retail banking sectors for this reason.<sup>28</sup>
- 4.15 The fact that the UK retail communications and pay TV sectors are intensely competitive means that this concern does not provide an underpinning for proposals for regulatory intervention.<sup>29</sup>

***There is less need for intervention in competitive markets***

- 4.16 More generally, there is less need for intervention in dynamic, competitive markets because competition itself normally produces solutions to problems experienced by consumers. This is one of the key features of competitive markets. Indeed, it is generally recognised that in such circumstances intervention is likely to do more harm than good, by inhibiting the development of private solutions to market imperfections.

**Switching and cancellation are straightforward**

- 4.17 Ofcom's failure to undertake any contextual analysis, and, instead, to focus on a search for 'difficulties' faced by consumers when switching, results in a distorted perspective. The simple fact is that switching provider of communications and pay TV services, and/or cancellation of those services, is, for the vast majority of consumers, a straightforward process – certainly no more complex (and typically far less complex) than a wide range of activities that consumers deal with without needing regulatory assistance or intervention.
- 4.18 This is particularly the case for switching processes that today are customer-managed, requiring consumers simply to cancel their existing service and to arrange for a new service provider to begin supplying them. Given the multiplicity of far more complex transactions consumers undertake every day, it cannot credibly be claimed that such a process is too complex for consumers to cope with.
- 4.19 Similarly, a key part of Ofcom's proposals, namely intervention in relation to the ways that consumers are able to cancel their services in the context of its 'enhanced cease and re-provide' proposal, is

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<sup>28</sup> See: 'Retail Banking market investigation; Final Report', Competition and Markets Authority ("CMA"), August 2016 (<https://assets.publishing.service.gov.uk/media/57ac9667e5274a0f6c00007a/retail-banking-market-investigation-full-final-report.pdf>); and 'Energy market investigation; Final Report', CMA, June 2016. (<https://assets.publishing.service.gov.uk/media/5773de34e5274a0da3000113/final-report-energy-market-investigation.pdf>). In the retail banking report, the CMA found that weak customer responses to differences in prices and service quality means that banks have limited incentives to compete for personal account customers (see paragraph 6.233). In the energy market investigation report, the CMA found that a significant number of customers did not take advantage of opportunities to switch providers, giving rise to a 'Weak Customer Response' adverse effect on competition among gas and electricity companies at the retail level of the sector (see paragraphs 9.562 – 9.563).

<sup>29</sup> In Section 6, below we discuss Ofcom's proposition in the Consultation that there could be significant benefits to consumers if its proposed regulation resulted in increased retail competition. Given the already intensely competitive nature of the markets in question, a view that increased regulation would result in significant benefits to consumers by increasing competition is not credible.

premised on a proposition that consumers find it difficult to cancel their services with their current provider. As discussed further below, there is little evidence that this is the case. It is straightforward for consumers to get in touch with their existing providers to cancel communications and pay TV services.

- 4.20 Sky offers customers several ways of contacting Sky to cancel their services so they can choose the method which works best for them. Sky currently offers customers the choice of cancelling by letter, email, phone or webchat, which we consider suits the preferences of the vast majority of consumers.<sup>30</sup>
- 4.21 It is true that many service providers normally insist on contact from the account holder when they are cancelling their service, and that some consumers may find this annoying or inconvenient. However, there is a very important reason for such insistence, which works in the interests of consumers – namely, to ensure that the person cancelling the service has the right to do so and fully understands the implications of their decision. Sky is firmly of the view that protecting consumers from unwanted or uninformed cancellation of their contracts by people who are not authorised to do so is a critical element of its current processes, and Ofcom should be very cautious in undermining this important protection for consumers.

#### **There is significant switching and cancellation activity**

- 4.22 Whilst promoting high levels of switching is inappropriate as an objective in itself, consideration of the volume of switching and cancellation that occur provides important contextual information about the ease of switching. In particular, if there are significant impediments to switching and cancellation it is unlikely that significant levels of these activities will be observed. Indeed, one of the conundrums posed by Ofcom's approach is why such high levels of switching are observed if the problems faced by consumers are as pervasive as Ofcom appears to believe.
- 4.23 Ofcom claims that there are around 884,000 'cross platform switches' in the telecommunications and pay TV sectors each year. However, in Sky's case alone, in the last financial year around [•] customers cancelled their service with Sky. This fact, together with publicly available data on other firms' churn rates leads us to believe that Ofcom has significantly under-estimated the true level of cross platform switching and cancellations in the UK communications and pay TV sectors.
- 4.24 Accordingly, there is significant evidence available that millions of UK consumers switch suppliers of broadband, telephony and pay TV, or cancel their pay TV subscription every year. It is wholly implausible that such significant levels of switching and cancellation would be observed if those activities were difficult for consumers.

#### **Ofcom's own evidence shows that cross platform switching processes work well**

- 4.25 Ofcom's own Consumer Experience Report 2015 shows that 91% of standalone digital TV customers found the switching process easy.<sup>31</sup> This figure is consistent with Ofcom's findings when it began its strategic review of switching in 2010.<sup>32</sup>
- 4.26 During 2015 Ofcom undertook a significant piece of consumer research aimed at exploring consumers'

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<sup>30</sup> See further the evidence from Ofcom's consumer survey issue on this matter, discussed in Section 5 below.

<sup>31</sup> Figure 37, 'The Consumer Experience, Research Annex', Ofcom, 10 February 2016. ([https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0023/38543/annex.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0023/38543/annex.pdf))

<sup>32</sup> Figure 10, 'Consumer Switching and Bundling report', Saville Rossiter-Base, September 2010.

experiences of switching in the UK telecoms and pay TV sectors.<sup>33</sup> While this consumer survey had a number of problems associated with it, which we discuss further below and at Annex 6, when considered objectively, its key results are as follows:

- (i) there is a high level of satisfaction with existing cross platform switching processes;
- (ii) the number of people for whom process-related issues caused major difficulties is small; and
- (iii) consumers who choose not to switch are not put off by switching processes.

We discuss each of these below.

***There is a high level of satisfaction with existing cross platform switching processes***

4.27 The survey used three different measures of satisfaction with respondents' switching experience:

- (i) QG13: How would you rate your overall switching experience i.e. from the point at which you decided you wanted to switch your service(s), to the point you were using your new provider's service(s)?
- (ii) QG19: Overall how satisfied are you with your decision to switch/stay with your provider?
- (iii) QH1: Based on your experience how likely are you to recommend switching to someone else (e.g. a friend or relative)?<sup>34</sup>

4.28 Tables 4.1 - 4.3 below sets out the key findings of the survey in relation to cross platform switchers.<sup>35</sup>

**Table 4.1**  
**QG13: How would you rate overall switching experience?**

	Number of respondents	Percentage
Easy	265	32%
Very easy	421	50%
Fairly difficult	103	12%
Very difficult	28	3%
Don't know	18	2%
	835	

Source: Sky calculation based on survey response data

4.29 Of those who provided a response to this question (excluding the 'don't knows'), the percentage indicating that they would rate their experience as easy or very easy is 84%.

**Table 4.2**  
**QG19: Overall how satisfied are you with your decision to switch**

<sup>33</sup> We refer to this research in this response as 'Ofcom's 2015 consumer survey'. The document summarising the results of the research is published as an Ofcom document, with a publication date of 29 July 2016, even though it is referred to on Ofcom's web site as having been produced by BDRC. We refer to this document hereafter as 'The Main Findings slide pack'.

<sup>34</sup> This question is similar in nature to that commonly used by firms to calculate 'net promoter scores' in order to evaluate consumer satisfaction with their performance.

<sup>35</sup> We have adopted a conservative definition of cross platform switchers and excluded only those who are clearly intra-Openreach switchers.

**your provider?**

	<b>Number of respondents</b>	<b>Percentage</b>
Very satisfied	432	52%
Fairly satisfied	310	37%
Fairly dissatisfied	46	6%
Very dissatisfied	30	4%
Don't know	17	2%
	835	

Source: Sky calculation based on survey response data

- 4.30 Of those who provided a response to this question (excluding the 'don't knows'), the percentage indicating that they were very satisfied or fairly satisfied with their decision to switch provider is 91%.

**Table 4.3**  
**QH1: Based on your experience how likely are you to recommend switching to someone else (e.g. a friend or relative)?**

	<b>Number of respondents</b>	<b>Percentage</b>
Very likely	323	39%
Fairly likely	343	41%
Fairly unlikely	60	7%
Not at all likely	37	4%
Don't know	72	9%
	835	

Source: Sky calculation based on survey response data

- 4.31 Of those who provided a response to this question (excluding the 'don't knows'), the percentage indicating that they were likely or very likely to recommend switching to someone else, such as a friend or relative, is 87%. For many companies, achieving a score as high as 87% in relation to this question would be considered a mark of significant success.

***The number of cross platform switchers for whom process-related issues caused major difficulties is small***

- 4.32 The Consultation focuses on the scope to make process-related improvements to switching and cancellation processes. Accordingly, the key responses in relation to the difficulties experienced by cross platform switchers are those of people who experienced process-related issues.

- 4.33 In the Consultation, Ofcom defines the following categories of response to comprise 'process related' difficulties<sup>36</sup>:

- Cancelling your previous service
- Your previous provider trying to persuade you to stay
- Arranging the switch so that you were not paying for your old and new services at the same time

<sup>36</sup> Paragraph 3.19.

- Contacting your previous provider
- Arranging the switch so that you always had access to your services
- Getting the switch to happen on the date that you wanted

4.34 24% of cross platform switchers in Ofcom’s 2015 consumer survey indicated that they had experienced one or more of these and regarded it as a ‘major’ difficulty.<sup>37</sup> Only 8% of cross platform switchers considered one or more of these difficulties to be the main difficulty they faced when switching.<sup>38</sup>

4.35 The figures for the percentages of cross platform switchers in the survey who indicated that each of Ofcom’s process-related issues comprised a major difficulty for them were as follows:

**Table 4.4**  
**Percentage of respondents identifying Ofcom’s process-related difficulties as a ‘major difficulty’**

Issue	Percentage of respondents
Cancelling your previous service	11%
Your previous provider trying to persuade you to stay	10%
Arranging the switch so that you were not paying for your old and new services at the same time	8%
Contacting your previous provider	7%
Arranging the switch so that you always had access to your services	7%
Getting the switch to happen on the date you wanted	4%

Source: Sky calculation based on survey response data

4.36 It is important to recognise that these figures are not independent of each other. Respondents were permitted to indicate more than one ‘major’ difficulty. Accordingly, the percentages indicated above could relate to the same respondent.

4.37 These figures are small (particularly in the case of “*getting the switch to happen on the date you wanted*”). They point clearly to a conclusion that there are no material process-related impediments to cross platform switching.

***Consumers who decided not to switch are not put off by switching processes***

4.38 Of consumers who did not switch in Ofcom’s 2015 consumer survey, 90% of non-switchers and 89% of ‘non-active considerers’ were satisfied with their decision to stay with their current provider.<sup>39</sup> As set out in Table 4.5, below, only a tiny proportion of these consumers perceived hassles with the switching process.

**Table 4.5**  
**Main factor in decision not to switch / actively consider switching**

	Percentage of respondents
It’s too time consuming to go through the process of switching from one	3%

<sup>37</sup> Of these, 47% said that they experienced one ‘major’ difficulty, and 30% said that they experienced two ‘major’ difficulties.

<sup>38</sup> Slide 24, Main Findings slide deck.

<sup>39</sup> Slide 106, Main Findings slide deck.

provider to another	
I was worried about being without the broadband service(s) during the switch	2%
I was worried about being without the landline phone service(s) during the switch	1%
Concerned it would be difficult to arrange for the old and new services to start and stop at the right time	1%
Concerned about paying two providers at the same time	1%
Too much hassle to cancel my current service	1%
I was worried about being without the pay TV service(s) during the switch	1%

Source: Slides 98-100, Main Findings slide deck

4.39 Ofcom's 2015 consumer survey therefore provides compelling evidence that there are no fundamental problems with switching and cancellation processes in the UK communications and pay TV sectors today. Particularly having regard to the downward bias imparted by the approach of asking consumers about their overall view of their switching experience at the end of a survey that focused on, and prompted respondents to consider, any problems they may have experienced during that process<sup>40</sup> – however minor – the results are a significant endorsement of current processes.

4.40 These results should be welcomed by Ofcom, rather than ignored because they do not fit its preferred conclusion. Yet this is exactly how Ofcom has approached this evidence. There is no clearer indication of Ofcom's biased approach than its rather cryptic description of its approach in paragraph 3.17 of the Consultation. Having first observed that 81% of consumers switching between platforms rated the process as either very easy or fairly easy, while 17% said it was difficult or very difficult, Ofcom then states that it is:

*“minded to consider these findings alongside consumers' responses to prompted questions about their switching experiences”.*

4.41 What this appears to mean in practice is that Ofcom prefers to discount entirely the clear evidence that the large majority of consumers find switching easy or very easy, and instead focus on the small minority who, when prompted, said that they found some aspect of the process difficult.

### Consumers are empowered

4.42 The extent to which consumers are empowered to take decisions about which supplier will best meet their needs, and to be able to switch among suppliers, is likely to be a significant contributory factor to effective switching. There is no discussion at all of this factor in the Consultation.

4.43 Today, consumers are more empowered to take decisions in relation to choice of supplier, and switching among them, than ever before. Ofcom's own consumer survey demonstrates that there is good awareness on the part of consumers about existing switching processes. This should not be surprising, reflecting the facts that (i) such processes are not complex, and (ii) there is a multiplicity of sources of trusted information readily available to them. The latter include:

- firms operating in the sector<sup>41</sup>;
- the views of friends and family, which remains a significant source of trusted information;
- Ofcom<sup>42</sup>;

<sup>40</sup> We discuss this bias further in Section 5, below.

<sup>41</sup> See, for example, Virgin Media's web page: 'How do I switch from my current supplier?' ([http://help.virginmedia.com/system/selfservice.controller?CONFIGURATION=1001&PARTITION\\_ID=1&secureFlag=false&TIMEZONE\\_OFFSET=&CMD=VIEW\\_ARTICLE&ARTICLE\\_ID=3221](http://help.virginmedia.com/system/selfservice.controller?CONFIGURATION=1001&PARTITION_ID=1&secureFlag=false&TIMEZONE_OFFSET=&CMD=VIEW_ARTICLE&ARTICLE_ID=3221)). This includes printable forms for sending to existing providers to cancel their service.

- newspaper columns and websites, such as The Telegraph’s ‘Household Savings’ section<sup>43</sup>;
- online specialist web sites and comparison sites (such as uswitch.com, broadbandchoices.com, broadband.co.uk, MoneySavingExpert.com and Moneysupermarket.com);
- online forums, such as those operated by Digital Spy<sup>44</sup>; and
- consumer organisations, such as Which?

4.44 Given the plethora of readily available sources of reliable, clear and trusted information available to consumers at this point in time, assertions that switching may be ‘difficult’ because it is hard for consumers to work out how to switch are simply not credible.

4.45 Consumers already have significant legal rights that protect them throughout the switching process, which underpin consumer empowerment and contribute to effective switching. General consumer laws and sector-specific regulation (including Ofcom’s General Conditions) provide considerable safeguards for consumers. The level of protection for consumers has increased markedly in recent years, with, for example, the introduction of the Consumer Rights Act – described as the “*biggest overhaul of consumer rights in a generation*”<sup>45</sup> - into UK law as well as The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. In addition to having stronger rights, the sources of trusted information described above help ensure that consumers are aware of when and how to exercise those rights.

## Conclusion

4.46 The complete absence of any contextual analysis of the circumstances in which switching and cancellation takes place is a significant flaw in the Consultation. Its absence is apt to lead to erroneous conclusions about the need for, and benefits of, regulatory intervention.

4.47 A number of key contextual factors point strongly to a conclusion that there is no need for significant intervention in relation to switching processes in the UK communications and pay TV sectors, notably:

- (a) the highly competitive nature of the relevant sectors;
- (b) the straightforward nature of switching and cancellations processes that exist in the sectors;
- (c) the significant levels of switching and cancellation activity today;
- (d) the significant amount of evidence available to Ofcom that existing switching processes work well and generate high levels of consumer satisfaction; and
- (e) the fact that consumers in these sectors are more empowered to take decisions about their supplier of communications and pay TV services, and whether to switch to an alternative supplier, than ever before.

<sup>42</sup> See, for example, Ofcom’s switching page on its web site (<https://www.ofcom.org.uk/phones-telecoms-and-internet/advice-for-consumers/costs-and-billing/switching>), or ‘How do I switch landline phone supplier?’ ([http://ask.ofcom.org.uk/help/telephone/switch\\_landline\\_supplier](http://ask.ofcom.org.uk/help/telephone/switch_landline_supplier)).

<sup>43</sup> See, for example, ‘How to save on broadband’ (<http://www.telegraph.co.uk/sponsored/finance/household-savings/12082222/best-broadband-deals.html>).

<sup>44</sup> See: <http://forums.digitalspy.co.uk/forumdisplay.php?f=77>.

<sup>45</sup> Press release, Department for Business, Innovation and Skills, 27 March 2015. (<https://www.gov.uk/government/news/biggest-overhaul-of-consumer-rights-in-a-generation>.)

## SECTION 5: OFCOM'S PROPOSED INTERVENTIONS ARE NOT NECESSARY

### Introduction

5.1 Ofcom's analysis of (i) the experience of consumers when switching providers in the UK telecommunications and pay TV sectors, (ii) the views of those who have chosen not to switch, and (iii) the views of those who have not considered switching, is set out in Section 3 of the Consultation.<sup>46</sup> On the basis of that analysis, Ofcom reaches a "*provisional view*" that:

*"existing cross-platform switching arrangements create a number of process-related difficulties for switchers, and can deter some consumers from switching."*<sup>47</sup>

Ofcom further provisionally concludes that its evidence on these issues "*justifies regulatory intervention*"<sup>48</sup>. As a result, Ofcom proceeds, in Section 4 of the Consultation, to set out proposed interventions that are intended to remedy those "*difficulties*".

5.2 The specific "*process-related difficulties*" identified by Ofcom are as follows:

- "• loss of service, particularly due to delays in the service(s) being installed or activated when switching, and difficulties consumers experience (or are worried they will experience) co-ordinating the stop/start of the service(s);*
- "• double paying for services that overlap, particularly due to difficulties consumers experience co-ordinating the stop/start of the service(s) or to avoid a loss of service; and*
- difficulties contacting previous providers / cancelling old service(s), particularly due to restricted and at times lengthy methods of cancellation."*<sup>49</sup>

5.3 Ofcom goes on to state that it also:

*"found concern related to each of these areas among consumers who decided not to switch, as well as a general lack of understanding amid consumers about how the switching process operates. In certain instances, there was also a lack of awareness of the implications of switching – particularly in relation to unexpected charges and minimum notice periods."*<sup>50</sup>

5.4 As set out in Section 2 of this response, above, Ofcom must only introduce new regulation if it is targeted at cases in which action is needed. It must demonstrate that proposals for new regulation are so targeted on the basis of cogent analysis and clear evidence capable of withstanding profound and rigorous scrutiny. The burden of proof rests with Ofcom to demonstrate that proposals for new regulation are necessary. Furthermore, when considering whether or not there are problems with switching that warrant intervention Ofcom's principle of acting with a bias against regulation dictates that it should set a high evidential threshold for reaching a conclusion that intervention is needed.

5.5 This Section 5 of Sky's response assesses the evidence and analysis relied upon by Ofcom in support of its provisional conclusions about the existence of problems that warrant intervention. It contains three sub-sections. In sub-section 5A, we provide some general comments about the evidence and analysis set out in Section 3 of the Consultation. In sub-section 5B we assess in detail the specific evidence

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<sup>46</sup> This analysis combines, appropriately, (i) identification of particular problems, and (ii) analysis of their magnitude or harm caused to consumers.

<sup>47</sup> Paragraph 1.4.

<sup>48</sup> Paragraph 1.6.

<sup>49</sup> Paragraph 3.64.

<sup>50</sup> *Ibid.*



relied upon by Ofcom. Finally, in sub-section 5C, we provide an overall assessment of Ofcom's provisional view that it has identified process-related difficulties that warrant regulatory intervention.

- 5.6 The analysis in this Section 5 demonstrates that the evidence on which Ofcom relies in support of its provisional view is of an inadequate standard, and Ofcom's interpretation of that evidence exaggerates the process-related difficulties experienced by UK consumers when switching providers of telecoms and pay TV services, and/or cancelling their pay TV subscriptions. It also shows that Ofcom has failed to consider relevant evidence and given undue weight to irrelevant or insignificant considerations.
- 5.7 Having proper regard to (i) the small scale of the issues raised by Ofcom, (ii) the fact that no switching processes can be expected to work perfectly, (iii) the relevant context set out in Section 4, above, and (iv) Ofcom's commitment to acting with a bias against regulation, the analysis set out in Section 3 of the Consultation fails to provide a sound evidential basis for intervention.
- 5.8 Whilst Ofcom has set out evidence that it considers justifies intervention in relation to some types of switches, this is not the case in relation to switching and cancellation of pay TV services on a standalone basis. Ofcom has not demonstrated to an adequate standard that its proposal to include such switching and cancellation activity within the scope of its proposed new regulation is targeted at a problem in which action is needed.

#### **5.A General comments on the evidence relied upon by Ofcom**

- 5.9 This sub-section provides comments of a general nature on the analysis and evidence presented in Section 3 of the Consultation, as follows:
- the analysis and evidence presented by Ofcom is insubstantial;
  - the consumer survey that forms the basis for Ofcom's conclusions is not wholly reliable;
  - the structure of the consumer survey was biased towards an unfavourable view of switching;
  - Ofcom exaggerates the extent of difficulties faced by consumers when switching;
  - the consumer survey evidence is insufficiently granular;
  - Ofcom exercises insufficient caution in relation to the views of consumers who have not switched; and
  - anecdotes are not reliable evidence.

#### **The analysis and evidence presented by Ofcom is insubstantial**

- 5.10 As noted above, Ofcom's proposals for new regulation are significant. For example, they would bring firms' activities that are currently not specifically regulated by Ofcom within the scope of regulation for the first time.<sup>51</sup> As a result, it should be expected that the evidence and analysis relied upon by Ofcom would be substantial. However, the opposite is the case.
- 5.11 The analysis and evidence base set out in the Consultation relating to the need for intrusive new regulation in this area is extraordinarily meagre. The relevant part of the Consultation comprises only 12 and a half pages. A substantial part of those 12 and a half pages (around 4-5 pages) is devoted to relatively long anecdotes which, as discussed further below, are of no incremental evidential value.
- 5.12 Such a short consideration of evidence and analysis relating to the difficulties experienced by consumers when switching supplier is insufficient to justify the imposition of significant new regulation.

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<sup>51</sup> As with all commercial activities, they are regulated by general law – including, importantly in this case, general consumer law.

## The consumer survey that forms the basis for Ofcom's conclusions is not wholly reliable

- 5.13 Ofcom aspires to be an evidence-based regulator: one of its key regulatory principles is that it will “*strive to ensure its interventions will be evidence-based*”. In keeping with this aspiration, in 2015 Ofcom commissioned a significant piece of consumer research to better understand UK consumers’ experiences of switching of telecommunications and pay TV services.<sup>52</sup> The research was carried out in October and November 2015, and the results presented to Ofcom in early 2016. The research was carried out by a well-known consumer research agency (BDRC), generally to a high standard.
- 5.14 This consumer survey forms the bedrock of Ofcom’s conclusion that significant new regulation of switching and cancellations in the UK pay TV and communications sectors is required.<sup>53</sup>
- 5.15 However, there are a number of clear problems with the survey, and Ofcom’s use of its results, that undermine its value as a source of evidence on the issues in question. We discuss the most important of these problems below, and a number of others at Annex 6.

## The structure of the consumer survey was biased towards an unfavourable view of switching

- 5.16 The CMA’s guidance on best practice in survey design states:

*“Care should be taken to present consumer survey questions... to ensure that answers to later questions are not biased by the presentation of information in earlier questions.”<sup>54</sup>*

The design of the survey in this case fails that key requirement.

- 5.17 The most striking feature of the consumer survey is that respondents were asked a wide range of questions about the “*difficulties*” they experienced – both ‘major’ and ‘minor’ - when switching, before they were asked for their views of the experience overall. Questions about difficulties required respondents to read long lists of potential issues that they may have encountered. (As discussed in Annex 6, the wording of many of these questions also was unbalanced or ambiguous.) Plainly, this approach gives rise to a substantial risk of responses to questions about consumers’ overall experience when switching provider being biased against positive responses.
- 5.18 Overall, 84% of cross platform switchers who expressed a view on this question rated their switch as easy or very easy when asked at the end of the survey. Had the survey adopted a more neutral approach to this issue, it is probable that this percentage would be significantly higher.
- 5.19 The Consultation misrepresents Ofcom’s approach on this issue. Ofcom states:

*“in the quantitative BDRC research, the majority (81%) of consumers switching between platforms initially rated the process as either ‘very’ or ‘fairly’ easy, while 17% said it was difficult”.*<sup>55</sup> (Emphasis added.)

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<sup>52</sup> This section focuses on the substantial piece of quantitative consumer research undertaken for Ofcom in 2015, rather than either (i) the qualitative research undertaken for Ofcom, or (ii) the narrower consumer research on loss of service conducted in 2016.

<sup>53</sup> At paragraph 2.9 Ofcom cites a number of types of evidence on which it has relied in the Consultation. Section 3 of the Consultation, which is the section addressed to the identification of problems with switching, however, relies overwhelmingly on the quantitative and qualitative research undertaken for Ofcom by BDRC in late 2015 and 2016.

<sup>54</sup> Paragraph 3.24, ‘Good practice in the design and presentation of consumer survey evidence in merger inquiries’, 1 March 2011. (First published jointly by the Office of Fair Trading and the Competition Commission.) (<https://www.gov.uk/government/publications/mergers-consumer-survey-evidence-design-and-presentation>)

<sup>55</sup> Paragraph 3.17.

5.20 This statement conveys the impression that respondents were initially asked about their overall experience – to which they responded positively – but, with further prompting, subsequently revised their view. It is impossible to understand why Ofcom has described the survey results in this way, as it is untrue. The fact is that respondents were asked about their overall view of the switching process at the end of the survey, not at the outset.

**Ofcom exaggerates the extent of difficulties faced by consumers when switching**

5.21 The consumer survey evidence clearly points to the fact that switching is in general straightforward, and not difficult for the large majority of switchers. However, Ofcom has preferred to present the results of the survey in such a way as to exaggerate the extent of difficulties faced by consumers when switching, in particular by combining the responses of those who indicated that the difficulties they faced were ‘major’ and those that indicated that they were ‘minor’.

5.22 The consumer survey asked respondents who indicated that they had faced difficulties when switching to (i) indicate the nature of those difficulties, based on a pre-determined list of potential issues, and (ii) indicate whether they considered each of these to be a “major difficulty” or a “minor difficulty”.

5.23 The most reasonable approach to the interpretation of the results of these questions is to focus on major difficulties. It is common sense that minor difficulties are unlikely to deter consumers from switching provider, and cannot reasonably be relied upon to justify such significant regulatory intervention. Indeed, this is the approach that Ofcom took in its recent consultation on switching in the mobile telephony sector, when considering the results of similar questions in a consumer survey.<sup>56</sup> In this case, however, Ofcom has chosen throughout its Consultation to add together the percentage of respondents indicating that an issue is a major difficulty and a minor difficulty. No explanation is provided for this difference in approach.

5.24 The most likely reason that Ofcom has adopted this approach is not difficult to discern: focusing on major difficulties indicated by consumers in the survey would provide no basis at all for intervention. Table 5.1 below shows the percentage of cross platform switchers who indicated that a process-related issue caused them a major difficulty during their switch:

**Table 5.1**

Issue	Percentage of cross platform switchers that indicated that it was a major difficulty
Cancelling your previous service	11%
Getting the switch to happen on the date you wanted	4%
Arranging the switch so that you always had access to your services	7%
Arranging the switch so that you were not paying for your old and new services at the same time	8%

Source: Slide 28, Main Findings slide pack

5.25 These figures are small. Yet the corresponding figures cited by Ofcom in the Consultation – derived by adding together the percentages of respondents who identified such issues as either a ‘major’ difficulty or a ‘minor’ difficulty - are set out in Table 5.2:

<sup>56</sup> Footnote 20, ‘Consumer Switching: Proposals to reform switching of mobile communications services’, Ofcom, 23 March 2016. ([https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0025/82636/consumer-switching-mobile-consultation.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0025/82636/consumer-switching-mobile-consultation.pdf))

**Table 5.2**

Issue	Percentage of cross platform switchers that indicated that it was a difficulty
Cancelling your previous service	38%
Getting the switch to happen on the date you wanted	17%
Arranging the switch so that you always had access to your services	34%
Arranging the switch so that you were not paying for your old and new services at the same time	29%

Source: Slide 28, Main Findings slide pack

5.26 Attached at Annex 3 is an expert report on Ofcom’s 2015 consumer survey, prepared by an independent expert statistician, Philip Malivoire. On Ofcom’s approach of adding together the percentages of respondents who identified a difficulty when switching as either major or minor, Mr Malivoire concludes that:

*“it was not appropriate to combine major and minor difficulties.”<sup>57</sup>*

5.27 Ofcom’s approach to evaluating the significance of the difficulties experienced by consumers when undertaking cross platform switches plainly has regard to irrelevant considerations, and fails to have proper regard to relevant considerations, which leads it to erroneous conclusions about the necessity of regulation. Ofcom should therefore correct this approach.

**The consumer survey evidence is insufficiently granular**

5.28 Ofcom’s proposals for new regulation comprise a number of discrete elements, each of which is significant and therefore should be justified as being necessary in its own right. In particular, Ofcom proposes to apply new regulation to (i) switching between the Virgin Media and Openreach platforms by customers of triple play and dual play packages, (ii) switching by triple play customers on the Openreach platform, (iii) switching of pay TV services on a standalone basis, and (iv) cancellation of pay TV services when not part of a switch.

5.29 Ofcom, however, relies almost entirely on high-level, aggregate evidence that relates to the experience of all types of switches. For example, there is no analysis at all in the Consultation of whether the ‘difficulty’ associated with overlapping contracts arises when switching pay TV on a standalone basis.<sup>58</sup>

5.30 As noted in Section 3, above, the absence of such analysis in relation to switching of pay TV services on a standalone basis, or cancellation of pay TV services when not part of a switch, is particularly glaring. There is minimal evidence in the Consultation to support a proposition that the ‘difficulties’ identified by Ofcom apply to such switches and/or cancellations.

5.31 In practice, the process that Ofcom has followed has been to (i) identify problems that are of concern based on aggregated data, and (ii) simply then deem that its proposed solutions must be applied to any services and types of switches that it considers appropriate. Ofcom’s legal duties, however, do not permit it to take that approach.

5.32 The reason for this approach is tolerably clear. Ofcom’s 2015 consumer survey, which provides the

<sup>57</sup> Page 10, Philip Malivoire’s report.

<sup>58</sup> This is not relevant to cancellation of pay TV services.

evidential bedrock for its assessment of difficulties faced by consumers when switching, was clearly intended to be capable of being used to examine particular switching experiences. The survey was carefully constructed so as to provide a mix of different types of switcher, and considerable effort was applied to obtaining samples of each type. However, ultimately, the sub-samples achieved were often too small to enable valid conclusions to be drawn from them.

- 5.33 By way of example, the survey identified 213 respondents who had experienced an unwanted break in service when switching (including intra-Openreach dual play switchers). However, it is impossible to undertake any granular analysis of their experience, particularly in relation to the type of switch that they were involved in, because sub-samples are too small for statistically meaningful results to be derived. For example, there were only 15 respondents within the group who (i) had experienced an unwanted break in service, and (ii) were standalone pay TV switchers; and there were only 18 respondents who (i) had experienced an unwanted break in service and (ii) had combined a cross platform switch (normally pay TV) with an Openreach switch.<sup>59</sup>

#### **Ofcom exercises insufficient caution in relation to the views of consumers who have not switched**

- 5.34 Ofcom's analysis relies in part on the perceptions of consumers who have either (i) considered switching and decided not to, or (ii) not considered switching.
- 5.35 Ofcom should give considerably more weight to the views of those who have actually engaged in switching, and who are therefore likely to be well informed about the difficulties (if any) that are in reality associated with it, than the views of those who may not be as well informed. Plainly, it is reasonable to consider the views of consumers who have not switched – particularly those who took a well-informed decision not to do so. However, where there is a gap between non-switchers' views and the reality of the situation it cannot be reasonable to base conclusions about the existence of 'difficulties' when switching (and in particular 'process related difficulties') on the fact that some consumers misperceive its difficulty.
- 5.36 Furthermore, if there are gaps between the perception of the difficulty of switching and the reality of doing, the most effective solution is likely to be the provision of improved information to consumers (whether by firms, Ofcom or third parties), rather than costly process changes.

#### **Anecdotes are not reliable evidence**

- 5.37 As noted above, a significant part of the text of Section 3 of the Consultation comprises anecdotes relating to individual consumers' experiences of switching supplier, or cancelling their service.
- 5.38 Anecdotal evidence, such as that derived from qualitative research, can have a useful role to play in consumer research. For example, qualitative research is often used to help inform areas for further quantitative research.<sup>60</sup>
- 5.39 Anecdotes that describe the specific details of consumers' experiences, however, are unreliable as evidence on their own because there is no way of telling whether or not the specific experience of a single consumer is representative of the broader experience of all consumers, which is what matters for the identification of problems that may require regulatory intervention. The significant probability is that

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<sup>59</sup> The largest sub-sample within this category was 51 respondents, who had undertaken a cross platform switch of broadband and talk services. Even a sub-sample of 51 respondents is too small to allow statistically meaningful conclusions to be drawn about their experience.

<sup>60</sup> For example, advice from the Qualitative Research Consultants Association states: "*Do not expect qualitative research to: Count, measure or offer statistical validation.... Be a substitute for quantitative research because of time and/or budgetary constraints when quantitative evaluation is critical.*" See: 'When to use qualitative research'. (<http://www.qrca.org/?page=whentouseqr>.)

they are unrepresentative.<sup>61</sup>

5.40 In the Consultation, anecdotes are used to add colour to the conclusions reached by Ofcom, principally derived from its quantitative research. They add nothing further to those conclusions in evidential terms. Accordingly, in the analysis set out in sub-section 5B, below, we disregard the numerous anecdotes recounted by Ofcom in Section 3 of the Consultation.

## **5.B The specific difficulties Ofcom has identified**

5.41 As set out above, Ofcom identifies five “*process-related difficulties*”<sup>62</sup> that it considers justify the imposition of significant new regulation, as follows:

- (i) unwanted breaks in service when switching;
- (ii) double paying for services when switching;
- (iii) difficulties contacting previous provider / cancelling old service(s);
- (iv) confusion generated by the existence of multiple switching processes; and
- (v) lack of consumer awareness of the implications of switching.

In this sub-section we assess the evidence on which Ofcom relies in relation to each of these issues.

### **(i) Unwanted breaks in service when switching**

5.42 Protection of consumers from unwanted breaks in service when switching provider is a key reason for Ofcom’s proposed intervention. Ofcom’s assessment of the benefits of its proposed intervention shows that this is the most significant (albeit over-estimated and small) contributor to the quantified benefits of intervention.

5.43 We discuss the following issues further below:

- Ofcom significantly over-estimates the incidence of unwanted breaks in service;
- unwanted breaks in service are not a significant issue when switching pay TV provider;
- Ofcom fails to consider the impact of unwanted breaks in service on consumers’ views of their switching experience;
- impact on those who did not switch; and
- causes of unwanted breaks in service when switching platforms.

#### ***Ofcom significantly over-estimates the incidence of unwanted breaks in service***

5.44 Ofcom’s conclusion on this issue is based almost entirely on an observation from its 2015 consumer survey that 17% of cross platform switchers experienced an unwanted loss of service when switching.<sup>63</sup> However, this figure significantly over-estimates the incidence of unwanted loss of service when switching platforms.

5.45 As explained in CRA’s report:

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<sup>61</sup> If they are in fact representative of consumers’ experiences – for example because there is evidence that significant numbers of consumers have said the same thing – evidence to support that proposition must be presented. Ofcom presents no such evidence in the Consultation.

<sup>62</sup> Paragraph 3.19.

<sup>63</sup> Paragraph 3.22.

*“If Ofcom was to focus its proposals only on the harm arising from those consumers reporting a major difficulty with the switch, the proportion of cross-platform switchers experiencing unwanted loss of service (using Ofcom’s methodology) decreases from 17% to 10%. Moreover, many of these major difficulties will not relate to the switching process. If we filter the incidence of loss of service again only where the respondent indicated ‘process related’ difficulties, it falls to 5%.*

*Filtering only those respondents that experienced major difficulties for each service, the proportion experiencing loss of service was 8% for fixed landline, 9% for fixed broadband and 5% for pay TV. Focussing on customers with ‘process related’ major difficulties, the proportion was 5% for fixed landline, 5% for fixed broadband and 3% for pay TV.”<sup>64</sup>*

5.46 As CRA also observe, the figure of 17% only applies to triple play switches, which are a minority of the switches that Ofcom proposes to regulate.<sup>65</sup> Even on Ofcom’s own figures, the percentages of other types of switches that result in unwanted breaks in service are significantly lower. For example, the percentage for standalone pay TV switches is 6%.

5.47 CRA also raise significant concerns in relation to Ofcom’s estimates of the impact of unwanted loss of service on consumers, which are detailed in their report.<sup>66</sup> When combined with the fact that Ofcom has significantly over-estimated the incidence of unwanted breaks in service, the impact in terms of harm to consumers from this issue is significantly smaller than that posited by Ofcom.

***Unwanted breaks in service are not a significant issue when switching pay TV provider***

5.48 It is evident from the data available to Ofcom that unwanted breaks in service are not a significant issue in relation to switching pay TV provider on a standalone basis. As noted above, even on Ofcom’s own evidence, only 6% of standalone pay TV switchers experience an unwanted break in service, which is (i) a small figure in itself, and (ii) likely to be a significant over-estimate, such that the true number of standalone pay TV switchers who experience an unwanted break in service is significantly smaller than this figure.

5.49 Furthermore:

(a) there were too few observations in the 2015 survey to produce a statistically valid estimate of the duration of unwanted loss of service when switching pay TV on a standalone basis. Nor did Ofcom’s 2016 follow-up research devoted specifically to loss of service issues provide any data on this issue; and

(b) the consequences for consumers of a break in service when switching pay TV provider are likely to be less significant than in relation to loss of broadband and telephony services. This is reflected in Ofcom’s consumer survey: respondents were less than half as likely to describe loss of service with pay TV as “*very inconvenient*” (20%), compared to broadband (43%) and landline services (40%).<sup>67</sup> Similarly, concern about loss of service amongst those who considered switching but chose not to was cited as a major issue by 25% of consumers for broadband but only 7% for pay TV.<sup>68</sup>

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<sup>64</sup> Paragraphs 79-80, CRA’s report (footnotes omitted).

<sup>65</sup> Paragraphs 83-90, CRA’s report.

<sup>66</sup> Paragraphs 112-175, CRA’s report.

<sup>67</sup> Slide 14, ‘Detailed loss of service Quantitative research’, Ofcom, July 2016 (“Loss of service research”). ([https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0029/74387/research-slide-pack.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0029/74387/research-slide-pack.pdf))

<sup>68</sup> Slide 81, Main Findings slide pack.

- 5.50 Loss of service when switching pay TV provider occurs far less frequently than when switching broadband or telephony services and when it does occur it is much less impactful for consumers than loss of service with fixed broadband and fixed line telephony. There is no reasonable basis for including switching of pay TV services on a standalone basis within the scope of Ofcom's proposed regulation that derives from a concern about unwanted loss of service when switching.

***Ofcom fails to consider the impact of unwanted breaks in service on consumers' views of their switching experience***

- 5.51 There can be little doubt that unwanted breaks in service when switching supplier can be inconvenient and annoying for some consumers. However, the key question for the purpose of Ofcom's current inquiry is the extent to which they deter consumers from choosing to switch. Ofcom's analysis fails to consider the impact of unwanted breaks in service on consumers' views of their switching experience, and therefore the extent to which such breaks are likely to act as a deterrent to switching. Ofcom's 2015 consumer survey shows that 69% of those who experienced an unwanted break in service rated the switching process as easy or very easy, compared to 84% of all switchers.

***Impact on those who did not switch***

- 5.52 Ofcom also indicates a concern that consumers' fears of loss of service when switching may deter them from seeking to do so. However, the evidence cited by Ofcom on this issue is too flimsy for any weight to be placed on it. Other than recounting an anecdote from Ofcom's qualitative research (which, on its own is not reliable evidence<sup>69</sup>), Ofcom relies only on a finding from its 2015 consumer survey that "*almost half (47%) of consumers who decided not to switch cited worries about being without broadband during the switch as a factor in their decision.*"<sup>70</sup> At the outset, it is clear that this statement relates only to potential loss of broadband during the switch.
- 5.53 Once again, however, this figure combines the responses from those who considered this to be a major issue, and those who considered it to be a minor factor in their decision. Only 2% of respondents cited it as the main factor and 75% did not consider it a major issue.<sup>71</sup> Accordingly, it is evident that concern about loss of service during a switch is unlikely to act as a significant cause of consumers' decisions – whether active or otherwise – to remain with their existing provider.
- 5.54 More generally, it must be open to question whether it is reasonable to base decisions about proposals for significant new regulation on the concerns of people who have not switched if those concerns are not well founded. In practice, there is no reason to believe that such concerns will be diminished by changes to switching processes. It is likely to be a better way forward to address such concerns directly, for example by raising consumers' awareness about the general reliability of switching processes.

***Causes of unwanted breaks in service when switching platforms***

- 5.55 Ofcom also devotes attention in this section of its consultation to analysis of the reasons that unwanted breaks in service occur when switching provider, based on analysis of data from the 2015 consumer survey.<sup>72</sup> In a sense, this analysis is somewhat redundant given that Ofcom's proposed intervention to address this issue is agnostic in relation to the causes of unwanted breaks in service. In effect, Ofcom is proposing that existing, working services should not be switched off until a new service is up and running

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<sup>69</sup> As discussed above, this is because it is not possible to determine whether such an anecdote is representative of the general experience of consumers. The significant likelihood is that it is not.

<sup>70</sup> Paragraph 3.32.

<sup>71</sup> Slide 81, Main Findings slide pack.

<sup>72</sup> Paragraphs 3.30 – 3.31, and Figure 5.



as a remedy to the issue of unwanted breaks in service when switching. In that context, the causes of unwanted breaks in service are not relevant.<sup>73</sup>

5.56 What is clear, however, is that Ofcom does not have a sound appreciation of the reasons that unwanted breaks in service occur.<sup>74</sup> This is particularly evident from the fact that whilst identifying the causes of unwanted loss of service was one of the objectives of the 2016 follow-up consumer research on this subject<sup>75</sup> (indicating clearly that the earlier research had not adequately addressed that issue), it failed to produce any information on this topic at all.

5.57 As discussed further in Section 6, below, it is likely to be the case that a significant cause of unwanted breaks in service when switching platform in the UK telecommunications sector is quality of service problems on the part of Openreach. Given the extensive documentation of these problems – including significant problems in relation to missed engineer appointments, delays in installing new lines (both of which are commonly required when switching from Virgin Media to the Openreach network), and faults in newly installed lines, it would be extremely surprising if this was found not to be the case on the basis of more detailed analysis.

#### **(ii) Double paying for services when switching**

5.58 ‘Double paying’ refers to a situation in which there is an overlap of consumers’ contracts when they switch provider, resulting in them paying two providers at the same time. Ofcom asserts that *“any contract overlap causes harm to consumers”*<sup>76</sup> (emphasis added). Such a strong assertion is neither reasonable nor sustainable. In particular:

- it is not necessarily the case that consumers are paying two different providers for identical services at the same time; and
- there is a range of sound reasons why consumers may choose such a situation. For example, a consumer may leave a minimum term contract early and, rather than pay an early termination charge, choose to continue paying the old provider’s charges until the end of the contract. In Ofcom’s consumer survey nearly a third of consumers who had a contract overlap (29%) chose to do so to get a better service or a better deal immediately without waiting for their notice period to finish.<sup>77</sup>

#### ***Ofcom significantly over-estimates the incidence of double paying***

5.59 Based on its 2015 consumer survey Ofcom asserts that 22% of cross platform switchers *“recall experiencing contract overlap and therefore paying both providers at the same time during the*

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<sup>73</sup> As discussed further in Section 6, whilst a ‘make before break’ rule protects consumers from unwanted breaks in service, it does nothing to remedy the underlying causes of loss of service when switching. It is strongly arguable that identifying and addressing the causes of loss of service when switching is a better long-term solution to the issue than simply introducing a ‘make before break’ rule.

<sup>74</sup> In general, information provided by the Ofcom 2015 consumer survey was of little value in relation to this issue because the reason categories provided to respondents in the survey were ambiguous, which means that responses provide little useful information about the reason why a break in service occurred in practice. For example, the most common stated cause was *“delay in service activation”* – a category for which there could be any number of underlying causes. Similarly, *“Problems/a fault with the equipment (e.g. satellite dish, cable box, broadband router)”* provides little meaningful information about the specific cause of the unwanted break in service.

<sup>75</sup> Slide 2 of the Loss of service research states that one of the objectives of the research was to *“Understand the reasons for loss of service”*. However, there is no mention of the reasons for loss of service in the remainder of the slide pack.

<sup>76</sup> Footnote 69.

<sup>77</sup> Slide 46, Main Findings slide pack.

*switch*".<sup>78</sup> However, the number of switchers who stated that they did not want a contract overlap was significantly smaller, at 16%.<sup>79</sup>

5.60 Moreover, once again the evidence cited by Ofcom combines the responses of those who thought the issue was a major one, and those who regarded as a minor issue. In addition, the statistic cited by Ofcom relates to all respondents who recalled experiencing a contract overlap, rather than those who had a contract overlap for process-related reasons. The percentage of respondents who regarded their contract overlap as a major issue, and for whom the overlap arose as a result of process-related issues, was only 3%.

5.61 This is plainly a very small percentage and, as such, it is not open to Ofcom to place any significant weight on it. Interpreted properly, the evidence relied upon by Ofcom provides no sound basis for a view that intervention is required to prevent unwanted contractual overlaps when switching provider of telecoms and/or pay TV services.

***There is no evidence to indicate that double paying is a significant issue in relation to switching pay TV provider***

5.62 Ofcom cites no evidence on the extent to which double paying occurs when switching pay TV on a standalone basis. Accordingly, concern about this issue cannot form a reasonable basis for the inclusion of switching of pay TV on a standalone basis within the scope of Ofcom's proposals.

***Causes of overlapping contracts and/or double paying***

5.63 The majority of Ofcom's analysis of this issue is devoted to assessing the reasons why consumers have overlapping contracts when switching between platforms. The conclusions that Ofcom draws from this analysis, however, are unclear. First, Ofcom states:

*"the key drivers for consumers double paying appear to fall into the following categories:*

- *difficulties co-ordinating, e.g. being unaware of notice periods, having issues with available engineer appointments or cancellation (58%);*
- *ensuring continuity of service (28%); and*
- *getting a better service / deal immediately (29%)."*<sup>80</sup>

5.64 However, in the immediately following paragraph, somewhat inconsistently, Ofcom states:

*"Aside from ensuring continuity of service, the most cited specific reasons for double paying were: not being aware of the notice period with their old provider, the new provider giving the consumer a date that was before the end of their old contract, to switch to a better service immediately and issues with available engineer appointment dates."*<sup>81</sup>

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<sup>78</sup> Paragraph 3.33.

<sup>79</sup> A desire to rely on the higher figure appears to lie behind Ofcom's assertion that it considers that any overlap causes harm to consumers, regardless of their own views on this issue.

<sup>80</sup> Paragraph 3.35. The percentages cited refer the proportion of cross platform switchers who reported having overlapping contracts who stated a specific reason falling within the three broad categories of causes referred to by Ofcom.

<sup>81</sup> Paragraph 3.36.

5.65 The reality is that Ofcom’s consumer research suggests that there is a wide variety of reasons why consumers may have a period of unwanted overlap of services when they switch supplier – many of which are unrelated to the nature of the switching process.

5.66 Ofcom goes on to focus on alleged consumer confusion about notice periods as a source of double paying. However, there is no sound basis for Ofcom’s view that consumers are confused about their notice period, or that this is an important reason that consumer have overlapping contracts when switching. Ofcom states that “*most consumers appeared to be outside their minimum contract periods when they switched*”<sup>82</sup> and then cites a range of statistics about when consumers gave notice – either in relation to a minimum term contract, or in relation to their notice period. It is entirely unclear how these observations are intended to support a proposition that consumer confusion about notice periods is a cause of overlapping contracts when switching.

**(iii) Difficulties contacting previous provider / cancelling old service(s)**

5.67 Ofcom expresses concern that consumers find it difficult to (i) contact their existing provider of communications and/or pay TV services, and (ii) to cancel their current service when switching provider. Ofcom asserts that:

*“A number of pieces of evidence suggest consumers face difficulties contacting their old provider and cancelling their old service(s).”*<sup>83</sup>

5.68 As a result, Ofcom proposes significant new regulation of cancellation processes, including mandating the ways that service providers are required to accept notice of cancellation from consumers.

5.69 Somewhat surprisingly, however, other than anecdotes (which comprise unreliable evidence), Ofcom relies on only two pieces of evidence in relation to people who have switched provider on these issues. Both are observations derived from the 2015 consumer survey, as follows:

- 38% of cross platform switchers in the survey experienced difficulty with cancelling their old service<sup>84</sup>; and
- 23% of such switchers reported difficulty contacting their old provider.<sup>85</sup>

5.70 In the first instance, this is an extraordinarily small, and manifestly inadequate, set of observations on which to base a conclusion that consumers face significant difficulties in contacting their previous provider and/or cancelling their old service.

5.71 Equally importantly, both these figures are based on respondents who stated that these issues were a major difficulty or a minor difficulty when they switched provider. As discussed above, that is an unreasonable approach since it places undue weight on the minor difficulties. When only respondents who indicated that these issues were major difficulties are considered, the percentages fall to 11% (in relation to cancelling their old service) and 7% (in relation to contacting their old provider). Such percentages strongly indicate that these are not significant impediments to switching provider for the vast majority of consumers.<sup>86</sup>

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<sup>82</sup> Paragraph 3.37.

<sup>83</sup> Paragraph 3.41.

<sup>84</sup> Paragraph 3.42. At paragraph 3.53 Ofcom describes this as a “*notable proportion*”.

<sup>85</sup> Paragraphs 3.42.

<sup>86</sup> In Figure 7 of the Consultation, Ofcom sets out the various reasons why respondents considered they had difficulty contacting their previous provider. However, this is of little relevance given the small numbers of consumers for whom this is a major difficulty.

5.72 Ofcom also considers the potential impact of cancellation processes on those respondents in the consumer survey who considered switching, but chose not to do so. Ofcom finds that 36% of consumers who decided not to switch reported “*difficulty cancelling my service*” as “*a factor*” in their decision.<sup>87</sup> Once again, Ofcom combines responses of those who considered “*difficulty cancelling my service*” to be a major factor in their decision and those who considered it to be a minor factor. Only 13% of respondents considered it to be a major factor in their decision.

5.73 In addition, Ofcom refers to concerns on the part of respondents who did not switch that (i) “*it is too time consuming to go through the process of switching from one provider to another*”, and (ii) “*the hassle of needing to contact more than one provider*” as factors in their decision not to switch.<sup>88</sup> These observations are puzzling in relation to the issue of difficulties experienced by consumers in contacting their existing provider and/or cancelling their service. It is difficult to understand why Ofcom considers that they support a view that difficulties experienced by consumers in contacting their existing provider and/or cancelling their service are a significant issue.

***There is no evidence to indicate that difficulties when contacting an existing provider or cancelling are significant issues in relation to switching pay TV provider***

5.74 Ofcom provides no analysis at all of the extent of difficulties experienced when contacting an existing provider during a switch or cancellation, broken down by different types of switch or cancellation. Accordingly, Ofcom provides no evidence at all that the difficulties it cites arise when switching pay TV on a standalone basis, or when cancelling a pay TV subscription.

***Ofcom’s other concerns on this issue are insufficiently evidenced and unbalanced***

5.75 A significant part of this (short) section of the consultation is devoted to consideration of (i) the method preferred by consumers to contact their existing provider, and (ii) providers seeking to persuade consumers to stay with their service. On the basis of its analysis Ofcom concludes:

*“these difficulties are part of a broader picture in which the need to contact providers by phone, and the way providers use that process, add to the unnecessary difficulties some consumers face when switching.”*<sup>89</sup> (Emphasis added.)

5.76 Ofcom’s provisional findings on these issues lie behind proposals for significant new regulation of the methods offered by providers to enable consumers to cancel their services in future.

5.77 The vast majority of the evidence relied upon by Ofcom in relation to these issues is anecdotal, and therefore unreliable.<sup>90</sup>

5.78 Moreover, Ofcom’s references to the evidence on which it purports to rely in relation to these issues are notably vague. For example, Ofcom states:

- “*There are also a number of pieces of evidence which, viewed as part of the overall evidence, suggest that...*”<sup>91</sup> Ofcom does not state what it considers to be the “*overall evidence*” on which it

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<sup>87</sup> Paragraph 3.53.

<sup>88</sup> Paragraph 3.54. 20% of respondents indicated that the first of these was a major factor in their decision not to switch, while 17% indicated that the latter was a major factor.

<sup>89</sup> Paragraph 3.55.

<sup>90</sup> For example, Ofcom states: “*For instance, one cross-platform switcher in our quantitative BDRC research reported difficulty cancelling their previous service...*” It is manifestly evident that a sample of one cross platform switcher cannot provide reliable evidence on an issue. It may well be the case that other respondents made statements that were completely counter to that cited by Ofcom.

is relying. Indeed, it is not entirely clear what are the “*number of pieces of evidence*” referred to by Ofcom;

- “*Complaints made to Ofcom also indicate that in some instances providers will require consumers cancelling by other methods to provide extensive information*”<sup>92</sup>. Yet the only support for this assertion is, once again, the citation of a single complaint received by Ofcom. The reference to “*in some instances*” strongly suggest that the number of such complaints is small;
- “*Some complaints to us have also concerned the visibility and accessibility of other non-phone based cancellation methods.*”<sup>93</sup> Ofcom provides no further evidence on such complaints (other than, once again to quote extensively from a single complaint);
- “*Some complaints to Ofcom appear to suggest that...*”<sup>94</sup> Similarly, Ofcom provides no further evidence on such complaints (other than, once again to quote extensively from a single complaint).

5.79 More generally, Ofcom’s analysis of these issues – which raise difficult policy considerations – is extraordinarily cursory, and notably unbalanced. We discuss this analysis in the following sections.

#### ***Methods used by service providers to enable consumers to cancel their services***

5.80 The evidence base relied upon by Ofcom on the issue of contact between service providers and their customers is manifestly deficient as a basis for well-founded conclusions on this issue. In particular, there is no evidence or analysis at all in this section of the Consultation of what methods service providers actually use to enable consumers to cancel their services today, the reasons that they use particular methods, or how those methods are evolving over time. Nor is there any evidence or analysis relating to the methods actually used by consumers when cancelling their services. Given the small number of service providers that are the focus of Ofcom’s inquiry, such analysis would not be difficult.

5.81 Ofcom concludes that “*the need to contact providers by phone*” is a source of difficulty when switching.<sup>95</sup> However, this ignores alternative routes already offered by many providers and the fact that, as Ofcom acknowledges, contacting a provider by telephone to cancel a service remains the overwhelming preference for consumers, with a choice of online routes the clear second preference.<sup>96</sup> Indeed, in Sky’s own case, it offers phone and online cancellation routes that account for the preference for 93% of cross platform switchers.<sup>97</sup>

5.82 In addition, proper analysis of this issue requires sound data on the extent of any problems experienced by consumers associated with cancelling their existing service. Yet there is no evidence in the consultation that Ofcom has collected or (if it has) that it has assessed such data.

5.83 More generally, the issue of which methods of cancellation it is reasonable to permit service providers to use, or to compel them to use, raises difficult policy issues, involving trade-offs between different considerations. On the one hand, it might be considered to be in consumers’ interests to enable them

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<sup>91</sup> Paragraph 3.45.

<sup>92</sup> Paragraph 3.48.

<sup>93</sup> Paragraph 3.49.

<sup>94</sup> Paragraph 3.50.

<sup>95</sup> Paragraph 3.55.

<sup>96</sup> Slide 16, Main Findings slide pack.

<sup>97</sup> *Ibid.* 60% of respondents expressed a preference for contact by phone, 19% by email and 14% by web-chat. Sky enables cancellation via all three of these methods.

to cancel by whatever means are technically feasible. However, that must be balanced by other important considerations relating to security of consumer data, protection against unauthorised account changes, and practicality.

- 5.84 In practice, it would be in neither consumers' nor service providers' interests to allow notice of cancellation to be given via whatever methods are technically feasible. That would result in unacceptable risks of misuse of consumers' private information, and unauthorised account changes (including slamming).
- 5.85 Ofcom's brief analysis of these issues gives insufficient consideration to these important reasons why it is both appropriate and in consumers' interests for providers to insist on contact from those with whom they have a contract when that contract is being cancelled or otherwise changed. In the absence of such analysis, it is unreasonable for Ofcom to characterise any difficulties experienced by consumers associated with firms' desire to protect their customers as "*unnecessary difficulties*".

#### Customer retention activity

- 5.86 Similarly, there is no evidence at all presented in relation to the issue of customer retention activity, which is briefly considered by Ofcom in this part of Section 3 of the Consultation.
- 5.87 As in the case of methods of cancellation, there are significant trade-offs that must properly be taken into account in relation to the issue of retention activity by service providers. It is readily apparent that many consumers value the opportunity to receive offers from their existing provider, and that a diminution of such opportunities would work against their interests. Sky welcomes the fact that, by contrast with its position in the past, Ofcom now recognises the value to consumers of retention offers, which appears to lie behind Ofcom's statement in the Consultation that it no longer proposes to make enforcement of General Condition 1.2 an administrative priority, and which is acknowledged explicitly at paragraph 4.39 of the Consultation.<sup>98</sup>
- 5.88 On the other hand, as Ofcom also recognises at paragraph 4.39 of the Consultation, it is also evident that some consumers do not welcome conversations of this type, and would prefer not to have them. Accordingly, policy in this area requires a careful balancing of the interests of different groups of consumers.
- 5.89 Yet it appears to be the case that, in this part of Section 3 of the Consultation, Ofcom concludes that customer retention activity is an "*unnecessary difficulty*"<sup>99</sup> faced by consumers when cancelling with their existing provider. The cursory nature of Ofcom's assessment of this issue is manifestly insufficient to support that conclusion and ignores the legitimate right of providers to seek to retain their customers.

#### Ofcom's cancellation programme is likely to provide a more appropriate basis for proper consideration of these issues

- 5.90 Ofcom is already undertaking an own-initiative monitoring and enforcement programme into cancellation and termination arrangements, which has involved substantial requests for information from providers, giving Ofcom access to a large, rich database on this subject.<sup>100</sup> This programme gives Ofcom the opportunity to properly consider any difficulties experienced by consumers cancelling their services. It would be inappropriate for Ofcom to propose specific cancellation process reforms relating to cancellations before Ofcom has concluded its ongoing assessment of compliance in this area.

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<sup>98</sup> Paragraph 4.44. This is discussed further in Section 6, below.

<sup>99</sup> Paragraph 3.55.

<sup>100</sup> See: [http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw\\_01158/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01158/).

**(iv) Confusion generated by the existence of multiple switching processes**

- 5.91 Implicitly, Ofcom concludes that the existence of a number of different switching processes for different types of switches ‘confuses’ consumers and thereby acts as a deterrent to switching.<sup>101</sup>
- 5.92 The most notable feature of Ofcom’s analysis of this issue is its brevity; it comprises only four short paragraphs. This is manifestly insufficient to support well-founded conclusions on this issue.
- 5.93 In support of its apparent view that consumers find the existence of a number of different switching processes confusing, Ofcom relies on the following observations:
- 25% of all switchers (i.e. both cross platform and Openreach switchers) in Ofcom’s 2015 consumer survey reported a difficulty with understanding the steps required to switch<sup>102</sup>;
  - around a third of Openreach switchers said they cancelled their service(s) with their old provider – thereby going through more of a cease and re-provide type arrangement, despite not being required to do this<sup>103</sup>;
  - “*not all respondents*” in Ofcom’s qualitative research were aware that for cross platform switches they needed to cancel with their old provider as well as sign up for new services with a new provider<sup>104</sup>; and
  - a third (32%) of respondents in Ofcom’s 2015 consumer survey who decided not to switch said “*not knowing what to do to switch*” was “*a factor*” in their decision.<sup>105</sup>
- 5.94 This is an extraordinarily small number of points – most of which are of limited relevance to the issue at hand, or of limited evidential value. These points should therefore not be given undue weight by Ofcom and ultimately cannot form a basis for a well-founded conclusion that, in general, consumers find the existence of a number of different switching processes confusing.
- 5.95 Moreover:
- (a) it is wholly unclear why Ofcom considers it appropriate to include Openreach switchers within the observations cited, and provides no reason for doing so. Ofcom’s proposals are focused on cross platform switching;
  - (b) once again, the figure of 25% cited by Ofcom relates to those respondents in Ofcom’s consumer survey who cited this factor as a major difficulty and those who cited it as minor difficulty. The percentage who cited it as a major difficulty was only 3% - and only 1% of respondents cited it as the main difficulty; and
  - (c) in relation to the second of these points, as Ofcom itself concedes<sup>106</sup> there is no evidence that this was due to consumer confusion rather than consumer choice;
  - (d) an assertion that “*not all respondents*” in a piece of research understand a particular issue is, plainly, an unreasonable approach. For example, this approach admits the possibility that there was a single respondent who did not understand this; and

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<sup>101</sup> Ofcom does not set out a clear conclusion on this issue in the Consultation.

<sup>102</sup> Paragraph 3.57.

<sup>103</sup> *Ibid.*

<sup>104</sup> Paragraph 3.58.

<sup>105</sup> Paragraph 3.59.

<sup>106</sup> Footnote 92.

- (e) in relation to the last of these points Ofcom fails to mention that this reason was ranked 32nd out of 35 reasons cited by those who had considered switching but had not done so in terms of importance.<sup>107</sup>
- 5.96 Ofcom’s implicit assertion that consumers find it difficult to cope with the modest complexity associated with there being a number of different switching processes used in the UK communications and pay TV sectors is, moreover, implausible.
- 5.97 First, those processes are not difficult to comprehend. While there are several different processes, all that matters from the point of view of a given consumer is understanding what they need to do to switch, when they consider doing so; they do not need to understand all switching processes at all points in time.
- 5.98 Second, as discussed in Section 3, above, there are numerous sources of readily available information available to consumers about how to switch when they consider doing so. In essence, Ofcom’s proposition is that consumers are, in general, incapable of finding and/or processing that information. There is no evidence to suggest that that is the case.
- 5.99 Finally, Ofcom’s implicit assertion belies consumers’ demonstrable capacity to cope with complexity. In the modern world, complexity is rife, and yet consumers demonstrate every day that they are able to deal with it. By way of example, over the past ten years over two thirds of UK adults (and a likely higher proportion of children) have chosen and learned to use a smart phone. Indeed, Ofcom has stated that “*The UK is now a smartphone society*” and “*smartphones have become the hub of our daily lives*”<sup>108</sup>. Choosing and using a smartphone involves mastering a wide range of complex issues and processes, from deciding among the different types of platforms available, to learning to download, install and use apps. Yet, plainly, UK consumers have demonstrated themselves to be fully capable of doing so.
- 5.100 In these circumstances, a view that discovering how to switch providers, and acting on that information, when they need to do so, constitutes a material impediment to switching in the UK communications and pay TV sectors is wholly implausible.
- 5.101 We note that there is no consideration at all in Ofcom’s discussion of this issue of whether there is any confusion among consumers about how to switch providers of pay TV on a standalone basis. Given that this is a straightforward process of (i) cancelling an existing subscription, and (ii) taking a subscription with a different provider, it is implausible that proper analysis of this issue would find that it was confusing to consumers.
- (v) Lack of consumer awareness of the implications of switching**
- 5.102 Ofcom concludes that “*the evidence also suggests that consumers are not always aware of the implications of their switch and that this can keep them from making an informed decision [when switching].*”<sup>109</sup>
- 5.103 As with the issue of alleged confusion caused by multiple switching processes, the most notable feature of Ofcom’s analysis of this issue is its brevity; it comprises only three short paragraphs – with one of those paragraphs devoted to describing what Ofcom means by the term ‘implications of switching’. This is manifestly insufficient to support well-founded conclusions on this issue.

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<sup>107</sup> Slides 78-80, Main Findings slide pack.

<sup>108</sup> Ofcom’s media release accompanying the publication of the 2015 Communications Market Review. ‘The UK is now a smartphone society’, 6 August 2015. (<https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2015/cm-uk-2015>.)

<sup>109</sup> Paragraph 3.60.



- 5.104 In practice, Ofcom’s evidence on the issue of lack of consumer awareness of the implications of switching is as follows<sup>110</sup>:
- 23% of cross platform switchers in Ofcom’s 2015 consumer survey reported receiving unexpected bills or charges from their old provider<sup>111</sup>; and
  - other research undertaken by Ofcom found that “*only 35% of dual play bundle consumers, 27% of triple play bundle consumers and 23% of standalone pay TV consumers knew whether they were in a contract and how much longer it had to run*”<sup>112</sup>.
- 5.105 Even if they were reliable, citation of such a small number of statistics is plainly insufficient as a basis for a well-founded conclusion on this issue. Moreover, even taken at face value, the statistics cited by Ofcom indicate that only a small minority of consumers have difficulty with the issues cited by Ofcom, suggesting Ofcom has placed undue weight on the experience of such consumers.
- 5.106 More generally, Ofcom’s brief analysis appears to overlook the fundamental point that consumers should not be expected to need to understand issues such as the ETC they may need to pay, their notice periods, or how much longer their contract has to run at every point in time. That would be unrealistic. What matters is whether consumers are able easily to find out information of this type if and when they need to. Ofcom adduces no evidence on this issue.
- 5.107 Sky notes that Ofcom adduces only one observation on standalone pay TV customers – which is, in effect, that 77% of those surveyed knew whether or not they were in a contract and how much longer it had to run. This single observation provides no basis for including switching of standalone pay TV services within the scope of Ofcom’s proposals based on a concern about lack of consumer awareness of the implications of switching.

#### **Overall assessment**

- 5.108 Ofcom concludes that it has identified a number of process-related ‘difficulties’ with current switching processes for communications and pay TV services in the UK that justify intervention. However, the evidence and analysis that Ofcom seeks to rely on to support its conclusions about the scale of these problems is flimsy, and riddled with significant flaws. It has placed undue weight on a number of irrelevant or insignificant points and has failed to take account of highly relevant evidence. This approach significantly undermines Ofcom’s conclusions and is inconsistent with Ofcom’s legal duties.
- 5.109 Indeed, the poor quality and small amount of the evidence cited by Ofcom gives rise to a strong impression that it is attempting to justify an intention to regulate, rather than responding to genuine, significant problems faced by consumers that emerge from a careful consideration of available evidence.
- 5.110 An objective examination of the evidence on the process-related difficulties identified by Ofcom would show that a number of them might reasonably be regarded as being ‘difficulties’ for consumers, and that consumers would benefit if those difficulties were reduced.
- 5.111 However, the mere existence of any difficulties cannot reasonably justify a conclusion that regulatory intervention is required. As Ofcom’s guidance, quoting the Better Regulation Task Force, states:

*“ Sometimes the fact that a market is working imperfectly is used to justify taking action. But no*

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<sup>110</sup> At paragraph 3.62 Ofcom also cross-refers to its discussion of consumer awareness of notice periods in the context of its discussion of double paying, which is addressed above.

<sup>111</sup> Paragraph 3.61.

<sup>112</sup> Paragraph 3.62.

*market ever works perfectly*".<sup>113</sup>

- 5.112 The same can be said of switching processes. In short, it would be unrealistic to expect all switching processes to work flawlessly, and to involve no 'difficulty' at all – process-related or otherwise – for consumers. Perfection is an unreasonable and unrealistic benchmark for determining whether regulatory intervention is needed.
- 5.113 Properly assessed, the process-related 'difficulties' that Ofcom has identified are far less significant than their portrayal in the Consultation. The issues that Ofcom identifies, and the extent of 'difficulties' that they create for consumers, are within the tolerance of the difficulties that *any* switching process might be expected to generate. Given this, and having regard, in particular, to:
- (a) the relevant context set out in Section 4, above – in particular, the competitiveness and dynamism of the relevant sectors, consumers' overall favourable view of switching processes in these sectors, the straightforward nature of switching and cancellation processes, and the plethora of reliable information available to consumers; and
  - (b) Ofcom's 'key principle' of acting with a bias against regulation,

Ofcom's conclusion that new regulation in relation to these matters is needed is not sustainable. Ofcom's conclusion fails to meet its duty under section 3(3) of the Act to demonstrate that proposed regulation is targeted only at cases in which action is needed.

- 5.114 Whilst Ofcom has set out evidence that it considers justifies intervention in relation to some types of switches, this is not the case in relation to switching and cancellation of pay TV services on a standalone basis. In the case of these activities Ofcom has presented little evidence, and certainly no evidence capable of withstanding profound and rigorous scrutiny, that consumers experience the process-related difficulties discussed in the Consultation. As a result, Ofcom has manifestly failed to meet its duty under section 3(3) of the Act to demonstrate that regulation of switching and cancellation of pay TV services on a standalone basis is targeted only at cases in which action is needed.

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<sup>113</sup> Paragraph 1.1, 'Better policy making: Ofcom's approach to Impact Assessment', Ofcom, 21 July 2005 ("Better Policy Making").

## **SECTION 6: OFCOM'S PROPOSALS ARE NOT PROPORTIONATE**

### **Introduction**

6.1 On the basis of its provisional view that there are process-related difficulties associated with cross platform switching of communications and pay TV services (including switching of pay TV services on a standalone basis), and cancellation of those services, Ofcom sets out two proposals for new regulation intended to remedy those difficulties. Ofcom proposes to require the introduction of:

- (a) 'gaining provider led' ("GPL") switching for these switching processes; or
- (b) a new 'enhanced cease and re-provide' ("EC&R") switching process.

Ofcom commissioned Cartesian, a firm of consultants, to develop specifications for these processes, which were published with the Consultation. Ofcom expresses a clear preference for the first option – the introduction of new GPL switching processes.

6.2 Central to both proposals is a requirement to develop and operate a platform that would enable providers to communicate in real-time with each other, for example to confirm customers' details, or to re-arrange installation visits.

6.3 Both of Ofcom's proposals also include (i) new regulation of cancellation processes, including prescription of the methods by which providers would be required to enable consumers to cancel their contracts, and (ii) new regulation of the information that must be provided to consumers.

6.4 In this Section 6 of Sky's response we provide an assessment of the specific proposals for new regulation put forward by Ofcom against the legal requirements that Ofcom must meet before introducing such regulation. As set out in Section 2, above, Ofcom must demonstrate that proposed new regulation is proportionate, which in turn requires Ofcom to establish that its proposed intervention: (i) is effective in achieving the legitimate aim of the regulator; (ii) is no more onerous than is required to achieve that aim; (iii) is the least onerous, if there is a choice of equally effective measures, and (iv) in any event, does not produce adverse effects which are disproportionate to the aim pursued.

6.5 In the following sections we explain that:

- (a) Ofcom has failed to consider the option of not intervening;
- (b) Ofcom's proposals are likely to be ineffective;
- (c) the costs of Ofcom's proposals exceed their benefits;
- (d) Ofcom's proposals give rise to a high risk of unintended consequences; and
- (e) it is likely that Ofcom's concerns could be addressed in a more proportionate way.

### **Ofcom has failed to consider the option of not intervening**

6.6 One of the most glaring omissions from the Consultation is consideration of the option of not intervening. In direct contradiction to all relevant guidance on the assessment of proposals for regulatory intervention – including Ofcom's own guidance – Ofcom's Consultation does not consider the 'do nothing' option. The reason that this requirement is critical when assessing proposals for new regulation is straightforward: regulation can often do more harm than good, such that – even in situations where problems are identified – not intervening is the best option.

6.7 Failure to consider the 'do nothing' option in Ofcom's assessment sends a strong signal of Ofcom's approach to this issue. It indicates that Ofcom has already concluded that intervention is required, and that the only issue to be determined is the form and extent of its intervention. Not only is such an approach inconsistent with best regulatory practice, and Ofcom's professed principle of acting with a bias against regulation, it also gives rise to obvious risks of confirmation bias and failing to consult with

an open mind. In Sky's view, situations in the past where Ofcom has taken a view that significant new regulation is needed, based on flimsy evidence or a flawed interpretation of evidence, and that the key issues to be determined are the form and nature of intervention, have led Ofcom into serious error.

- 6.8 As set out in Section 5, above, an objective reading of the evidence relied upon should lead Ofcom to a conclusion that new regulation of the switching and cancellation processes under consideration is not required. Without prejudice to this point, as explained further below, it is evident that the costs of the two specific regulatory proposals put forward by Ofcom are likely to outweigh their benefits, such that not introducing the proposed new regulation would be a more proportionate option. Ofcom's failure to consider the option of not intervening means that it has no way of determining whether that is the most proportionate response to the difficulties that it has identified. As a result, Ofcom's failure to consider the 'do nothing' option is a fundamental flaw in the Consultation.

### **Ofcom's proposals are unlikely to be effective**

*The available evidence shows that Ofcom's proposals will not be effective solutions to the problem of loss of service when switching*

- 6.9 The most prominent of the difficulties identified by Ofcom, which its proposed interventions are intended to remedy, is that of unwanted breaks in service experienced by consumers when they switch providers. Ofcom states that it considers this problem to be "*particularly concerning given consumers' growing reliance on communications services*"<sup>114</sup>, and cites its statement in the Strategic Review of Digital Communications that "*the disruption that loss of service causes can be on a par with a power cut or loss of water supply*"<sup>115</sup>.
- 6.10 Given that many switches in the communications sector occur via a GPL process today, there is a valuable source of direct evidence available on the effectiveness of that approach to switching on the incidence of loss of service when switching providers.<sup>116</sup> It is therefore of considerable surprise that Ofcom has not used such evidence in assessing the effectiveness of GPL switching in relation to the issue of loss of service when switching supplier.
- 6.11 In fact, Ofcom could have used the results of its 2015 consumer survey for this purpose. At least one of the sample groups in the survey comprises households that have undertaken solely intra-Openreach switches (the 'ORS dual play switch' group), which today follow a GPL process. The survey demonstrates clearly that consumers undertaking such switches experience the highest level of unwanted breaks in

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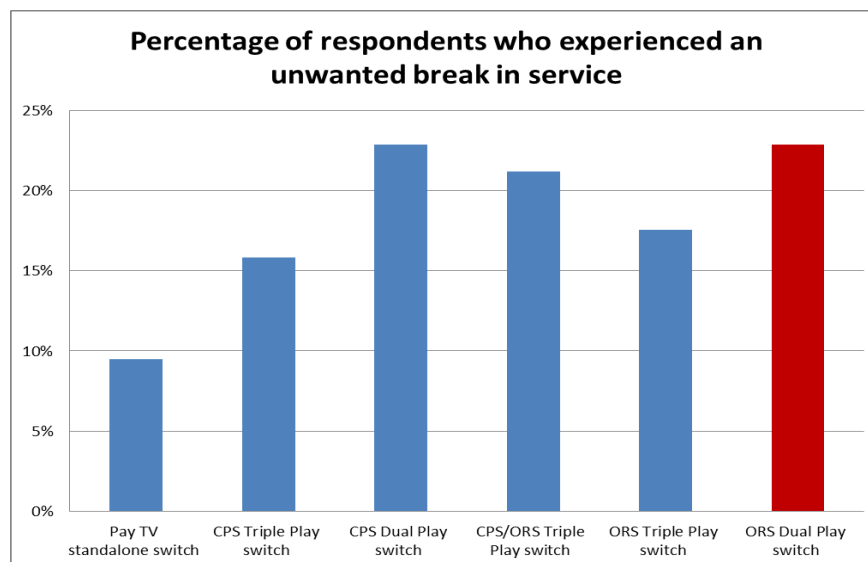
<sup>114</sup> Paragraph 3.24.

<sup>115</sup> *Ibid.* This claim appears to Sky to be somewhat overstated given that (a) water and energy are clearly significantly more essential to households' well-being than communications services, and (b) today, if people lose fixed line communications services for a period of time they are likely to have alternative methods available to them for communicating and accessing the internet (notably via mobile devices and in their workplaces). We assume that Ofcom did not intend this statement to relate to pay TV services, as an assertion that a loss of service in pay TV was on a par with a power cut or loss of water supply would clearly be risible. Even if consumers experience a period where they are not receiving a pay TV service, they still have numerous options for watching free-to-air television and other audiovisual services – such as DVDs, online TV services, and pay per view services. When their TV service does become available they will also typically have the ability to catch up on programmes they may have missed.

<sup>116</sup> Throughout the Consultation Ofcom is selective in how it uses the results of its research into intra-Openreach switches. In some instances, Ofcom uses the results from intra-Openreach switches as a guide to likely behaviour for cross platform switches and as an input to the estimate of benefits from process reform (e.g., in estimating potential take-up of a GPL process by consumers). However, in other instances – for example, the average duration for loss of service – Ofcom has not used the current experience of intra-Openreach switches as a guide. Where information exists on outcomes or behaviour under an existing GPL process, this should be used consistently to predict behaviour.

service (equalled only by cross platform dual play switches<sup>117</sup>). This is compelling evidence that the introduction of GPL switching would be likely to have little if any impact on levels of loss of service when switching triple play bundles or in relation to cross platform switches.

**Figure 6.1**



6.12 Ofcom attempts to explain the higher incidence of unwanted loss of service with Openreach switches by pointing out that it completed implementation of a new switching process on the Openreach platform only in June 2015.<sup>118</sup> This ignores the fact that prior to the June 2015 reforms the vast majority of Openreach switches already followed a GPL process. For example, in its August 2013 statement on Openreach switching Ofcom explained that at that time around 90% of migrations went through the GPL process with only 10% going through a losing provider led process.<sup>119</sup>

***Ofcom’s proposals will have no impact on loss of service arising from post-switch faults***

6.13 Ofcom’s proposed approach to the issue of unwanted breaks in service is to require the existing provider to continue to provide their service until the new provider’s service is up and running. That proposal will have no impact on breaks in service that arise as a result of a new service ceasing to work a short time after the switch. This issue - encompassing both ‘Dead on Arrival’ (“DoA”) and ‘Early Life Failure’ (“ELF”) faults – is a common problem with Openreach provisioning.<sup>120</sup> For example, such faults occur in around 10% of cases for Sky.<sup>121</sup> Ofcom is well aware of the significance of these problems, via its work in both market reviews and the Strategic Review of Digital Communications.

<sup>117</sup> The common denominator in these switches is that they involve Openreach, given that a significant proportion of cross platform dual play switches will comprise switches from Virgin Media to the Openreach network. As discussed further below, the quality of service problems related to Openreach are well known, and it should come as little surprise that the incidence of loss of service when switching is highest for switches that involve Openreach.

<sup>118</sup> Paragraph A7.8.

<sup>119</sup> Paragraph 3.29, ‘Consumer Switching: A statement and Consultation on the processes for switching fixed voice and broadband providers on the Openreach copper network’, Ofcom, 8 August 2013. (<https://www.ofcom.org.uk/consultations-and-statements/category-2/consumer-switching-review>)

<sup>120</sup> A DoA fault occurs when an Openreach engineer believes that a line is working properly and ‘closes off the job’ and the customer subsequently contacts their CP to say that the service is not working correctly within eight days of installation. An ELF occurs when a fault with the service occurs between days 9 -28 after installation.

<sup>121</sup> Instance figures are based on internal Sky provisioning data in the 13 weeks to 30 September 2016.

***Ofcom's proposals will not be effective in reducing consumer confusion about switching processes***

6.14 Ofcom asserts that consumer confusion about switching in the communications sector is generated by the fact that there is a range of different switching processes in place. Under the heading of “*confusion about multiple switching processes*”, Ofcom states:

*“The current arrangements for switching triple play services set out earlier in this section mean that consumers can face different switching arrangements (GPL NoT+ or C&R) or a mix of these (GPL NoT+ and C&R) in order to change provider.”<sup>122</sup>*

6.15 Ofcom describes one of the benefits of its proposals as being a reduction in consumer confusion associated with having fewer switching processes. Ofcom states:

*“It seems to us a reasonable view that, where there are fewer processes consumers and providers need to follow, they are likely to find the process easier.”<sup>123</sup>*

6.16 This assertion appears to be based on a fundamental misconception that Ofcom's proposals would result in there being fewer processes for consumers and providers to follow.

6.17 Ofcom's proposed processes would supplement rather than replace existing processes. Accordingly, Ofcom's proposals would result in an increase in the number of switching processes available in the sector. It is therefore impossible to see how Ofcom believes that adding to the range of switching processes will be effective in reducing consumer confusion about switching processes.

6.18 In part, Ofcom also ascribes reduced consumer confusion about switching processes to its proposals that “*the old and new providers would be required to inform the switcher how it works*”<sup>124</sup> – and, more generally, to provide more information to consumers about switching. However, requiring providers to provide additional information to consumers about switching processes in order to reduce consumer confusion does not require substantial, costly changes to switching processes.

6.19 Ofcom also claims that there could be gains from aligning switching processes in the fixed line communications and pay TV sectors with its proposed changes to switching processes in the mobile telephony sector, in which Ofcom has stated a preference for requiring gaining provider led switching. Ofcom states:

*“That alignment could also mean that, if there was further take-up of quad play services (or other bundles involving mobile), a consumer may be able to go through a single type of process to switch all relevant services.”<sup>125</sup>*

6.20 There are two problems with this argument.

6.21 First, as Ofcom acknowledges<sup>126</sup>, it relies on an ultimate conclusion that its current preferred option in the case of regulation of mobile switching is confirmed as being necessary and a proportionate intervention, in conformity with Ofcom's duties in relation to new regulation. There is no certainty that this will be the case.

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<sup>122</sup> Paragraph 3.56.

<sup>123</sup> Paragraph 5.43.

<sup>124</sup> Paragraph 5.38.

<sup>125</sup> Paragraph 5.42.

<sup>126</sup> *Ibid.*

6.22 Second, Ofcom fails to acknowledge that, in the event that its GPL proposals in both sectors were implemented, although the switching processes in both cases would be gaining provider led, the actual processes and timing of actions during those processes would be very different.<sup>127</sup>

### **The costs of Ofcom's proposals exceed their benefits**

6.23 As discussed in Section 2, above, Ofcom has a duty to carry out an impact assessment on important regulatory proposals, such as those set out in the Consultation.<sup>128</sup>

6.24 The core of any regulatory impact assessment is an analysis of the costs to which the new regulation is expected to give rise, and the benefits that it is expected to deliver. It is axiomatic that new regulation should only be introduced if it is expected to deliver benefits that outweigh its costs.

6.25 Ofcom's assessment of the expected costs and benefits of its proposed intervention is set out in Section 5 of the Consultation (entitled 'Option assessment') and accompanying annexes. This analysis is fundamentally flawed. In particular, Ofcom's analysis significantly overstates the net benefits of the proposed intervention – in part by simply ignoring well recognised costs to consumers associated with its proposals – and significantly underestimates the costs associated with its proposals. It also has minimal regard to the real risk of unintended adverse consequences of intervention.

6.26 We discuss the following flaws in the sections below:

- Ofcom has failed to assess proposals in relation to pay TV switching and cancellation separately
- Even on Ofcom's own analysis the benefits of these interventions are small
- Many switches will take longer under both of Ofcom's proposals
- Ofcom has failed to take into account important costs to consumers and businesses associated with its GPL proposal
  - Consumers will receive fewer retention offers and there will be less right-sizing
  - Consumers will not know the implications of switching when they agree to switch
  - Consumers are more likely to be the victim of slamming, erroneous transfers or mis-selling
- Consumers who are uncertain and doubtful about switching to begin with are most put off by gaining provider led switching
- Costs to consumers associated with Ofcom's EC&R proposal
- Ofcom's assertion that there would be significant benefits to consumers from increased competition as a result of the implementation of its proposals is not credible
- CRA's report shows that Ofcom has significantly overstated the benefits of its proposals
- Ofcom's assessment significantly understates the costs of its proposals

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<sup>127</sup> For example, with cross platform switching Ofcom proposes a mandatory ten working day transfer period before the switch occurs to allow customers to receive information about the implications of switching. No such step exists in the mobile switching proposals because Ofcom proposes that consumers would receive information about the implications of switching by SMS before their decision to switch.

<sup>128</sup> At paragraph 2.33 Ofcom asserts that the analysis contained in the Consultation comprises an impact assessment for the purposes of section 7 of the Act. This approach is inappropriate; it places an unnecessary burden on consultees to sift the consultation document to determine which parts of it in fact comprise what would normally be considered to be part of an impact assessment. Instead, it would be more transparent, and enable consultees more easily to discern Ofcom's reasoning and be able to comment on it, if the impact assessment was set out in a separate section of the Consultation, such as in an annex. (Sky notes that Ofcom's guidance on impact assessment states that Ofcom's impact assessments "*will generally be set out in a separate section or annex*" (paragraph 6.1, Better Policy Making). Whilst this statement is caveated, Sky considers that this approach should be followed for the reasons set out above – particularly where significant new regulation is being proposed, as in this case.)

***Ofcom has failed to assess proposals in relation to pay TV switching and cancellation separately***

- 6.27 Ofcom's proposed interventions comprise four distinct proposals:
- (a) an extension of the current regulation of switching of telephony and fixed broadband services to include switching of such services between the two main fixed line telecommunications infrastructures – i.e., between the Openreach and Virgin Media networks;
  - (b) an extension of the current regulation of switching of telephony and fixed broadband services to include switching by consumers who take fixed broadband, telephony and pay TV from the same provider – i.e., switching by 'triple play' customers;
  - (c) the regulation for the first time of switching of pay TV provider on a standalone basis (i.e., when no other services are switched at the same time); and
  - (d) the introduction of additional new regulation of cancellation of pay TV services (in relation to the EC&R proposal).

6.28 Each of these is a significant proposal for new regulation in its own right. Accordingly, the proportionality of each proposal should be assessed separately. The risk of failing to do so is that new regulation is introduced that is disproportionate. Ofcom, however, has failed entirely to assess the costs and benefits of these proposals separately, giving rise to a significant risk that they are disproportionate interventions.

6.29 This is particularly the case in relation to proposals to extend regulation to standalone pay TV switching and/or introduce new regulation in relation of cancelling pay TV services. Even taking the evidence on difficulties in relation to these activities presented by Ofcom at face value, the evidence indicates that they are not significant. Accordingly, there is likely to be little gain to consumers from introducing significant new regulation to address these issues. Given that both Ofcom's proposals are likely to give rise to significant costs, the likelihood is that these separate proposals are disproportionate.

***Even on Ofcom's own analysis the benefits of these interventions are small***

6.30 Ofcom concludes that the benefits to consumers from the implementation of gaining provider led switching for all communications and pay TV switches would be in the order of £10m per annum in the case of its GPL switching proposal, and between £2.7m - £5.9 per annum in the case of its EC&R proposal.<sup>129</sup>

6.31 Even taking these figures at face value, they are extraordinarily small – equal to at most 0.02% of total annual industry revenue. Having regard to the fact that, as discussed further below, Ofcom's benefit estimates are found by CRA to be overestimates, and that they fail to have regard to significant costs to consumers associated with the proposals the true percentage is likely to be even smaller still.

6.32 Such small benefits indicate a need to concentrate on well-focused, low cost interventions in relation to consumer switching in the communications and pay TV sectors or, in some cases, doing nothing at all. It is wholly irrational to believe that they justify proposals for significant, costly intervention of the types proposed by Ofcom.

***Many switches will take longer under both of Ofcom's proposals***

6.33 Ofcom's proposals would result in longer switching times for pay TV services, to the detriment of consumers. This detriment has not been quantified in Ofcom's assessment of the benefits or costs of its

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<sup>129</sup> Figure 15. We have converted Ofcom's present value estimates to annual values.



proposals. Ofcom asserts, without any evidential basis, that it will only have a “small negative impact” under its GPL proposal.<sup>130</sup>

6.34 Longer switching times for pay TV services arise due to the combination of (i) the fact that pay TV switches to Sky take a shorter period of time than other types of switches in the sector, and (ii) Ofcom’s proposals that:

- where a consumer switches more than one service, all services must be switched at the same time<sup>131</sup> (this applies to both Ofcom’s GPL and EC&R proposals); and
- under its GPL proposal a ten working day transfer period, would apply to standalone pay TV switches.<sup>132</sup>

We discuss each of these further below.

6.35 Unlike other providers (with the exception of BT’s DTH satellite pay TV service), Sky provides its broadband, landline and pay TV services via two different networks. Sky relies on BT’s Openreach network to provide fixed broadband and telephony services, and delivers pay TV service via satellite.<sup>133</sup> This means that when a consumer switches to Sky for broadband, telephony and pay TV there are in fact two separate switches that take place, following different processes and timescales: (i) broadband and telephony, and (ii) pay TV.

6.36 Where a new customer requires the installation of equipment (particularly a satellite dish), [•] % of Sky’s customers are installed in less than nine days and [•] % in less than 14 days.<sup>134</sup> The median figure is [•] days. This reflects Sky’s intense focus on excellence in customer service delivery, and large investments in both its workforce and technology. If a customer already has the relevant equipment (for example, because they have been a DTH satellite subscriber in the past) switching times can be much shorter than the average. By contrast, switches of fixed broadband and talk services take far longer with only [•] % completed in fewer than nine days and a median figure of [•]

6.37 The result of any requirement that, in the case of a triple play switch, all three services must be switched at the same time would therefore mean that all three services could only be switched when the last service was ready – which would inevitably be the broadband and telephony service. As a result, timescales for switching to Sky’s pay TV service from another provider when undertaking a triple play switch would increase significantly.

6.38 In relation to Ofcom’s proposal to apply a gaining provider led switching process to standalone pay TV services, this includes a requirement to have a ten working day ‘transfer period’, in which the consumer is able to cancel their switch. Accordingly, the minimum time that a standalone pay TV switch could take under this proposal is ten working days, which is significantly longer than the average time it takes consumers to switch to Sky’s pay TV service today (where, as noted above, the median figure is [•] calendar days).

6.39 Both proposals would result in significant detriment to consumers.

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<sup>130</sup> Figure 17.

<sup>131</sup> Section 1.2, ‘Gaining provider led front-end Process use cases’, Cartesian, July 2016. ([https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0021/54930/cart2.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0021/54930/cart2.pdf))

<sup>132</sup> Figure 11.

<sup>133</sup> Sky also delivers pay TV services on an OTT basis, via its NOW TV service. However, that service is out of scope of Ofcom’s current proposals.

<sup>134</sup> All Sky figures in this paragraph are calendar days (whereas Ofcom stipulates the proposed transfer period in working days), and are based on Sky’s internal provisioning data for the 12 months ending 24 March 2016.

- 6.40 There is good evidence available that indicates that consumers prefer switches to occur sooner rather than later. In other words, consumers value not having to wait significant periods of time for a switch to occur once they have requested it.
- 6.41 The results of the 2012 survey commissioned by BT, Sky and Virgin Media showed that when consumers were asked how important the length of time it takes to switch providers is, 87% of respondents rated the importance between 7-10 on a scale of one to ten (with ten representing 'very important').<sup>135</sup> When respondents were asked the length of time they thought would be reasonable to have to wait for their broadband and fixed line services to be switched from one provider to another, the most common response for both services was "three days", with only one in ten respondents answering that ten (calendar) days was reasonable.<sup>136</sup>
- 6.42 Sky also recently commissioned further research asking consumers how satisfied they would be with different wait times for pay TV if they were switching provider.<sup>137</sup> Whilst 80% of respondents would be very satisfied or satisfied with a three day waiting time, that figure dropped to 17% if they were required to wait 14 days, i.e., the minimum wait period envisaged under Ofcom's GPL proposal. The proportion of respondents stating they would be very dissatisfied with a 14 day wait was 53%, rising to 84% if they were required to wait more than 21 days, which, based on Ofcom's proposal, is a typical wait time for a triple play switcher to Sky where a new line needs to be provided.

**Table 6.1**  
**Consumer satisfaction with waiting times when switching pay TV**

	Very Satisfied	Satisfied	Dissatisfied	Very dissatisfied
1 day	74%	21%	3%	2%
3 days	36%	44%	13%	7%
7 days	13%	41%	27%	19%
10 days	4%	24%	37%	36%
14 days	3%	14%	31%	53%
21 days	2%	6%	22%	71%
more than 21 days	1%	4%	11%	84%

Source: Sky consumer research

- 6.43 Ofcom, however, seeks to downplay the importance of speed of switching to consumers, stating: "*there is evidence [that consumers] place greater value on the process providing certainty and being error-free.*"<sup>138</sup> Ofcom cites only two pieces of evidence in support of this assertion, neither of which provides reliable evidence on this issue.<sup>139</sup>

<sup>135</sup> Table 34, Sky Annex, Sky Response to 'Consumer Switching: A consultation on proposals to change the processes for switching fixed voice and broadband providers on the Openreach copper network', Ofcom, 9 February 2012.

<sup>136</sup> Tables 32-33, *ibid.*

<sup>137</sup> This was undertaken by including a specific question on this subject in a YouGov omnibus survey carried out in September 2016 (together with relevant screening questions).

<sup>138</sup> Paragraph 5.53.

<sup>139</sup> The first piece of evidence is responses from a question in a consumer survey conducted for Ofcom in 2010. In that question, respondents were asked whether they preferred (a) a faster process with an uncertain switch date, or (b) a process with a guaranteed switch date which could require a longer switching period. Given the biased wording of the question, it is unsurprising that most respondents chose the latter. Moreover, in the current circumstances the dichotomy is a false one. There is in general little uncertainty over switch dates in relation to pay TV and triple play switches.

- 6.44 Increasing the length of time that switching takes is a clear dis-benefit to consumers to which Ofcom must have regard in its assessment of its proposals.

***Ofcom has failed to take into account important costs to consumers and businesses associated with its GPL proposal***

- 6.45 Ofcom's analysis of the benefits to consumers of the GPL proposal ignores a number of well recognised costs to consumers that arise under gaining provider led switching processes. Having proper regard to those costs significantly diminishes the value of the net benefits to consumers of the proposals and, indeed, given the low value of the benefits to consumers estimated by Ofcom, gives rise to a realistic risk of consumers being made worse off by Ofcom's proposals. These are as follows:

- (a) consumers will receive fewer deals and there will be less right-sizing;
- (b) consumers do not know the implications of switching when they agree to switch; and
- (c) consumers are more likely to be the victim of slamming, erroneous transfers or mis-selling.

**Consumers will receive fewer retention offers and there will be less right-sizing**

- 6.46 GPL processes provide a route whereby consumers can leave their existing provider without any meaningful contact with them. This means that there would be likely to be a significant reduction in the number of consumers who contact their existing provider before initiating a switch.<sup>140</sup>
- 6.47 It is common practice in the sector to seek to retain customers who express a desire to switch by making them an offer to discount the amount they currently pay for services (retention offers or 'save' activity). Accordingly, the adoption of a switching process in which fewer consumers in practice contact their losing provider and therefore are not presented with retention offers will result in significant costs to those consumers who would otherwise have preferred to receive (and accept) those offers. Not only will such consumers lose out by not receiving retention offers from their existing supplier, they will also bear the costs of switching provider that they would otherwise avoid.
- 6.48 Unsurprisingly, it is evident that many customers place significant value on being able to negotiate these discounts. This is evident in the data from Ofcom's 2015 consumer survey<sup>141</sup>, and it accords with Sky's experience during periods in which it has with-held from making such offers to consumers, which generates significant dissatisfaction.
- 6.49 It is evident that Ofcom perceives the benefits to consumers of retention offers. Ofcom states:

*"We note that... some consumers appear to welcome, and may benefit from, the possibility of obtaining a better deal from their old provider"*<sup>142</sup>

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The second piece of evidence cited by Ofcom is the results of consumer research undertaken by the Financial Conduct Authority. Notwithstanding the fact that the research relates to a very different sector – retail banking – where accuracy of switching is likely to be far more important to consumers than the speed of switch, Ofcom fails to note that the FCA research related to a proposal to require a relatively small reduction in the time permitted for a switch (from seven working days to five working days). Such evidence is uninformative about consumers' willingness to accept significant increases in the time that they are required to wait to have pay TV installed when switching.

<sup>140</sup> Evidence indicates that many will continue to contact their existing provider before initiating a switch. Nevertheless, it is likely that many households who would otherwise have a conversation with their existing provider before agreeing to switch would not do so if Ofcom's GPL proposal was implemented.

<sup>141</sup> It is noteworthy that the most cited "major" difficulty most cited by cross platform switchers was "*getting a better deal with your previous provider*" (12%). We infer from the fact that this is reported as a difficulty that respondents were actually reporting the fact that they were unable to get a better deal and were disappointed when that happened. (Slide 24, Main Findings slide pack.)

<sup>142</sup> Paragraph 4.39.

- 6.50 Ofcom also notes that its consumer survey showed that for “67% of consumers who decided not to switch, negotiating/accepting a deal with their current provider was a key factor in their decision.”<sup>143</sup>
- 6.51 Yet the implementation of a GPL switching process would significantly reduce the number of consumers who benefit from retention offers each year.
- 6.52 Ofcom indicates in the Consultation that it intends not to make enforcement of General Condition 1.2 (which prohibits save activity in certain circumstances) an administrative priority.<sup>144</sup> However, this statement provides no certainty for stakeholders. The principles of administrative law mean that Ofcom cannot fetter its discretion by indicating that it will not enforce a General Condition<sup>145</sup>; Ofcom must be prepared to assess individual cases on their merits. Accordingly, despite Ofcom’s statement, a provider’s failure to comply with General Condition 1.2 will remain liable to legal challenge and it is not clear to Sky that it would be open to Ofcom to refuse to accept a dispute on this issue.<sup>146</sup>
- 6.53 In addition to the benefits to consumers of avoided switches as a result of save activity, there are corresponding benefits to firms. These can be considerable, including the time and costs of completing the switching process, engineer site visits and new equipment installation. Unnecessary costs that are avoided are a direct benefit of save activity.
- 6.54 Similar disbenefits for consumers arise in relation to reduced opportunities for ‘right-sizing’. In many instances when customers contact Sky to cancel their existing service it is possible to reduce the amount that customer pays simply by altering the package of services to which they subscribe. Service agents are able to discuss the customer’s requirements, and ensure that they subscribe to the package that best suits their requirements. It is often the case that consumers are unaware of alternative package options, or, for example, the fact that they can save money by dropping parts of their package to which they attach little value (for example because they do not use a particular service). The consumer’s existing provider has knowledge of how the consumer and his or her household is actually using the service and is best placed to suggest an alternative package (e.g., of TV channels, inclusive calls or different broadband speeds or usage caps) that might better meet the household’s needs. The gaining provider will not have actual data on which to help inform a similar assessment.
- 6.55 In such cases not only does the customer avoid the need to incur the costs of switching, they achieve their desired objective of reducing the cost of their services.
- 6.56 Ofcom’s impact assessment does not have regard to these disbenefits to consumers and firms from its proposals.

Consumers will not know the implications of switching when they agree to switch

- 6.57 One of the fundamental problems with gaining provider led switching processes is that consumers do not have full information about the consequences of a switch at the time that they take the decision to switch. In this context, regulators’ oft-stated preference for GPL switching processes is perverse; normally the presumption is that consumers are better off when they enter into transactions with as

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<sup>143</sup> Paragraph 3.51.

<sup>144</sup> Paragraph 4.44.

<sup>145</sup> *Lavender v Minister of Housing and Local Government* [1970] 1 WLR 1231; *British Oxygen v Minister of Technology* [1971] AC 610.

<sup>146</sup> A refusal to accept a dispute could itself be challenged. Section 186 of the Act sets out the narrow circumstances in which Ofcom can refuse to accept a dispute.

much information as possible about the costs and benefits associated with a particular purchase.<sup>147</sup>

6.58 Under a GPL process, in many cases the gaining provider will be unable to offer an accurate response to consumer queries at the critical point in the switching process, such as information about their minimum term, ETCs or alternative packages. As Ofcom acknowledges: *“The new provider is not necessarily in the best position to give the consumer this information”*.<sup>148</sup> It is likely therefore that some consumers will place an order to switch with the new provider and only later receive and fully understand the implications of their decision to switch. Ofcom’s consumer research shows this:

- (a) Ofcom refers to data showing that 23% of cross platform switchers reported unexpected charges.<sup>149</sup> This figure is marginally higher for Openreach switches (25%)<sup>150</sup> but significantly higher amongst triple play Openreach switches (33%).<sup>151</sup>
- (b) Ofcom’s 2015 consumer survey shows that 32% of *all* those who switched compared to 23% of cross platform switchers found out about ETCs after they had signed up with a new provider.<sup>152</sup> This suggests that the figure for Openreach switchers is likely to be over 40%.<sup>153</sup> Figures for disconnection charges and charges for not returning equipment show similar results.<sup>154</sup>

6.59 Consumers want to know the implications of switching before they leave. The consumer survey commissioned by BT, Sky and Virgin Media supporting our response to Ofcom’s 2012 Consultation<sup>155</sup> shows a clear preference from respondents for prior knowledge of the full implications of switching providers. When asked whether respondents would prefer to have all the information about the consequences of switching before they placed the order to switch or whether they would prefer to switch and then be informed by their current provider what the consequences of the switch were a few days later, but be given the opportunity to cancel the order at no cost to them, 88% of respondents preferred to receive information regarding their switch before they placed their order and only 8% opted for receiving information after placing the order.<sup>156</sup>

6.60 Much of the detail around Ofcom’s current proposal appears designed to remedy this fundamental defect with GPL switching – for example, requiring firms to provide consumers with information about the implications of switching on their bills. These attempts to remedy this defect, however, are a poor substitute for an approach in which the customer obtains that information from their existing provider before initiating a switch. Ofcom goes so far as to assert that the changes it proposes *“will improve availability of information about the implications of switching”*<sup>157</sup> and would *“ensure that consumers*

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<sup>147</sup> For example, it is contradictory that providers are required by Ofcom to provide consumers with all the information they need to ensure that they can make an informed transactional decision in relation to acquisition sales (see for example General Condition 9.2) and yet, in the context of switching, Ofcom prefers a process that often results in consumers making poorly informed decisions.

<sup>148</sup> Paragraph 4.33.

<sup>149</sup> Paragraph 3.61.

<sup>150</sup> Slide 20, Main Findings slide deck.

<sup>151</sup> Tables 151-152, ‘Triple play quantitative data tables’, BDRC, 2015. ([https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0014/72212/bdrc-data-tables.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0014/72212/bdrc-data-tables.pdf))

<sup>152</sup> Slide 51, Main Findings slide deck.

<sup>153</sup> *Ibid.* The base was too low (48) to reports results under BDRC’s methodology but the underlying data tables support this. See Tables 183-184, ‘Triple play quantitative data tables’, BDRC, 2015.

<sup>154</sup> Slides 52 and 53, Main Findings slide deck.

<sup>155</sup> ‘Consumer Switching: A Consultation on proposals to change the processes for switching fixed voice and broadband providers on the Openreach copper network’, Ofcom, 9 February 2012. (“2012 Consultation”)

<sup>156</sup> Table 35, Annex, ‘Sky Response to the 2012 Consultation’.

<sup>157</sup> Paragraph 5.5.

*have information they need to hand at the time they need it*".<sup>158</sup> This is obviously not the case with its GPL switching proposal, which would rely on consumers carefully examining information on their bill at a time when they may not even be thinking of switching and remembering that information when using the switching process.

- 6.61 Ofcom proposes that customers be given up-to-date information about their contract end date, ETCs and any disconnection charges on monthly bills.<sup>159</sup> However, bills are generated at a specific point in time, and therefore there is a risk that the information provided quickly becomes out of date. Moreover, it is not clear that consumers would pay attention to the detailed switching information provided on their bills unless they were intending to switch at the time they received the bill. The only way to ensure that accurate and comprehensive switching information is given to a specific customer at a specific time is by having the customer contact their current provider.
- 6.62 Furthermore, with gaining provider led switching the gaining provider will not know if the customer is in a minimum term before the switching process commences unless the customer mentions it. The losing provider may have a legitimate interest in holding the customer to the contract they agreed, and seek to do so.<sup>160</sup> This means a proportion of switches will be commenced by the gaining provider even though the existing provider can legitimately refuse the switch, giving rise to costs that would not arise if the customer had spoken to their existing provider first. Any assessment of a GPL process needs to take contract affirmation into account. Section 7 explains Sky's position on contract affirmation in more detail.
- 6.63 Again, Ofcom seeks to attempt to remedy these significant defects of gaining provider led switching by proposing a ten working day window during which the consumer is able to cancel their switch without penalty. In other words, Ofcom recognises that in many cases consumers will, on learning the full consequences of their switch, wish to reverse their decision to switch and decide instead to stay with their existing provider.
- 6.64 Two obvious detriments arise in relation to this proposal. First, the consumer at that point must ensure that the switch is cancelled – requiring further time and effort on their part. It is plain that, at that point in time, the incentive of the gaining provider is to do everything possible to ensure that the switch proceeds.
- 6.65 Second, Ofcom has indicated that it expects the gaining provider to do everything possible within the ten working day period to provide service to the consumer at the end of that period.<sup>161</sup> Accordingly, firms face the risk of incurring significant costs that are entirely wasted when the consumer subsequently cancels the switch. For example, the cost to Sky of a standard engineer visit for TV installation is in excess of £[•]. Accordingly, if Sky installed a new TV customer during the ten working day period, only to have the customer subsequently cancel the switch, the cost of the engineer visit would be entirely wasted.
- 6.66 These wasted costs would either need to be recouped from the customer or absorbed by the provider. Ofcom assumes these costs will be absorbed by the provider<sup>162</sup> which is contrary to existing consumer

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<sup>158</sup> Paragraph 5.47.

<sup>159</sup> Table 1, 'Gaining provider led front-end Process use cases', *op. cit.*; Table 1, 'Enhanced C&R Front-End Process Use Cases' Cartesian, July 2016. ([https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0026/54890/cart1.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0026/54890/cart1.pdf))

<sup>160</sup> This is known as contract affirmation.

<sup>161</sup> Paragraph 4.18, which states: "*During the transfer period, the new provider would be required to provide the consumer with any equipment necessary for the operation of the new service(s)*".

<sup>162</sup> Ofcom would require that at any time during the ten working day transfer period "*the consumer may cancel the switch without liability*" (Paragraph 5.51, emphasis added).

protection laws that require consumers to pay for services supplied during the cooling off period.<sup>163</sup>

- 6.67 Ofcom has therefore failed to have regard to the likely significant costs associated with reversing unwanted switches in the assessment of its proposals.

Consumers are more likely to be the victim of slamming, erroneous transfers or mis-selling

- 6.68 Switching in the UK communication and pay TV sectors is largely free from slamming and mis-selling, and rates of erroneous transfers are low. This is a substantial benefit to consumers, the value of which cannot be taken for granted. The stress and hassle to consumers associated with being switched without permission is likely to be an order of magnitude greater than the relatively small detriments that arise from current switching processes today. Ofcom must, therefore, exercise great caution in requiring changes that would result in greater incidence of slamming, mis-selling and erroneous transfers.
- 6.69 Gaining provider led processes are inherently more susceptible to slamming, erroneous transfers or mis-selling than processes in which the consumer remains in control of the switch. Currently, either (i) a customer contacts their existing provider to cancel, so with appropriate identification and verification, there is no doubt as to whose service is to be cancelled, or (ii) a customer cancels their subscription by cancelling their payments, which only the customer themselves can do. This consumer protection does not exist under a gaining provider led process. Whilst Ofcom's proposals envisage an account number being provided as a form of account identification, this is not the same as verifying the identity of the customer to establish that they have authority to make decisions about the existing services being supplied. This and other errors (e.g., input errors) would result in customers having their services cancelled without their consent or the wrong customer having their service cancelled.
- 6.70 Irresponsible sales and marketing activity by the gaining provider resulting in mis-selling or slamming is also more likely with gaining provider led processes. A losing provider led process generally requires more up-front validation of the customer's request to cancel services. Ofcom's GPL proposal includes post-sale measures (ten working day transfer period, losing provider letter) designed to mitigate risk but this does nothing to address risk at the key point in the customer journey – at the point of sale.

***Consumers who are uncertain and doubtful about switching to begin with are most put off by gaining provider led switching***

- 6.71 In part, Ofcom's proposals are intended to result in greater switching by those consumers who, today, are put off from doing so – for example, as a result of perceived complexity of the process. For example, Ofcom states:

*“Not understanding which processes to follow may also result in consumers choosing not to switch. For instance, in the quantitative BDRC research a third (32%) of consumers who decided not to switch said “not knowing what to do to switch” was a factor in their decision.”<sup>164</sup>*

- 6.72 Research carried out for Ofcom in the context of its mobile switching programme<sup>165</sup>, however, shows that those consumers who are least likely to switch suppliers are also least likely to favour a gaining provider led process.
- 6.73 This research identified three ‘mind-sets’ of consumers who were contemplating switching, as set out in

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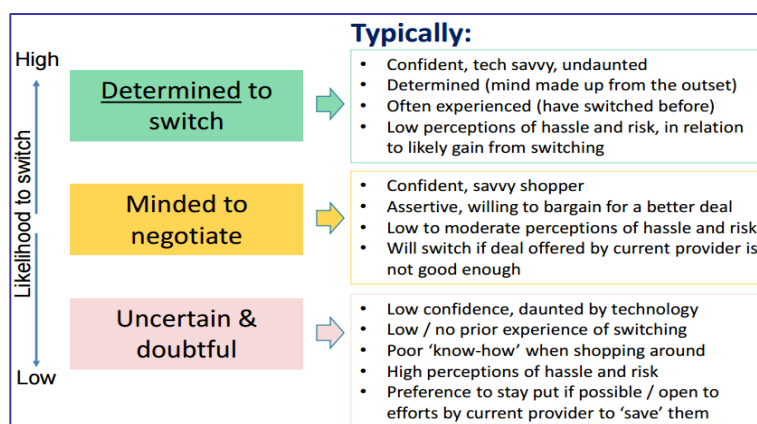
<sup>163</sup> Regulations 36(2) and 36(4), The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

<sup>164</sup> Paragraph 3.59.

<sup>165</sup> ‘Switching mobile network provider - The Consumer Experience, Final report’, futuresight, February 2016. (“futuresight report”) ([https://ofcom-build.squiz.co.uk/\\_\\_data/assets/pdf\\_file/0029/82649/mobile\\_switching\\_qualitative\\_research\\_feb16.pdf](https://ofcom-build.squiz.co.uk/__data/assets/pdf_file/0029/82649/mobile_switching_qualitative_research_feb16.pdf).)

the following slide from the research report:

Figure 6.2



Source: Slide 28 of the futuresight report

6.74 The 'uncertain & doubtful' group perceived the most hassle with switching and were least likely to switch.

6.75 However, the research also found that this group were most likely to identify disadvantages with a GPL switching process, based around a perceived loss of control to an unknown provider:

*"Disadvantages of GPL, stated by participants, related mainly to perceived loss of control ...  
 Loss of control in managing the switch  
 Fears, expressed spontaneously, of being switched without their knowledge or consent  
 Compared to their current provider, the new provider is not as trusted / no established relationship  
 Happens without their input - reliant on the new provider to inform them / keep them in the loop  
 Reduced negotiating power with current provider ...  
 These disadvantages tended to be expressed more strongly by the 'uncertain & doubtful' ...  
 Many reported a fear of placing control into the hands of an 'unknown' entity".<sup>166</sup>*

6.76 This group also "*tended to make their decision based on interaction with their current provider*"<sup>167</sup> and were more likely to prefer a losing provider led switching process:

*"Feels safest'  
 Gives them direct contact with their 'trusted' current provider  
 The potential new provider is 'unknown' (untried and untested)  
 The current provider holds their personal details = more secure, re: authorised transfer..."<sup>168</sup>*

6.77 It is reasonable to infer that this insight from the mobile sector reflects, to a large degree, consumer attitudes in closely related sectors. The 'uncertain & doubtful' group is the group that Ofcom's GPL proposal is designed to assist - determined switchers or those minded to negotiate have lower perceptions of hassle and risk. Yet this is the group that is most likely to be put off by a GPL process.

<sup>166</sup> Slide 72, *Ibid.*

<sup>167</sup> Slide 53, *Ibid.*

<sup>168</sup> Slide 78, *Ibid.*



### ***Costs to consumers associated with Ofcom's EC&R proposal***

- 6.78 A key element of Ofcom's EC&R proposal is the requirement to enable consumers to cancel their existing services without having a conversation with their existing provider, for example by using Interactive Voice Response ("IVR") or a web-form. At the outset, Sky notes that Ofcom's proposals on this issue are unacceptably vague, particularly in view of their potential significance. For example, the proposed list of ways that Ofcom proposes to require providers to enable consumers to cancel their services is in all cases put as a list of examples, rather than being definitive, and different examples are given in different places in the Consultation.<sup>169</sup>
- 6.79 Furthermore, Ofcom proposes mandating IVR as a cancellation route despite having no evidence of any demand for, or preference for, IVR. IVR does not even appear as an option in the consumer research on this question.<sup>170</sup>
- 6.80 In Ofcom's 2015 consumer survey, 14% of switchers said their preferred methods of cancellation included web-form. However, over half of those respondents also indicated a preference for email, phone or webchat.<sup>171</sup>
- 6.81 Based on no evidence of demand for IVR as a method of cancellation and only 6%<sup>172</sup> of consumers favouring web-form over all other methods, Ofcom then assumes that 25% of switchers would use IVR and web-form following their introduction.<sup>173</sup> Ofcom states that the 25% figure "*is somewhat lower than the percentage of customers who have stated that those [IVR and web-form] are their preferred options and so we consider this assumption is conservative*".<sup>174</sup> As explained above, however, this is an erroneous view of the 25% figure, and therefore the assertion that one quarter of consumers would use IVR and web-form to cancel their services in future if those options were mandated by Ofcom is unfounded (and certainly not "*conservative*").
- 6.82 Interactive contact with a customer when they cancel a service is extremely important for two reasons. First, it enables a provider to verify the identity of the customer, to ensure that they have the authority to cancel or amend a service. Second, it enables the provider to explain the implications of cancelling the service to the customer, enabling an informed switch or cancellation.
- 6.83 A requirement to introduce new ways of cancelling that reduce interaction with the losing provider will therefore give rise to a risk of:
- (a) increased levels of slamming, mis-selling or other types of services being cancelled without appropriate authority;
  - (b) the loss of benefits to consumers associated with having a conversation with an informed advisor on retention offers or right-sizing and avoiding the hassle of switching; and
  - (c) the costs to consumers of having to reverse cancellations once they come to realise the full implications of cancelling their service.

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<sup>169</sup> It is not possible for respondents to the Consultation properly to consider, in particular, the costs associated with Ofcom's proposals when they are put in a vague way.

<sup>170</sup> Slide 15, Main Findings slide deck.

<sup>171</sup> Paragraph 201, CRA's report.

<sup>172</sup> *Ibid.*

<sup>173</sup> Paragraph 5.27.

<sup>174</sup> Paragraph A8.48.

6.84 These detriments, which have not been taken into account in Ofcom’s assessment, are explained in more detail above. The nature of these detriments is similar under both Ofcom’s GPL and EC&R proposals, but the overall impact under EC&R is likely to be lower than under GPL because the customer will still be required to have some form of contact with their existing provider.

***Ofcom’s assertion that there would be significant benefits to consumers from increased competition as a result of the implementation of its proposals is not credible***

6.85 Perhaps in recognition of the small value of the benefits of its proposals, Ofcom seeks to imply that there could be large benefits to consumers associated with an increase in competition flowing from its proposals. Ofcom asserts:

*“we consider reducing switching costs is likely to facilitate more intense competition between providers...this will benefit consumers in the form of lower prices, higher quality service, choice, and innovation.”*<sup>175</sup>

6.86 Ofcom asserts further that the benefits from increased competition flowing from its proposals “*could be very significant*”, and goes on to state that:

*“For example, a 1% decrease in the average prices as a result of our proposals would result in over £1.2 billion benefit to consumers.”*<sup>176</sup>

6.87 Ofcom’s assertions in relation to the ‘competition benefits’ associated with its proposals are without foundation and cannot be relied upon.

6.88 First, as discussed in Annex 5, Ofcom’s assertions are based on a premise that there is a straightforward relationship between switching costs and competition: higher switching costs reduce competition. That premise is unreliable.

6.89 Moreover, as set out in Section 4, above, competition at the retail level the UK’s communications and pay TV sectors is already intense. Accordingly, even if it were correct that there is a simple negative relationship between switching costs and competition (which it is not), it should be expected that a reduction in switching costs would have – at best – a marginal impact on market outcomes. If markets are already strongly competitive, firms will already be doing all they can to attract and retain customers – including via pricing aggressively and by delivering consumers attractive and innovative products. Given the extremely competitive nature of the sector today, it is wholly fanciful to believe that Ofcom’s proposals could deliver benefits to consumers of the magnitude cited.

6.90 Second, again taking as given the assumption that there is a negative relationship between switching costs and competition, it would seem likely that the extent of the impact on competition from changing switching processes would depend on the extent of the reduction in switching costs facing consumers. Ofcom, however, has undertaken no analysis of the extent of the reduction in switching costs that might be generated by its proposals.

6.91 More generally, it is apparent that there is no evidential or analytical basis for the figure cited by Ofcom. Indeed, Ofcom states that it has “*not attempted to quantify the benefits flowing from an increase in competition*”<sup>177</sup>, which is clearly the case. However the citation of the figure of a £1.2 billion benefit to consumers from the implementation of its proposals is clearly intended to provide an impression that such benefits would be substantial. This figure can form no part of any reasonable impact assessment

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<sup>175</sup> Paragraph 5.72.

<sup>176</sup> Paragraph 5.75.

<sup>177</sup> *Ibid.*

of Ofcom's proposals

- 6.92 Ofcom concludes only that competition benefits "*could be significant*" (emphasis added). This is implausible. Given the existing intensity of competition it is likely that they would not be significant.

***CRA's report shows that Ofcom has significantly overstated the benefits of its proposals***

- 6.93 As explained above, Sky commissioned CRA to examine Ofcom's estimates of the value of the benefits associated with its proposals. CRA's report is highly critical of Ofcom's analysis, finding that Ofcom has significantly overstated the value of the benefits of its proposals to consumers. CRA conclude that:

*"Overall, a more detailed analysis and interpretation of the results from the surveys commissioned by Ofcom provide an alternative, more plausible set of assumptions. This revised, more plausible set of assumptions and more reasonable interpretation of the available evidence reduces the benefits to consumers by around £10 million annually and suggests very limited annual benefits of the proposed options (at most £0.6 million)."*<sup>178</sup>

- 6.94 CRA are also critical of Ofcom's estimates for only providing an assessment for the gross benefits to consumers of its proposals. CRA note that Ofcom has failed to give "*due consideration ... to possible offsetting negative consequences arising from the proposals*" which means the actual realised net benefits would be even lower than the revised estimate above and may well be negative.

- 6.95 Ofcom favours the GPL proposal to the EC&R proposal in large part because Ofcom considers it is likely that "*fewer switchers would co-ordinate their switching date*" under an EC&R process compared to a GPL process.<sup>179</sup> This assumption underpins most of the difference in Ofcom's quantified benefits of its GPL proposal compared to the EC&R option. CRA has examined expected consumer take-up of the proposed options and disputes Ofcom's assumption, concluding that:

*"The consumer survey data commissioned by Ofcom suggests that forecast use of the GPL option for cross platform switchers is overly-optimistic, given the available evidence on use of the existing GPL process for switches between providers within the Openreach platform. The proportion of cross platform switchers using EC&R is instead likely to be the same or not much lower than the proportion of cross platform switchers using GPL. Even if this is not the case, any difference in take-up between the two options reflects consumers that should be excluded from the analysis as they are actively exercising an option to organise the switch themselves under the existing C&R process instead of having the switch organised by the new provider under the EC&R process. It should be assumed that, in doing so, they view themselves as deriving benefits from exercising that option, not experiencing harm."*<sup>180</sup>

***Ofcom's assessment significantly understates the costs of its proposals***

- 6.96 Similarly, as explained above, Sky commissioned Moorhouse to consider issues in relation to the cost implications of Ofcom's proposals. Moorhouse were asked to undertake two tasks:

- (a) to review the cost estimates produced for Ofcom by Cartesian; and
- (b) to provide a high-level estimate of the cost to Sky of implementing Ofcom's proposals.

- 6.97 On the first of these issues, Moorhouse find that the cost estimates produced for Ofcom by Cartesian are an order of magnitude too low. They find that Cartesian's estimate of the cost of developing,

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<sup>178</sup> Paragraph 10, CRA's Report

<sup>179</sup> Paragraphs 5.10-5.12.

<sup>180</sup> Paragraph 5, CRA's Report.

implementing and running the inter-provider communications channel is not credible due in large part to Cartesian's failure to (i) understand the systems, integration and operational complexity involved, and (ii) properly consider "unhappy" paths and the need for manual resolution of issues. Cartesian estimates that this functionality would cost around £8m to develop and implement. In reality, it would cost substantially more.

- 6.98 In relation to the second of these issues, Moorhouse finds that the cost to Sky of implementing Ofcom's GPL proposal would be £[•]<sup>181</sup> with ongoing maintenance costs of £[•] per annum. This is around [•] times higher than the Cartesian estimates of £1.39m for implementation and £258k annually for ongoing maintenance. For Sky alone, this means a 10 year cost in present value terms under the GPL proposal of £[•].
- 6.99 These cost estimates should be of considerable concern to Ofcom. In Sky's view it should be uncontroversial that a regulatory requirement to introduce and operate significant new switching processes, including a requirement to build and operate a platform that enables providers to communicate in real time, and accurately check customer details, will be expensive to implement and operate. Ultimately, given the strong competition that exists at the retail level of the sector, these costs will be passed on to consumers.
- 6.100 Accordingly, this type of intervention should be contemplated only where (i) significant problems have been identified with existing processes, (ii) the new processes would solve those problems effectively, and (iii) other, less costly, approaches to solving the identified problems have been explored fully. None of these conditions have been met in the current case.

#### **Summary: Ofcom's assessment of the costs and benefits of its proposals**

- 6.101 Ofcom's assessment of the costs and benefits associated with its proposed new regulation appears biased in favour of intervention, contrary to Ofcom's regulatory duties and principles. Benefits are overestimated, significant detriments to consumers and firms have not been taken into account, and costs have been significantly underestimated. The reality is that Ofcom's proposals would be likely to generate costs to consumers and businesses that outweigh any benefits delivered. This is a significant reason that those proposals are a disproportionate response to the purported difficulties experienced by consumers when switching supplier, or cancelling a service, that Ofcom has identified.

#### **Ofcom has failed properly to consider the risk of unintended adverse consequences**

- 6.102 Regulation often gives rise to unintended adverse consequences, which can significantly offset or eliminate any benefits achieved by regulating. It is therefore particularly important to consider the risk of such consequences arising as part of an assessment of the potential impact of proposed regulation.<sup>182</sup> This is recognised clearly in Ofcom's guidance on impact assessment:

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<sup>181</sup> The costs for the EC&R proposal were not estimated through the same process, but Moorhouse considers that these would, at a minimum, be £[•]-£[•] higher.

<sup>182</sup> As noted in the OECD's 'Introductory handbook for undertaking regulatory impact assessment':

*"Regulation will often cause people to change their behaviour and it is important to try to understand these changes. If regulation results in an increase in the price of a product (for example, by increasing product standards), people will usually respond by buying less of that product and switching instead to other substitute goods. Such substitution activity reduces the costs in utility terms to consumers, at least in the first instance. However, substitution effects may also create unintended problems.*

*For example reducing the risks in one area may create higher risks in another. An example of this is increasing the stringency of airline safety regulation. Such an action can be expected to reduce the number of deaths due to plane crashes. However, it will also increase the cost of flights. This increase in the cost of flights will cause some people to decide that they can no longer afford to fly and to drive to their destination instead. However, because car travel is much less safe than air travel, the increase in the number of road crash victims may well be greater than the reduction in air crash victims."*

*“A related issue is that of possible unintended consequences. In selecting and assessing the different options, our aim will be to think widely about the possible impacts, taking account of possible knock-on effects across the communications sector, including other parts of the value chain, and on existing regulation. By doing so, we will seek to minimise any unintended consequences, but it is important to be alive to the possibility that they may occur.”<sup>183</sup> (Emphasis added.)*

- 6.103 As noted above, Ofcom recognises the risk of increased slamming and erroneous transfers as a potential unintended consequence of its proposals.<sup>184</sup> However, there are two clear additional risks of unintended adverse consequences which Ofcom has not properly considered.
- 6.104 The first arises from the facts that (i) growing subscriber bases is extremely important to firms in the sector, and (ii) firms are likely to have numerous strategies available to them for attracting and retaining subscribers. Currently, firms are strongly incentivised to use methods of attracting and retaining subscribers that result in substantial benefits to consumers – such as via discounts for joining, right sizing, retention offers, and seeking to help consumers switch from rivals (for example via ‘switching squads’<sup>185</sup>). There is a significant risk that intervention that makes it more difficult to retain customers using the methods used today will induce firms to adopt different approaches to marketing that may be less beneficial to consumers.
- 6.105 Second, firms operating in the sector today are strongly incentivised to grow their subscriber bases, which results in intense competition among them. There is a realistic risk that regulation which has the effect of lowering the returns to customer acquisition could reduce firms’ incentive to compete aggressively for new customers. Accordingly, there is a risk that Ofcom’s proposals could result in weaker competition in the sector, to the detriment of consumers.

**It is likely that Ofcom’s concerns could be addressed in a more proportionate way**

- 6.106 Ofcom reaches a “*provisional view*” that:

*“existing cross platform switching arrangements create a number of process-related difficulties for switchers, and can deter some consumers from switching.”<sup>186</sup>*

- 6.107 Sky agrees with that view. However, Ofcom’s proposals represent a sledge-hammer being used to crack a small nut. Given the relative small scale of the detriments caused by the problems it has identified, requiring significant, costly changes to switching processes is a disproportionate regulatory response. Instead, Ofcom should consider targeted, low cost ways of addressing those issues.
- 6.108 It is also relevant that Ofcom’s proposals would take a considerable period to implement: Ofcom proposes an 18 month implementation period after further consultation, but that may underestimate the time required to implement these changes. By contrast, several of the proposals below could be implemented far more quickly.

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Page 8, OECD handbook. (<https://www.oecd.org/gov/regulatory-policy/44789472.pdf>.) In this case, the risk is that regulation causes firms to change their behaviour in ways that result in unintended problems.

<sup>183</sup> Paragraph 5.32, Better Policy Making.

<sup>184</sup> See, for example, paragraph 4.5.

<sup>185</sup> See, for example, Sky’s ‘Sky Switch Squad’ website, at: <http://www.sky.com/shop/switching-to-sky/broadband/>. The Sky Switch Squad was launched in 2013 with the objectives of (i) providing reassurance to customers that switching is not a difficult exercise (ii) increase focus on resolution of difficulties, and (iii) to provide more proactive communications to customers about what they should expect during a switch.

<sup>186</sup> Paragraph 1.4.

6.109 Indeed, one of the most striking features of the Consultation is the implicit assumption that the only solution to the difficulties that Ofcom has identified is major changes to switching processes of this type. It is evident that, at an early stage in the process, Ofcom commissioned consultants (i.e., Cartesian) to construct proposals for new switching processes. No consideration at all appears to have been given to non-process-related interventions, or interventions of a different form (such as those discussed further below). This is a significant flaw in Ofcom's approach to these issues. In particular, given the cost that Ofcom is likely to have incurred, and the effort that has been invested in constructing the Cartesian proposals, there is a significant risk that Ofcom will be biased towards the carrying forward of those proposals, and therefore not in practice consulting with an open mind (in breach of requirements to do so and the principle that public authorities should exercise fairness in the performance of their functions).

***In relation to unwanted breaks in service, Ofcom proposes to paper over the cracks***

6.110 It is unfortunate that neither of Ofcom's two rounds of consumer research were effective in clearly identifying the reasons that breaks in service occur when switching – despite this being one of the key stated objectives of Ofcom's second round of consumer research, focused on loss of service.<sup>187</sup>

6.111 It is readily apparent to Sky that one of the key causes of unwanted breaks in service when switching provider in the communications sector is service failures by Openreach. Service delivery problems on the part of Openreach are well documented (in particular by Ofcom), and widely acknowledged to be a significant issue even by BT's senior management.<sup>188</sup> In part, these problems stem from inadequate processes – which result for example in missed engineer appointments – but they are also linked significantly to reliance on an aged copper network which is prone to faults. Given the substantial amount of evidence available on Openreach service problems, it is wholly implausible that this is not a significant source of unwanted breaks in service when UK consumers undertake a switch of provider that involves Openreach – which comprise a significant proportion of all switching.

6.112 One of the key problems with Ofcom's proposals in relation to loss of service is that it essentially papers over the cracks of these service problems. The proposed solution is to require the existing provider to continue providing service until the new provider's service has been installed and is operating properly – regardless of how long that takes, or how often the service problems occur. It does nothing to address the underlying cause of quality of service-related breaks in service provision when switching. It is readily apparent that focusing on improving the underlying service quality problems at Openreach would provide a better and sustainable approach to addressing what is likely to be a major cause of breaks in service when switching.

6.113 In this context, Sky notes that improving Openreach's quality of service is a major focus of effort on the part of Ofcom and BT. For example, in its Initial Conclusions document in Ofcom's Strategic Review of Digital Communications, Ofcom stated:

*“Central to our strategy will be tougher minimum quality requirements on Openreach, rigorously enforced. We intend to impose a floor for service quality that rises over time, taking account of consumers' expectations. If Openreach fails to meet these standards, it will face substantial fines. Where required, we will establish minimum standards in new areas, such as for faults and incomplete orders, to complement existing requirements for improved repair and*

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<sup>187</sup> Slide 2 of the Loss of service research describes one of its objectives as being to “*Understand the reasons for loss of service*”. Despite this, no information at all is provided in the deck on this issue. The need to include this as an objective in a second round of consumer research was the result of the first round of research not providing clear answers on this issue.

<sup>188</sup> For example, ‘I know BT broadband can be infuriating - and I'm the boss of BT’, The Daily Telegraph, 23 May 2016. (<http://www.telegraph.co.uk/news/2016/05/23/i-know-bt-broadband-can-be-infuriating---and-im-the-boss-of-bt/>)

*installation times.*<sup>189</sup>

6.114 Similarly, in a document published in September 2015, Openreach committed to raising “*our service standards, offering quicker installations and faster fixes*”.<sup>190</sup>

6.115 The more successful are these approaches, the less need for costly intervention to address loss of service when switching.

***Alternative approaches to addressing issues are available that Ofcom has not considered***

6.116 One of the key flaws in Ofcom’s policy process has been Ofcom’s decision at an early stage that the most appropriate way forward is regulation to require significant changes to switching and cancellation processes, and then to commission consultants to design such processes. This has taken Ofcom down a path where Ofcom is now consulting only on options that are disproportionate responses to the difficulties that it has identified.

6.117 Ofcom should instead consider an alternative package of low-cost, well-targeted actions that can be implemented quickly.

***Potential measures to address loss of service when switching***

6.118 At their heart, Ofcom’s proposals aim to establish a process of ‘make before break’ when switching platforms. Ofcom defines this as a process where “*the losing provider does not stop the consumer’s service until the gaining provider has confirmed directly to the losing provider that they have activated the new service*”.<sup>191</sup> However, it is important to recognise that any form of ‘make before break’ requirement would reduce loss of service. Ofcom’s definition assumes co-ordination by the gaining provider, but the same result or effect could be achieved, for example, by requiring the old provider to keep services running until told by the customer to stop.

6.119 In this regard it is instructive that the European Commission has recently proposed new rules on switching and ‘make before break’ which prescribe the outcome but not the process used to achieve that outcome.<sup>192</sup> Processes are more likely to be effective if providers can leverage their own expertise to determine how best to achieve a desired outcome.

6.120 Such an approach is more in accordance with a number of important matters to which Ofcom must have regard, under section 3(4) of the Act, in performing its duties (and to which Ofcom fails to have regard to in the Consultation). In particular,

- (a) the desirability of promoting and facilitating the development and use of effective forms of self-regulation; and
- (b) the desirability of encouraging investment and innovation in relevant markets.

6.121 To the extent that self-regulation and industry coordination fail to move matters forward, Ofcom could use its powers to stipulate a simple ‘make before break’ rule (for example, in the form of a new General

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<sup>189</sup> Paragraph 1.35, ‘Making communications work for everyone: Initial conclusions from the Strategic Review of Digital Communications’, Ofcom, 25 February 2016.

<sup>190</sup> ‘Our Charter, Building Britain’s Connected Future’, Openreach, September 2015. (<https://www.btplc.com/Sharesandperformance/Presentations/Presentations/keycompanyannouncements/downloads/OpenreachCharter.pdf>.)

<sup>191</sup> Annex 5.

<sup>192</sup> Article 99(1), ‘Proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code’, European Commission, 14 September 2016.

Condition), whilst preserving provider discretion on how to achieve that outcome.

***Improved provision of information to consumers***

- 6.122 Many of the issues underlying the ‘difficulties’ identified by Ofcom are linked, either directly or indirectly, to issues concerning consumer awareness – for example, in relation to the implications of switching, or what they have to do to switch. Whilst, as set out in Section 4, above, consumers today have numerous sources of reliable information available to them, it may be the case that (i) there is scope for the provision of more, or improved information to consumers, and/or (ii) there would be benefits to raising consumer awareness of switching options (for example via firms’ marketing programmes, or an industry-funded advertising campaign).
- 6.123 Sky would welcome the opportunity to discuss with Ofcom and other stakeholders what quick wins could be delivered in this context.

***Difficulty contacting existing providers and/or cancelling services***

- 6.124 As discussed above, Ofcom is already undertaking an own-initiative monitoring and enforcement programme into cancellation and termination arrangements. This programme gives Ofcom the opportunity properly to consider any difficulties experienced by consumers cancelling their services, and well-targeted proportionate remedies to any such difficulties. Accordingly, Sky considers that any further action in this area should await the conclusion of this programme.
- 6.125 Notwithstanding this view, if action is to be taken in relation to increasing the range of options available to consumers to cancel their existing services, as in the case of ‘make before break’ rules discussed above, it would be preferable for Ofcom to specify the desired outcome, and leave the delivery of that outcome to firms, rather than seeking to specify the precise methods that firms must use in dealing with their customers.
- 6.126 It is critical that any further action in this area respects (i) the preference of the majority of consumers to be able to receive retention offers, and (ii) firms’ need to ensure that they are in contact with a customer in order to ensure that the person has the authority to cancel or alter the service.

**Summary**

- 6.127 Ofcom has not satisfied its statutory duty to demonstrate to an adequate standard that either of the two options it has put forward for new regulation of switching and cancellation processes is proportionate. Ofcom’s preferred GPL proposal is plainly a disproportionate solution to any difficulties when switching provider, or cancelling a service, that Ofcom identifies in the Consultation. Ofcom should now consider more proportionate ways forward.



## SECTION 7: OFCOM'S PROPOSALS ARE NOT CONSISTENT WITH CONTRACT AND CONSUMER LAWS

- 7.1 In the Consultation, Ofcom has failed properly to consider whether its proposals are consistent with existing contract and consumer laws, whether it has the powers to over-ride those laws and whether its interpretation of those laws would be supported by the Courts.
- 7.2 This omission is surprising given that the USD makes clear that rules on switching are without prejudice to other EC rules on consumer protection including those laid down in the Unfair Contract Terms Directive.<sup>193</sup> Any measures that Ofcom proposes therefore need to be consistent with such rules.
- 7.3 This Section 7 explains how:
- (a) Ofcom's GPL and EC&R proposals would override reasonable and well understood notice periods that provide benefits and certainty for consumers; and
  - (b) Ofcom's GPL proposal is inconsistent with the legitimate interest providers may have in holding the customer to their minimum term.

### **Ofcom's proposals would over-ride reasonable and well understood notice periods that provide benefits and certainty for consumers**

- 7.4 Ofcom's description of the interaction between contractual notice periods and switching processes fails to provide a coherent rationale for why Ofcom believes it is consistent with the CRF to propose changes to switching processes that undermine reasonable contractual commitments freely entered into by consumers. The approach Ofcom outlines is clearly inconsistent with the language of the USD.
- 7.5 Under its proposed EC&R process, Ofcom envisages a transfer period of between two and ten working days. Under its proposed GPL process, Ofcom envisages a ten working day transfer period. Ofcom says "*it is not clear to us that a longer period of contractual notice to the losing provider would be justified*".<sup>194</sup> Ofcom further says that the new provider can disregard any contractual notice period when setting a switch date,<sup>195</sup> and that the contractual notice periods "*otherwise owed to the old provider would not undermine the switching process*".<sup>196</sup>
- 7.6 In each case Ofcom outlines its provisional view that providers are not justified in imposing a contractual notice period of longer than ten working days.<sup>197</sup>
- 7.7 At the outset it should be noted that there is an inconsistency within Ofcom's EC&R proposal. A transfer period of two working days where the new provider can disregard the contractual notice period when setting the switch date means that either: (i) there is a *de facto* limitation on notice periods set at *two* working days (despite Ofcom's view that notice periods of ten working days are justified); or (ii) consumers will remain liable for "double payments" for up to eight working days. It appears that Ofcom intends the first of these, which means there is a contradiction between what Ofcom itself says is justified and what it proposes to allow in practice.<sup>198</sup>

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<sup>193</sup> Article 1(4), USD referring to Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

<sup>194</sup> Paragraph 4.19. The point is repeated by Ofcom when discussing the GPL proposal at paragraph 4.29.

<sup>195</sup> Figure 8, Step 2.

<sup>196</sup> Figures 10 and 13.

<sup>197</sup> Paragraphs 4.19 (EC&R) and 4.29 (GPL).

<sup>198</sup> In the section headed "Double paying", Ofcom says the contractual notice period "*would not undermine the switching process*". We interpret this to mean Ofcom envisages double paying for no more than one day. This means there is a *de facto* limitation on contractual notice periods set at two working days.

- 7.8 More fundamentally, in the context of both its EC&R and GPL proposals, Ofcom has failed to explain why it believes that intervening in a manner that undermines and ignores reasonable contractual commitments freely entered into by consumers is consistent with the USD. Recital 47 of the USD says that switching procedures should “*not preclude the imposition of reasonable minimum contractual periods in consumer contracts*”. Ofcom’s view appears to be that the transfer period should ‘trump’ any contractual notice period agreed with the customer.<sup>199</sup> However, this approach is precisely the reverse of what the USD envisages. The USD is clear that aspects of the switching process such as the transfer period do not over-ride reasonable notice periods.
- 7.9 A fair contractual notice period needs to be reasonable<sup>200</sup>, but it is for the Courts rather than for Ofcom to determine what a fair term is.
- 7.10 Sky considers that notice periods of up to 31 days are reasonable – a position supported by Ofcom previously (including in its consumer advice)<sup>201</sup> and by the Office of Fair Trading when assessing unfair terms in consumer contracts.<sup>202</sup>
- 7.11 In addition to the time providers need to carry out the necessary administration of contract termination and final billing, there are other reasons why a 31 day period benefits consumers both directly and indirectly, particularly in the case of pay TV services. For example:
- (a) to give customers a proper opportunity to receive, read and understand the implications of ending their contract. In some cases this may only take a few days but in other cases, particularly during holiday periods, it may take a lot longer for consumers to get round to reading this information;
  - (b) to allow providers to price pay TV content based on certainty that the customer will pay for that content for a minimum period of at least 31 days. This applies particularly in the case of premium pay TV content (such as sports and movie services) that are often made available on a monthly “no contract” basis. This pricing model could be undermined by shorter notice periods; and
  - (c) to meet the reasonable expectation consumers have of 31 days’ notice of material contractual information. There is a clear inconsistency between Ofcom’s rule requiring that consumer’s be given at least one month’s notice in writing of material contract *changes*,<sup>203</sup> and Ofcom’s proposals that would mean consumers have considerably less notice of important contractual information when switching.
- 7.12 Ofcom does not properly consider these wider factors when discussing contractual notice periods and instead focusses on a narrow set of factors relating to provider’s internal processes and contract administration.<sup>204</sup> In doing so, Ofcom appears to interpret “reasonable” as meaning “as short as possible” without regard to other factors that demonstrate how a 31 day notice period has benefits for

<sup>199</sup> For example, Ofcom asserts that “*a longer contractual notice period should not undermine the switching process...*” (paragraph 4.19). This view contradicts Ofcom’s earlier statement in the Consultation that “*The consumer should generally expect, for example, to be bound by fair contract terms and the obligations they create*” (paragraph 2.30).

<sup>200</sup> See, for example, paragraph 9 of Part 1, Schedule 2, Consumer Rights Act 2015. (Explaining that terms that require the consumer to give notice “*unreasonably early*” may be regarded as unfair).

<sup>201</sup> Paragraphs 8.33-8.34, ‘Ofcom review of additional charges Including non-direct debit charges and early termination charges’, Ofcom, 19 December 2008 (“Additional Charges Statement”). See also Ofcom’s additional charges advice to consumers: <http://consumers.ofcom.org.uk/phone/problems-and-complaints/additional-charges/>.

<sup>202</sup> Annex A, Group 8, ‘Unfair contract terms guidance - Guidance on the unfair terms provisions in the Consumer Rights Act 2015’, CMA, 31 July 2015. (Examples of terms that were amended by the OFT includes shortening a three month notice period to one month – these examples are expressly referred to by the CMA in its guidance at paragraph 5.16.6).

<sup>203</sup> See, for example, General Condition 9.6(a).

<sup>204</sup> Paragraph 4.7.

consumers that would be lost if Ofcom's proposals were implemented.

**Ofcom's GPL proposal is inconsistent with the legitimate interest providers may have in holding the customer to their minimum term**

7.13 Ofcom appears not to have considered that the current provider may have a legitimate interest in holding the customer to the contract they agreed (i.e., affirming the contract) if the customer tries to cancel their service in breach of contract in their minimum term.

7.14 Under a GPL process, the gaining provider will not know if the customer is in a minimum term before the switching process commences unless the customer mentions it. The losing provider may have a legitimate interest in affirming the contract if a customer tries to cancel in their minimum term. This means a proportion of switches will be commenced by the gaining provider even though the existing provider can legitimately refuse to end the existing service contract.

7.15 Ofcom commented on contract affirmation as part of its review of additional charges (such as ETCs). Ofcom said:

*"...[W]here a consumer breaches a fixed term contract, the innocent supplier has the right to decide whether (a) to treat the contract as at an end and claim damages; or (b) to 'affirm' the contract: to treat it as continuing and continue to perform his obligations. ... We acknowledge there is some (controversial) case law that supports this view. However, we consider that there is scope to argue that the limitations to the rules in the relevant case law apply. In particular, a supplier could not affirm the contract and claim the retail price because doing so would depend on the co-operation of the consumer (e.g. to maintain receipt of the service), in circumstances where he need not do so (indeed, is entitled to port his service to another supplier). And, it is not clear that a supplier would have any legitimate interest in continuing the contract, rather than claiming damages ...."*<sup>205</sup>

7.16 This analysis is not valid in the cross platform switching context for three reasons.

7.17 First, subsequent case law has clarified the test on contract affirmation as follows:

*"... an innocent party will have no legitimate interest in maintaining the contract if damages are an adequate remedy and his insistence on maintaining the contract can be described as "wholly unreasonable", "extremely unreasonable" or, perhaps, in my words, "perverse"."*<sup>206</sup>

7.18 Therefore, an innocent party will have a legitimate interest in affirming the contract if damages are not an adequate remedy and maintaining the contract is neither wholly or extremely unreasonable nor perverse.

7.19 Now that the test has been clarified, Ofcom's assertion in its Additional Charges Statement that case law on contract affirmation is "*controversial*" is no longer valid.

7.20 Second, to assert that affirmation is not a valid course of action "*because doing so would depend on the co-operation of the consumer (e.g. to maintain receipt of the service)*" is simply inaccurate. The supplier is already supplying the service and the co-operation of the consumer is not needed to continue doing

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<sup>205</sup> Paragraphs 6.127-6.128, Additional Charges Statement. *op. cit.*

<sup>206</sup> Paragraph 44, *Isabella Shipowner SA v Shagang Shipping Co Ltd, The Aquafaith* [2012] EWHC 1077 (Comm). The concept of 'legitimate interest' was also central to the Supreme Court's reasoning in *ParkingEye* which equally casts doubt on some of the conclusions reached by Ofcom in its Additional Charges Statement. *Cavendish Square Holding BV v Makdessi and ParkingEye Ltd v Beavis* [2015] UKSC 67.

so. The consumer may prefer not to receive the service, but that does not mean it is wholly unreasonable, extremely unreasonable or perverse for the provider to continue supplying a service that the customer can continue to receive,<sup>207</sup> and charging for it on the basis of a contract freely entered into by the consumer.

7.21 Third, Ofcom does not know and cannot assume that damages (e.g., ETCs) are an adequate remedy. Pay TV services in particular have high up front cost associated with them (e.g., for installation and the provision of a set top box). Providers may absorb those costs initially on the expectation that the customer will remain a customer and pay a monthly subscription for at least the minimum term and, in many cases, for considerably longer. Equally, providers may preserve flexibility for customers to change their package during their minimum term to account for seasonal variations in demand for types of content. These business models are good for consumers, increasing choice and flexibility and reducing up-front costs. [•]

7.22 The wording of USD Article 30 is clear: it says “*without prejudice to any minimum contractual period*”. If the intention was that switching processes should be without prejudice to ETCs only then the provision would have said that. By stipulating “*minimum contractual period*” this preserves national rules relating to contract, including breach of contract.<sup>208</sup> This means that under English law, the provider (as the innocent party) cannot be forced to accept ETCs, instead it can choose whether to accept the ETC as damages or affirm the contract where it has a legitimate interest in doing so.

7.23 Switching processes need to take providers’ policies on contract affirmation into account. With a GPL process in particular, it is likely that a material number of switches, particularly pay TV switches, will be started by the gaining provider even though the existing provider can legitimately refuse to end the contract. This will lead to consumer confusion and has costs (e.g., the switching process needing to be stopped after it has been started by the gaining provider) that would not arise if the customer had spoken to their existing provider first.

## Summary

7.24 Ofcom’s proposals are inconsistent with existing contract and consumer laws. Ofcom has a duty to regulate in a consistent way and should not mandate processes that over-ride fair contractual notice periods, which have many benefits for consumers, or ignore a provider’s legitimate interest in affirming a minimum term freely entered into by a consumer. Ofcom’s failure properly to consider or address these issues is further indication that Ofcom has failed to properly consider the adverse effects of its proposals as explained in Section 6 above.

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<sup>207</sup> We also point out that, in its Additional Charges Statement, Ofcom says that a customer who ports their service won’t be able to receive the losing provider’s service and this would be a factor in assessing legitimate interest. This is not a factor with cross platform switching where consumers can receive the same type of service from different providers at the same time (e.g., pay TV with different content from different providers).

<sup>208</sup> Article 1(4), USD (measures are “*without prejudice to ... national rules in conformity with Community law*”).

## SECTION 8: SUMMARY AND CONCLUSION

- 8.1 Ofcom's Consultation sets out proposals to introduce significant new regulation of switching and cancellation processes within the UK's telecommunications and pay TV sectors.
- 8.2 Ofcom's view in the Consultation that its proposed new regulation would apply to switching and cancellation of pay TV services is fundamentally flawed. It is based on an erroneous legal interpretation. Ofcom does not have the legal authority to impose such regulation.
- 8.3 In relation to cross platform switching of telecommunications services, and/or bundles of telecommunications services and other services, even leaving to one side the significant problems with the evidence and analysis relied upon by Ofcom, interpreted properly the evidence cited by Ofcom demonstrates that the difficulties experienced by consumers when undertaking such switches are not significant, and that consumer satisfaction with those processes is high. The processes do not work perfectly in every case, but that is an unrealistic and unreasonable standard to judge them against. The issues that Ofcom identifies, and the extent of 'difficulties' that they create for consumers, are within the tolerance of the difficulties that any switching process might be expected to generate.
- 8.4 Given this, and having regard, in particular, to:
- (a) the relevant context set out in Section 4, above – in particular, the competitiveness and dynamism of the relevant sectors, consumers' overall favourable view of switching processes in these sectors, the straightforward nature of switching and cancellation processes, and the plethora of reliable information available to consumers; and
  - (b) Ofcom's regulatory principle of acting with a bias against regulation,
- Ofcom's conclusion that new regulation in relation to these matters is needed is not sustainable. Ofcom's conclusion fails to meet its duty under section 3(3) of the Act to demonstrate that proposed regulation is targeted only at cases in which action is needed.
- 8.5 In relation to Ofcom's proposals to impose regulation on switching of pay TV services, and cancellation of pay TV services, without prejudice to the fact that Ofcom does not have the power to regulate these activities, Ofcom has presented little evidence, and certainly no evidence capable of withstanding profound and rigorous scrutiny, that consumers experience the process-related difficulties discussed in the Consultation in relation to these activities. As a result, Ofcom has again manifestly failed to meet its duty under section 3(3) of the Act to demonstrate that regulation of these activities is targeted only at cases in which action is needed.
- 8.6 Furthermore (and again without prejudice to the points set out above), Ofcom has also failed to demonstrate to an adequate standard that either of its two proposed interventions are proportionate responses to the difficulties that it has identified. All the relevant available evidence indicates that both of those proposals would be disproportionate responses to the difficulties that Ofcom has identified. In particular:
- (a) the GPL proposal would not be an effective solution to the issue of loss of service when switching, which Ofcom considers to be the main source of detriment to consumers in such switches; and
  - (b) Ofcom's analysis significantly overstates the benefits associated with its proposals, in part by ignoring significant detriments to consumers that they would cause, and by underestimating both their implementation costs and ongoing compliance costs.
- 8.7 Moreover, Ofcom has failed to have proper regard to the significant risk of adverse unintended

consequences associated with its proposals.

- 8.8 Ofcom has therefore failed to provide a cogent case for intervention in either case.
- 8.9 In these circumstances, it is likely that the best option available is that which Ofcom conspicuously fails to consider in the Consultation, contrary to all relevant guidance on this issue: the option of not intervening.
- 8.11 If, however, Ofcom continues to believe (contrary to the relevant evidence) that intervention is necessary, it should now consider options for better targeted, more proportionate intervention than those put forward in the Consultation.
- 8.12 Sky is committed to ensuring consumers can easily switch to the provider that best meets their needs and budget. We look forward to working with Ofcom, in a spirit of co-operation and open-mindedness, on addressing any specific concerns which Ofcom believes it has identified in the most appropriate way.

**Sky**

**October 2016**

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## **ANNEX 1: RELEVANT EXAMPLES OF FIRMS' CONSUMER MARKETING**



**ANNEX 2: REPORT FROM CHARLES RIVER ASSOCIATES ON OFCOM'S ANALYSIS OF THE BENEFITS OF ITS PROPOSALS**

**ANNEX 3: REPORT BY INDEPENDENT EXPERT STATISTICIAN, PHILIP MALIVOIRE, ON OFCOM'S 2015 CONSUMER SURVEY**

**ANNEX 4: MOORHOUSE CONSULTING REPORTS ON THE COSTS OF IMPLEMENTING OFCOM'S PROPOSALS**

## ANNEX 5: ECONOMIC ANALYSIS OF THE EFFECT OF SWITCHING COSTS ON COMPETITION

A5.1 The Consultation contains a short consideration of economic analysis of the relationship between switching costs and competition.<sup>209</sup> The central element of this passage is a quotation from a 2010 Ofcom document, which asserted that:

*“overall the academic literature’s position on switching costs is that “on balance switching costs seem more likely to increase prices”<sup>210</sup>.*

There are two notable problems with this quotation.

A5.2 First, Ofcom fails to note that it is taken from a Consultation. Several key respondents (including Sky<sup>211</sup>, BT and Virgin Media) were highly critical of Ofcom’s summary of economic analysis of switching costs in the 2010 Consultation. These criticisms, and Ofcom’s response to them, were discussed in Ofcom’s consultation on switching on the Openreach network published in February 2012<sup>212</sup>.

A5.3 It is disingenuous for Ofcom to quote its views that were subject to comment from consultees, and subject to later elaboration, without any acknowledgement of this fact.

A5.4 In its subsequent discussion of economic analysis of the relationship between switching costs and competition in the February 2012 document, Ofcom conceded that the economic literature on this issue was “*nuanced*”, and stated that Ofcom:

*“recognised that the literature (especially the earlier theoretical literature) identifies situations in which switching costs may weaken competition as well as situations in which they may have the opposite effect.”<sup>213</sup>*

A5.5 Ofcom asserted that its consideration in the earlier consultation had sought “*to reflect those nuances*”<sup>214</sup>. In Sky’s view, however, if that was Ofcom’s intention, it had not done so successfully. Regardless, it is wholly inappropriate for Ofcom, as it does in the current Consultation, now to revert to a stance that fails to reflect the fact that the economic literature on switching costs is nuanced.

A5.6 The reality is that standard economic analysis recognises that the effect of switching costs on competition is ambiguous and situation-dependent.<sup>215</sup> It is not possible to make a general statement that higher switching costs lead to reduced competition.

A5.7 Second, a considerable period of time – over six years – has passed since the 2010 consultation. It would be surprising if there had been no further developments of note in thinking on this subject over that period. It appears that Ofcom has made no effort to evaluate whether or not this is the case. In

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<sup>209</sup> Paragraphs 5.69 – 5.71.

<sup>210</sup> Paragraph 5.69.

<sup>211</sup> Sky’s response was accompanied by a report from Plum Consulting which also contained a critique of Ofcom’s analysis.

<sup>212</sup> ‘Consumer switching - A consultation on proposals to change the processes for switching fixed voice and broadband providers on the Openreach copper network’, Ofcom, February 2012. ([https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0022/71455/condoc.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0022/71455/condoc.pdf).)

<sup>213</sup> Paragraph A6.6, 2012 Consultation.

<sup>214</sup> Ofcom’s commentary also included a lengthy, though opaque, discussion of why it did not consider that economic analysis that shows that switching costs can result in increased competition is relevant to telecommunications services.

<sup>215</sup> A brief description of the key drivers in this literature is set out in ‘Harmonising consumer protection in the EU: Is it desirable?’, Oxera, June 2014. (<http://www.oxera.com/Latest-Thinking/Agenda/2014/One-size-fits-all-Consumer-protection-in-telecoms.aspx>.)

fact, a relatively brief examination indicates that there have been further economic articles since 2012 that consider the issue of the impact of switching costs on competition.<sup>216</sup>

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<sup>216</sup> See, for example, Luis Cabral, 'Dynamic Pricing in Customer Markets with Switching Costs', New York University and CEPR, August 2015. (<http://luiscabral.net/economics/workingpapers/scostsMar2015.pdf>.)

## ANNEX 6: COMMENTS ON OFCOM'S 2015 CONSUMER SURVEY

- A6.1 This annex provides further comments on the consumer survey carried out by BDRC for Ofcom in 2015.
- A6.2 As noted in Section 6, above, the consumer research was carried out generally to a high standard. Notwithstanding these observations, however, there are clear problems with the research itself, as follows<sup>217</sup>:
- (a) there is considerable bias within particular questions towards the identification of problems;
  - (b) the sub-samples are often too small to provide meaningful information on important issues;
  - (c) there is considerable ambiguity in many of the questions;
  - (d) people were permitted to answer the questionnaire even though they are not appropriately involved in the decision-making process within their household; and
  - (e) due to routing problems in the survey, large numbers of respondents were asked questions that did not apply to them.

Cumulatively, these problems result in significant concerns about the overall reliability of the conclusions that Ofcom draws from its research. We discuss each of them further below.

- A6.3 Before doing so we note that the survey involved asking people about their experience of switching provider in the past two years. In many cases, they were asked about switches that were not their most recent switches. Asking for the details of switches that occurred up to two years ago, or that were not their most recent switches, is likely to be challenging for many people. Whilst this does not cause the results of the survey to be unreliable, it does suggest exercising some caution in relation to how much weight is placed on its results.

### There is considerable bias within particular questions towards the identification of problems

- A6.4 Best practice in survey design requires that questions do not lead the respondent in a particular direction. For example, the CMA's guidance states:

*"A question that is presented in a way that leads consumers to one response in preference to another (irrespective of their actual view) is biased, and unlikely to be of evidential value. Efforts should be made during survey testing and piloting to ensure that each question is as clear, unambiguous and neutral as possible."*<sup>218</sup>

This means that care must be taken to phrase questions in as neutral a way as possible. Many of the questions in the survey fail this test.

- A6.5 For example, question 2C2A, which is central to the survey, asks people who had switched services:

*"which, if any, of these did you experience difficulty with...?"*

Respondents were then presented with a list of issues that they may potentially have experienced a problem with, and asked to determine whether each was (i) a "Major difficulty", (ii) a "Minor difficulty", or "Not a difficulty at all".

- A6.6 This cannot be described as being "as neutral as possible". First, a neutral approach would have avoided leading consumers to consider the "difficulty" they experienced. For example, a question that simply asked consumers about their view of each of the issues (e.g., "contacting your new provider"),

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<sup>217</sup> We have focused here on the most important problems with the survey. The list is not exhaustive.

<sup>218</sup> Paragraph 3.27, 'op. cit.

and enabled them to pick from a list of alternative descriptions would have been a more neutral, unbiased approach to this question.

- A6.7 Second, best-practice survey design would dictate that respondents are permitted to express a range of attitudes ranging from negative to positive, with an equal number of negative-skewing and positive-skewing options to choose from to prevent biasing the answers. Instead, in these types of questions, respondents were given two negative options (“*Major problem*” and “*Minor problem*”) and one neutral option (“*Not a difficulty at all*”). The option of expressing a positive view of the issue simply was not given to respondents – strongly reinforcing the bias in the overall approach to the question.
- A6.8 The clear consequence of this approach is that responses are likely to be biased in favour of the finding of “*difficulties*” with elements of the switching process, and therefore “*unlikely to be of evidential value*”.

### **Sub-samples are often too small to provide meaningful information on important issues**

- A6.9 Ofcom’s inquiry covers a number of different types of switches within the UK communications and pay TV sectors. It is particularly important to obtain good data relating to each of these different types of switches in order to avoid unnecessary or disproportionate regulation. For example, it may be the case that consumers experience significant difficulties switching particular services, but little or no difficulty switching others. Applying new regulation to the latter would, therefore, be unnecessary.
- A6.10 One of the most obvious problems with the survey, however, is that sub-samples relating to different types of switching experience are often too small to provide meaningful results on important issues to which the survey is addressed. For example, out of a total of 1152 respondents, the survey identified only 52 triple play cross platform switchers and 15 standalone pay TV switchers that had an unwanted break in service when switching provider.
- A6.11 The problem of small sub-sample sizes is readily apparent in BDRC’s presentation of the results of the survey to Ofcom, where there are numerous references to “*low base size*”, and statements that base sizes are “*too low to show*” results for. It is even more apparent in the full data tables, where there are over 500 references to “*small base*”.
- A6.12 The problems with small sample sizes in statistics are well known. Effectively, small sample sizes give rise to a significant risk that those sampled are unrepresentative of the wider population. Ofcom should not be seeking to base important policy decisions on potentially unrepresentative samples. Not only is this bad practice, but it flies in the face of Ofcom’s principle of acting with a bias against regulation.

### **There is considerable ambiguity in many of the questions**

- A6.13 The CMA’s guidance states:

*“Any confusion or ambiguity in the phrasing of a consumer survey question is likely to reduce the evidential weight that can be put on responses to it.”<sup>219</sup>*

- A6.14 One of the most significant flaws in the consumer questionnaire is that many of its questions are ambiguous, and therefore it is impossible to determine what respondents may have had in mind when they answered the questions. For example:
- (a) Respondents were asked whether they categorised “*paying a charge to exit your contract early*” as a “*Major difficulty*”, “*Minor difficulty*” or “*Not a difficulty at all*”. For those that responded that

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<sup>219</sup> Paragraph 3.26, *op. cit.*

it was a difficulty, it is impossible to determine whether that was because (for example): (i) they found the process of paying the charge difficult, (ii) they found it difficult to pay the charge on the basis of affordability, or (iii) they were simply annoyed that they had to pay an entirely legitimate early termination charge.

- (b) In a number of cases respondents were asked about problems they had with equipment during the installation process. For example, in question QG12, respondents were asked why they had an unwanted break in service, with one of the options being: “*Problems/a fault with the equipment (e.g. satellite dish, cable box, broadband router)*”. Particularly in the case of triple play switches, such a question is uninformative about which type of equipment resulted in their loss of service – whether it was that related to the pay TV element of the service, or the broadband and telephony element of the service. Similarly, at question QC2A, respondents were asked whether “*Other devices/products you own not working with new service*” was a major difficulty, minor difficulty or no difficulty at all when they switched. Responses to this question that indicate that this was a difficulty provide no meaningful information for the purposes of Ofcom’s survey.
- (c) Respondents who said they experienced difficulties contacting their new provider were asked the reason for this (question QC2AC). A number of reasons were listed: (1) Length of wait to speak to someone; (2) My instructions not being followed; (3) Difficult getting to speak to right person; (4) They were unable to help me; (5) They provided me with the wrong information; and (6) It took multiple calls to resolve a query. Many of these responses – specifically 2, 4 and 5 - are not difficulties *contacting* the new provider and instead are difficulties that might arise *after* the respondent had contacted the provider.

**People were permitted to answer the questionnaire even though they are not appropriately involved in the decision-making process within their household**

A6.15 It is standard practice in surveys of this type to ensure that those answering the questions are closely involved in the decisions covered by the survey. In recognition of this, the first screening question in the survey asked:

*“For which, if any, of the following services are you solely or jointly responsible for deciding which provider to use?” (QA1)*

A6.16 However, Ofcom then screened out only (i) those respondents who were not responsible for all of the three triple play services, and (ii) those who said they did not know – leaving a survey in which 80 of the 1132 respondents had insufficient decision-making power for the switch they were being questioned on. By way of example, in relation to cross platform triple play switches, 19 respondents indicated that they did not have decision-making responsibility for one or more of the constituent components of the package.

A6.17 This approach is clearly erroneous.

**Due to routing problems in the survey, large numbers of respondents were asked questions that did not apply to them**

A6.18 The survey included complex routing processes. This had a number of benefits, in particular: reducing the amount of questions each respondent was exposed to by only asking them relevant questions, and capturing maximum information from the sample base while minimising inconsistent responses and respondent fatigue.

A6.19 However, such complex routing requires careful checking prior to fieldwork to ensure that it works properly.



A6.20 We have examined only one question to determine whether the routing worked properly, and found that it did not. Question QC2A asked:

*“which, if any of these, did you experience difficulty with”*

A6.21 Routing was used to attempt to ensure that respondents were shown answer codes that were relevant to them, based on their earlier answers to question QC1A. However, that routing failed, resulting in large numbers of respondents being shown potential responses that were irrelevant to them.

A6.22 Such errors call into question the overall reliability of responses to questions in the survey that relied on the routing processes used.

# Annex 1: Relevant examples of consumer marketing



# BT consumer marketing

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<b>BT BROADBAND</b> <b>£5</b> 50% OFF Unlimited BT Broadband Includes Unlimited UK Weekend Calls Includes BT Sport Includes BT TV Starter + BT Infinity Plus	<b>BT INFINITY</b> <b>£10</b> 23% OFF Unlimited BT Broadband Includes Unlimited UK Weekend Calls Includes BT Sport Includes BT TV Starter + BT Infinity Plus	<b>BT INFINITY + BT TV</b> <b>£10</b> 23% OFF Unlimited BT Broadband Includes Unlimited UK Weekend Calls Includes BT Sport Includes BT TV Starter + BT Infinity Plus
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# Virgin Media consumer marketing

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 Visit a Virgin Media store | Go to [virginmedia.com](http://virginmedia.com) | Call 0800 052 0116

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Half price for 6 months on all these entertainment bundles.

<b>BIG EASY</b> 4 HD channels (BBC 1, 2, 4, 5) + BT Sport channels in HD + Ultra HD up to 10Mbps fibre optic broadband + Unlimited downloads <b>£24.49</b>	<b>BIG FUN</b> 4 HD channels (BBC 1, 2, 4, 5) + BT Sport channels in HD + Ultra HD up to 10Mbps fibre optic broadband + Unlimited downloads <b>£40.120</b>	<b>BIG KAHUNA</b> 120+ channels with 100+ TV to HD + BT Sport channels in HD + Ultra HD up to 10Mbps fibre optic broadband + Unlimited downloads <b>£55.127.50</b>
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Get quick. The curtain comes down 31st March.  
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**THE A-LIST SALE** 12 month contract

All our entertainment bundles now half price for 6 months. Hurry - offer ends 30th October.

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**On Virgin TV**

**All your entertainment, brilliantly connected.**

Now with one year of welcome discounts and our clever TiVo® box.

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--	---	--

All our bundles are now on a 12 month contract.

Hurry - offer ends 30th October.  
[virginmedia.com](http://virginmedia.com) | 0800 052 0740 | Virgin Media store

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# TalkTalk consumer marketing

**TalkTalk** TV, broadband & mobile

Hurry! Free broadband offer ends 28<sup>th</sup> September

**FREE** for 18 months  
£17.00 monthly rental applies

Totally unlimited broadband  
 The Boss of Broadband Deals

- Broadband up to 20Mbps
- Speed of up to 10Mbps
- Super Router with latest leading signal strength
- Free Wi-Fi\* (up to 100m)

or

**£750** a month for 18 months  
£17.00 monthly rental applies

TV, unlimited broadband & calls  
 The Boss of Broadband Deals

- Broadband up to 20Mbps
- Speed of up to 10Mbps
- Super Router with latest leading signal strength
- Free Wi-Fi\* (up to 100m)

talktalk.co.uk/star | 0800 049 7856

**TalkTalk** TV, broadband & mobile

FOR THE love of GREAT TV THIS Christmas

talktalk.co.uk | 0800 131 3323

<p><b>2</b> months</p> <p><b>£10</b> a month  <small>£17.00 monthly rental applies</small></p> <p>50% off</p> <ul style="list-style-type: none"> <li>• Totally unlimited broadband</li> <li>• TV, unlimited broadband &amp; calls</li> <li>• Free Wi-Fi* (up to 100m)</li> <li>• Super Router with latest leading signal strength</li> </ul>	<p><b>2</b> months</p> <p><b>£17.50</b> a month  <small>£17.00 monthly rental applies</small></p> <p>40% off</p> <ul style="list-style-type: none"> <li>• Totally unlimited Fibre Broadband</li> <li>• TV, unlimited broadband &amp; calls</li> <li>• Free Wi-Fi* (up to 100m)</li> <li>• Super Router with latest leading signal strength</li> </ul>
--	---

**TalkTalk** TV, broadband & mobile

The 100% BROADBAND sale

talktalk.co.uk | 0800 049 7853

<p><b>FREE</b> for 18 months  <small>£17.00 monthly rental applies</small></p> <p>Totally unlimited broadband</p> <ul style="list-style-type: none"> <li>• Broadband up to 20Mbps</li> <li>• Speed of up to 10Mbps</li> <li>• Super Router with latest leading signal strength</li> <li>• Free Wi-Fi* (up to 100m)</li> </ul>	<p><b>£5.00</b> a month  <small>£17.00 monthly rental applies</small></p> <p>TV, unlimited broadband &amp; calls      Half Price</p> <ul style="list-style-type: none"> <li>• Broadband up to 20Mbps</li> <li>• Speed of up to 10Mbps</li> <li>• Super Router with latest leading signal strength</li> <li>• Free Wi-Fi* (up to 100m)</li> </ul>
---	--

**TalkTalk** TV, broadband & mobile

SUPER STRENGTH broadband deals

talktalk.co.uk/metro | Call us on 0800 049 6291

<p><b>FREE</b> for 18 months  <small>£17.00 monthly rental applies</small></p> <p>Totally unlimited broadband</p> <ul style="list-style-type: none"> <li>• Broadband up to 20Mbps</li> <li>• Speed of up to 10Mbps</li> <li>• Super Router with latest leading signal strength</li> <li>• Free Wi-Fi* (up to 100m)</li> </ul>	<p><b>£10</b> a month  <small>£17.00 monthly rental applies</small></p> <p>Totally unlimited Fibre Broadband</p> <ul style="list-style-type: none"> <li>• Broadband up to 20Mbps</li> <li>• Speed of up to 10Mbps</li> <li>• Super Router with latest leading signal strength</li> <li>• Free Wi-Fi* (up to 100m)</li> </ul>	<p><b>£10</b> a month  <small>£17.00 monthly rental applies</small></p> <p>TV, unlimited broadband &amp; calls</p> <ul style="list-style-type: none"> <li>• Broadband up to 20Mbps</li> <li>• Speed of up to 10Mbps</li> <li>• Super Router with latest leading signal strength</li> <li>• Free Wi-Fi* (up to 100m)</li> </ul>
---	--	--

**TalkTalk** TV, broadband & mobile

FLASH SALE  
 Hurry ends in 2 days

talktalk.co.uk/metro | 0800 083 1317

<p><b>HALF PRICE</b> for 18 months  <small>£17.00 monthly rental applies</small></p> <p>Fibre broadband  <b>£750</b> a month</p> <ul style="list-style-type: none"> <li>• Broadband up to 20Mbps</li> <li>• Speed of up to 10Mbps</li> <li>• Super Router with latest leading signal strength</li> <li>• Free Wi-Fi* (up to 100m)</li> </ul>	<p><b>HALF PRICE</b> for 18 months  <small>£17.00 monthly rental applies</small></p> <p>TV, broadband, calls &amp; mobile SIM  <b>£10</b> a month</p> <ul style="list-style-type: none"> <li>• Broadband up to 20Mbps</li> <li>• Speed of up to 10Mbps</li> <li>• Super Router with latest leading signal strength</li> <li>• Free Wi-Fi* (up to 100m)</li> </ul>
--	---

**5 DAYS OF BLACK FRIDAY**

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**TalkTalk** TV, broadband & mobile

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www.talktalk.co.uk | 0800 049 7857

<p><b>50% off</b></p> <p><b>£3.75</b> a month for 18 months  <small>£17.00 monthly rental applies</small></p> <p>Broadband &amp; Anytime Calls</p> <ul style="list-style-type: none"> <li>• Broadband up to 20Mbps</li> <li>• Speed of up to 10Mbps</li> <li>• Unlimited Anytime UK landline and mobile calls</li> </ul> <p>SAVE up to £405  <small>see Broadband &amp; Anytime Calls</small></p>	<p><b>50% off</b></p> <p><b>£8.75</b> a month for 18 months  <small>£17.00 monthly rental applies</small></p> <p>Fibre &amp; Anytime Calls</p> <ul style="list-style-type: none"> <li>• Broadband up to 20Mbps</li> <li>• Speed of up to 10Mbps</li> <li>• Unlimited Anytime UK landline and mobile calls</li> </ul> <p>SAVE up to £326  <small>see Broadband &amp; Anytime Calls</small></p>	<p><b>25% off</b></p> <p><b>£7.50</b> a month for 18 months  <small>£17.00 monthly rental applies</small></p> <p>TV, Broadband &amp; Calls</p> <ul style="list-style-type: none"> <li>• Broadband up to 20Mbps</li> <li>• Speed of up to 10Mbps</li> <li>• Super Router with latest leading signal strength</li> <li>• Free Wi-Fi* (up to 100m)</li> </ul> <p>SAVE up to £133  <small>see Broadband &amp; Anytime Calls</small></p>
---	---	---

**TalkTalk** TV, broadband & mobile

HALF PRICE for 18 months  
£10 a month

TV, broadband, calls & mobile SIM for 18 months

SAVE £328 vs Sky, Virgin & BT\*

NETFLIX 6 months on us when you take our award winning TV bundles

talktalk.co.uk/star | 0800 049 7861



# Sky consumer marketing

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**FREE Samsung TV**

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that's including talk and line rental too

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Have a 24 month minimum term for Sky Broadband Unlimited, Sky Pay As You Talk and Sky Line Rental. Sky Network areas only. Lowest price guarantee based on today's publicly advertised retail and ongoing monthly prices for new customers calculated over 24 months (excludes annual line rental and unknown re-contracting offers that may be available after maximum term). Not available where Sky Sport is not available or where BT Sport is not available. See [sky.com/bestprice](http://sky.com/bestprice) for full details.

**sky**

Put your feet up this Black Friday with a free LG TV when you join Sky TV from £20 a month

**Free 32" LG TV**  
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Enjoy up to 10 channels, not available on Free TV including most satellite boxes that do not support Sky TV.

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On a 12 month contract compared to BT and Talk Talk

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- Free Movies from the UK, US & on Sky Selects the Best of Movies
- Watch the world's best Action, Sci-Fi and more on Sky TV

Plus add superfast Sky Fibre

- 20M download, so you can stream
- 20M upload, so you can
- 20M upload, so you can

It's easy to switch, with our superhero Switch Squad  
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**sky**



# Vodafone consumer marketing



**6 months free unlimited superfast fibre broadband**

Plus 6 months Netflix on us. It's a Data Extravaganza.

From only **£15** a month for existing customers - £16.99 a month for new - 18 month agreement

**NETFLIX**

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Vodafone  
Power to you

**6 months free unlimited fibre broadband**

Plus, with 6 months Netflix included on us, treat yourself in our winter sale.

Fibre broadband up to 38Mbps

**Save £90**

- £15 a month for 12 months thereafter  
- £16.99 a month line rental  
- 18 month agreement

**NETFLIX**

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Vodafone  
Power to you

**Unlimited Home Broadband from just £2.50 a month**

Enjoy broadband for less than you think

Unlimited Home Broadband Up to 17Mbps Only <b>£2.50</b> a month For 12 months, then £5 a month +£16.99 a month line rental. 18 month contract.	Unlimited Superfast Fibre Home Broadband up to 38Mbps Only <b>£7.50</b> a month For 12 months, then £15 a month +£16.99 a month line rental. 18 month contract.
---	---

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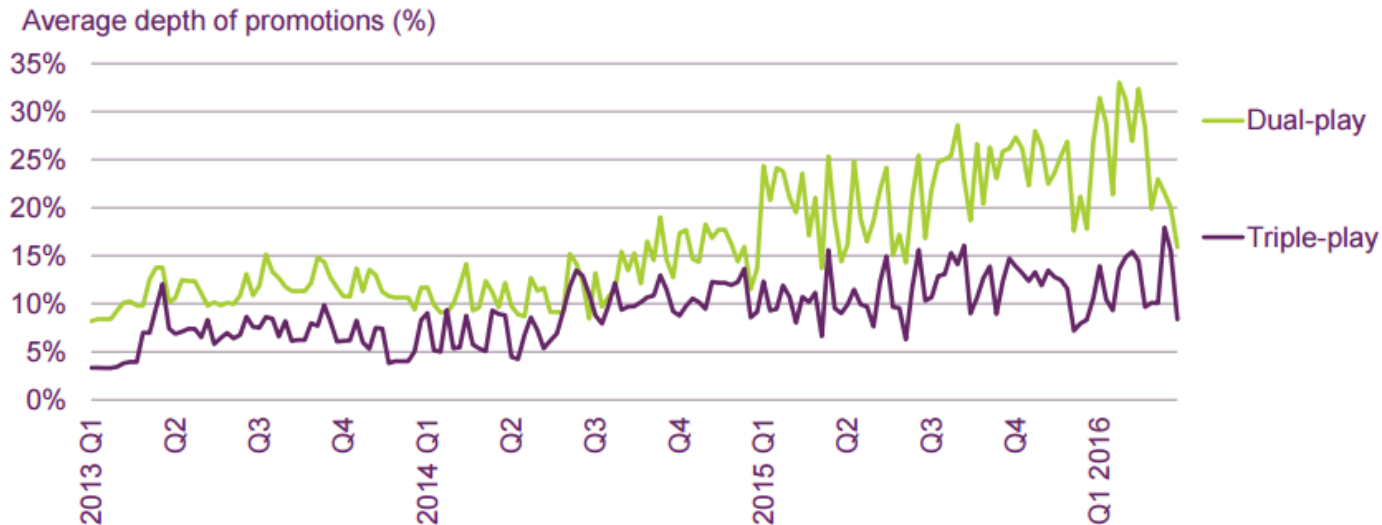
**NO MORE LINE RENTAL CHARGES**



# Promotions as a proportion of total monthly price

As a whole the market is discounting its products more heavily to win customers

**Figure 4.5 Promotions as a proportion of total monthly price for dual-play and triple-play bundles**



Source: Simplify Digital

Note: The average monthly price is calculated across each service's minimum contractual term; includes tariffs offered by the UK's four largest residential fixed telecoms providers – BT, Sky, Virgin Media and Talk Talk.





# Assessment of Ofcom's quantification of consumer benefits

In the context of Ofcom's consultation on:

*Making switching easier and more reliable for consumers:  
Proposals to reform landline, broadband and pay TV  
switching between different platforms*

Prepared for

Sky

Prepared by

Cristina Caffarra, Geoff Edwards, Simon  
Chisholm and Gerhard Dijkstra

Charles River Associates  
8 Finsbury Circus  
London EC2M 7EA

Date: 20 October 2016

**CRA** Charles River  
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## EXECUTIVE SUMMARY

1. Ofcom is currently consulting on options to change the process for consumer switching of landline, broadband and pay TV services between providers on different platforms. The consultation, *Making switching easier and more reliable for consumers*, identifies a number of difficulties that consumers purportedly face with the switching process, including contacting and cancelling their service with their existing provider, ensuring continuity of service (i.e. avoiding loss of service) through the switch, and avoiding contract overlaps (i.e. double payments). To address these difficulties, Ofcom proposes two options: a gaining provider-led process (GPL); or enhancing the current cease and re-provide (C&R) process by giving consumers more options to cancel their service and the option to have the gaining provider coordinate the switch (EC&R). Ofcom has assessed the impact of these options relative to the current arrangements, including estimating the benefits to consumers and implementation costs to providers.
2. We have been asked by Sky to consider Ofcom's assessment of the quantifiable benefits to consumers associated with the two options. The focus of this report is therefore on analysing Ofcom's estimates of consumer benefits arising from the proposals and the extent to which these benefits, before even considering costs, support either of the options.
3. To quantify the benefits to consumers, Ofcom has analysed the consumer harm that currently arises in the form of having to contact their current provider, through loss of service that may occur during a switch, and double payment that may occur to ensure continuity of service.
4. In our opinion, Ofcom's proposals are likely to give rise to far more limited benefits than suggested by Ofcom's analysis. Many of the assumptions underlying Ofcom's analysis are not robust to a more detailed analysis of the evidence on which they have been based.
5. The consumer survey data commissioned by Ofcom suggests that forecast use of the GPL option for cross-platform switchers is overly-optimistic, given the available evidence on use of the existing GPL process for switches between providers within the Openreach platform. The proportion of cross-platform switchers using EC&R is instead likely to be the same or not much lower than the proportion of cross-platform switchers using GPL. Even if this is not the case, any difference in take-up between the two options reflects consumers that should be excluded from the analysis as they are actively exercising an option to organise the switch themselves under the existing C&R process instead of having the switch organised by the new provider under the EC&R process. It should be assumed that, in doing so, they view themselves as deriving benefits from exercising that option, not experiencing harm.
6. In relation to loss of service and double payment, the evidence suggests that the *current incidence* of both under the existing C&R process is lower than Ofcom has assumed and the *expected reduction* in both resulting from implementing the proposed options is correspondingly lower than estimated by Ofcom. The evidence points to a significant 'residual' amount of service loss and double payment that will remain following Ofcom's proposed changes. This is partly because the proposed options do not address all of the underlying causes of either losses of service or double payments.

7. Taking these revisions into account, as well as the observation that Ofcom appears to have misinterpreted its survey results in estimating consumer harm from loss of service, annual benefits in relation to reductions in loss of service under GPL are reduced from Ofcom's estimate of £7.4 million to between £0.2 million and £0.4 million.
8. For double payment, the difference between Ofcom's estimated benefits and our own estimate is even greater. The assumptions underlying Ofcom's assumed harm from contract overlap do not reflect evidence that consumers often actively seek a contract overlap for reasons that are unrelated to difficulties associated with the switching process. Taking this into account, alongside reduced incidence and some other more minor revisions, our estimate of annual consumer benefits associated with reduced double payments under GPL is close to zero (compared to Ofcom's estimate of £2.6 million).
9. Ofcom has assumed consumers will save time by not having to contact their current or losing provider to cancel. However, using more realistic estimates for time taken to sign up with the gaining provider we find that this time is almost entirely offset by the additional time needed for the gaining provider to collect sufficient information from the consumer to ensure the transfer or transfers occur. We therefore estimate time savings of at most £0.1 million from the introduction of a GPL process, instead of Ofcom's estimate of £0.5 million. Indeed, under some scenarios there may even be additional time and therefore additional cost to consumers under a GPL process.
10. Overall, a more detailed analysis and interpretation of the results from the surveys commissioned by Ofcom provide an alternative, more plausible set of assumptions. This revised, more plausible set of assumptions and more reasonable interpretation of the available evidence reduces the benefits to consumers by around £10 million annually and suggests very limited annual benefits of the proposed options (at most £0.6 million).
11. Our estimates (and Ofcom's estimates) provide an assessment only of the *gross benefits* to consumers of Ofcom's proposals. In an impact assessment due consideration must also be given to possible *offsetting negative consequences for consumers* arising from the proposals (in addition to any additional time costs mentioned in paragraph 9 above). We focus on four likely negative consequences:
  - the proposed changes will likely result in delayed switches to products and services the consumers obtain greater value from;
  - there will be additional hassle for those consumers that switch under the proposed process that could have achieved the same (or a better) outcome under the existing process without the hassle associated with switching. For example, even if the proposed changes result in better outcomes for some consumers, others currently benefit from save activities of their existing provider. If save activities are reduced, these consumers may switch when they would otherwise have been saved and obtained the same or a better deal *and* avoided the hassle of switching;
  - there will be increased incidence of early termination charges (ETCs); and
  - there will be additional costs to providers from excessive orders and subsequent cancellations in the transfer period that are likely to be passed on to consumers.
12. In each case, some consumers may incur losses relative to the existing switching process and these losses should be taken into account. While not exhaustive, we use these likely causes of harm to consumers from the proposed options to illustrate the potential for

negative impacts, which must be discounted from the estimated gross consumer benefits to provide an estimate of the *net benefits* to consumers. We estimate that these negative consequences of Ofcom's proposals will result in annual costs to consumers of at least £1.3 million.

13. The benefits estimated by Ofcom assume the proposals apply to any service or package of services so long as the switch is cross-platform. However, the services that are being switched are very different. In particular, the problems inherent in switching pay TV will be different to those that may arise when switching broadband and/or landline. Consequently, the benefits to consumers are likely to materially differ between these different types of switch. By making no distinction between the type of service being switched, Ofcom does not estimate the benefits of its proposed changes for different types of switch and so fails to justify implementing its proposals across all platform switches and, in particular, extending its proposals to pay TV.
14. Indeed, the research undertaken by Ofcom to support the consultation and provide estimates of consumer benefits focused on dual play and triple play switchers.<sup>1</sup> This research does not allow separate robust estimates for many of the underlying assumptions critical to Ofcom's benefits case to be calculated for pay TV. While we have estimated gross consumer benefits specific to pay TV based on the very limited sample sizes in Ofcom's data, this is clearly a gap in Ofcom's research, particularly where different services may raise fundamentally different issues for consumers when switching. While the limitations of the research limit the extent to which conclusions can be drawn, the process of drawing these out serves to highlight both the extent to which the benefits (and issues) may differ and the extent to which Ofcom must undertake a separate assessment with a robust evidence base.
15. We conclude that Ofcom must revisit its estimates of the consumer benefits of the proposed options and in particular its use and interpretation of the supporting evidence it has commissioned, its failure to consider negative effects and estimate net (rather than gross) benefits, and its failure to identify the net benefits in relation to each type of switch (and in particular pay TV switches) separately. A more detailed analysis of the consumer survey data suggests that the estimated benefits are much more limited than Ofcom's preliminary analysis suggests. Moreover, some basic sensitivity tests including on assumptions that rely on limited evidence suggests that the proposed options may even result in overall consumer *harm*. This is before consumer benefits/detriments are considered alongside the implementation costs to providers associated with the proposed changes.
16. While Ofcom will have to consider these quantifiable benefits and costs to consumers alongside other unquantified benefits (and other costs), each of which is beyond the scope of this report, the results show that Ofcom cannot rely on its estimates of net benefits as outlined in its impact assessment to justify its proposals. Ofcom must recognise that its proposals risk actually causing harm to consumers.

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<sup>1</sup> The research objectives of both the triple play qualitative research and the triple play quantitative research, both undertaken by BDRC, state this explicitly. See Triple Play Switching Study, Qualitative research report, BDRC Continental, July 2016, page 7.

## 1. INTRODUCTION AND OVERVIEW

17. This report has been prepared by a group of economists from Charles River Associates (CRA), led by Dr. Cristina Caffarra, Vice President and Head of the CRA's European Competition Practice. The CRA team has extensive experience advising clients on competition and regulatory policy matters, particularly in the communications sector.
18. We have been asked by Sky to consider Ofcom's assessment of the benefits to consumers associated with proposed changes to the consumer switching process for switches of one or more services (landline, broadband and/or pay TV) between providers operating on different infrastructure platforms. These 'cross-platform' switches includes switches between the Openreach, KCOM, Virgin cable and Sky satellite platforms.
19. Ofcom's proposals are outlined in its current consultation, *Making switching easier and more reliable for consumers: Proposals to reform landline, broadband and pay TV switching between different platforms*,<sup>2</sup> which aims to make the switching process easier and more reliable compared to the status quo. As part of the consultation Ofcom has undertaken an impact assessment, which includes estimates of the benefits to consumers of the proposed changes, and commissioned research to inform the consultation and its appraisal of the options.
20. Ofcom proposes two options for changing the switching process: (a) a gaining provider led (GPL) process where consumers need to only contact the new provider to cancel their existing service and start their new one; and (b) enhancements to the existing cease and re-provide switching process (EC&R), which would provide consumers with a wider range of options to cancel their existing service(s) and the option for the new provider to organise the switch on the consumer's behalf to coordinate stop/start dates
21. The analysis in this document looks only at Ofcom's assessment of the benefits of the proposed options to consumers and the overall impact of the proposals on consumer welfare.
22. The remainder of this report is structured as follows:
  - In Section 2 we provide an overview of Ofcom's approach to estimating the expected benefits of its proposals and important areas that have been omitted from its assessment.
  - In Sections 3 to 6 we consider Ofcom's approach to estimating the gross benefits to consumers with respect to expected take-up by consumers of Ofcom's two options (Section 3), and the three main benefits that Ofcom expects to arise: reductions in loss of service (Section 4), reductions in double payments (Section 5) and time savings (Section 6).
  - In Section 7 we propose more plausible and reasonable assumptions to estimate the gross benefits and establish a robust base case for gross benefits.
  - In Section 8 we conduct scenario and sensitivity analysis around our base case to illustrate the significant of outstanding areas of uncertainty.
  - In Section 9 we estimate the gross benefits to consumers specifically with respect to pay TV switches, highlighting the importance of distinguishing between different

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<sup>2</sup> Ofcom, July 2016 ('*Making switching easier*')



types of switches when undertaking the impact assessment and deciding on how extensive any reforms should be.

- In Section 10 we identify a number of negative consequences to consumers that Ofcom has excluded from its analysis and that must be taken into account in order to reach a view on net benefits.
- Finally, Section 11 concludes.

## 2. OFCOM'S ASSESSMENT OF CONSUMER BENEFITS

### 2.1. Ofcom's approach to estimating benefits and supporting evidence

23. In estimating the benefits of its proposals for switchers, Ofcom focuses on valuing the harm arising from a number of process-related difficulties that its research shows that consumers face when switching, including:

- **Loss of service:** consumers find it difficult to coordinate the stop and start dates of the old and new services and to avoid delays in services being installed or activated when switching;<sup>3</sup>
- **Double paying** for services that overlap, particularly due to difficulties consumers experience managing the stop and start dates of the old and new services;<sup>4</sup>
- **Contacting the old provider** as part of the switch or **cancelling the old service**, particularly due to the method of cancellation and the time taken to cancel.<sup>5</sup>

24. The benefits arising from Ofcom's proposals are arrived at by estimating: the incidence of each of these difficulties under the existing switching process, the harm to switchers that each causes, and the forecast reduction in incidence as a result of the proposed changes. These are used to provide estimates for the harm that would be avoided under the proposed changes.

25. Ofcom has commissioned research to inform its consultation and to estimate the expected benefits from its proposals, including:

- An online survey of residential consumers conducted by BDRG Continental, a market research company with a total sample of 2,529, of which 1,132 had switched and 681 were cross-platform switchers. The survey aimed to provide a detailed understanding of consumers' experiences of switching triple play services, including the nature and scale of any difficulties experienced, and any differences between cross-platform switches and switches within the Openreach platform. It focussed on two packages: triple play consumers and dual play

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<sup>3</sup> See *Making switching easier*, paragraphs 5.7 to 5.17.

<sup>4</sup> *Ibid.*, paragraphs 5.18 to 5.22.

<sup>5</sup> *Ibid.*, paragraphs 5.23 to 5.36.

consumers, although some results are available for other packages.<sup>6</sup> (***Triple play quantitative research***)

- Qualitative research conducted by BDRG Continental with two components: focus groups of consumers with varying degrees of engagement in the market; and in-home household interviews of different types of households, designed to capture household decision making about providers and services.<sup>7</sup> (***Triple play qualitative research***).
- A face-to-face omnibus survey of the general population to ensure the online survey was representative of key groups of consumers (***the omnibus survey***); and following this initial research
- An online survey of residential customers that had experienced a loss of service – wanted or unwanted – of either their fixed landline, fixed broadband or pay TV service, conducted in May/June 2016. The total sample was 318 consumers, with those experiencing an unwanted loss 272 and the loss as a result of a switch 126. The aims of this research were to understand the reasons for loss of service and determine and quantify the impact on consumers. (***Loss of service quantitative research***)

26. We provide a detailed assessment of Ofcom's calculations and assumptions used to generate estimates of the benefits to switchers, including a detailed consideration of the supporting evidence in Sections 4 to 6.

## 2.2. Separately identifying the benefits of different types of switches

27. The benefits to consumers of Ofcom's proposed options are likely to be different depending on the type of cross-platform switch. The difficulties that arise from switching dual-play, for example, will be fundamentally different from those that arise when switching standalone pay TV, therefore the benefits of the proposed options will be different for switches involving dual play and standalone pay TV

28. Ofcom's analysis of consumer benefits does not distinguish between different switch types. As a result, Ofcom does not consider whether the proposed options deliver benefits say for pay TV or triple play cross-platform switches and its benefits analysis does not inform whether the proposed options are desirable for such switches.

29. Ofcom must demonstrate a rationale for change across each of the services and not simply aggregate all services together and apply blanket conclusions, particularly where different services raise fundamentally different issues when switching. By using conclusions drawn from evidence on switches of one type to determine the most effective policy for switches of another type risks over-regulation. This is particularly important in light of the fact (discussed below) that many of the problems in cross-platform switching can be attributed to fixed broadband and fixed landline issues rather than pay TV.

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<sup>6</sup> The survey was conducted in October/November 2015. It excluded consumers who requested a migration authorisation code (MAC) from the losing provider in order to switch fixed broadband, Virgin Media National (i.e. not Virgin's cable service) customers that were transferred to TalkTalk as part of a contractual arrangement that was agreed by the two providers, and those that switched because they had moved house, as these switches may be affected by a number of additional issues outside of the switching process.

<sup>7</sup> The survey was conducted August/September 2015 and involved eight focus groups and 15 in-home household interviews with a total of 85 participants. The main focus of the research was on triple play customers, but the research did include one group of dual play (landline and broadband) switchers.

30. The triple play quantitative (and qualitative) research focuses on triple play and dual play switches. For some questions, the survey has a sufficient sample to distinguish responses from pay TV switchers from responses from other switchers. In other instances, however, this is not the case. This is a gap in Ofcom's research. Without robust estimates of the benefits to consumers of the proposed changes for pay TV, the case for intervention cannot be made.
31. In Section 9 we explore the extent to which the purported gross benefits from Ofcom's proposal can be estimated for different types of switches and whether estimated gross benefits can be reproduced for different types of switches, in particular those involving standalone pay TV.

### **2.3. Distinguishing between gross benefits and net benefits**

32. An impact assessment is aimed at assessing if any proposed intervention is likely to be worth the cost. Appraisal of options must therefore include an assessment both of the benefits of the proposed options *and* of any negative consequences of intervention. Ofcom has undertaken a detailed assessment of the benefits to consumers. It has also considered the implementation costs to providers of its proposals. However, Ofcom has ignored any possible negative consequences and offsetting losses the consumer may face as a result of its proposals.
33. In this context, it is important for Ofcom to recognise that regulatory intervention can make a problem worse or create new issues. Ofcom's assessment has focused on estimating the *gross* benefits to consumers. These should be offset by estimates of potential losses to consumers from the proposals to arrive at estimates for *net* consumer benefits. Considering both gross and net benefits to consumers allows for the impact of the proposals on consumer welfare to be estimated, which can then be compared to the estimated implementation costs.
34. We outline a number of possible negative consequences of the proposed options and attempt to estimate these offsetting effects for consumers in Section 10.

### **2.4. Taking account of changing consumer behaviour**

35. Ofcom seeks to make switching easier and more reliable by reducing some of the process difficulties consumers face when switching. Ofcom believes that its proposed options will also benefit consumers that are considering switching but not doing so by reducing the process-related deterrents to switching. Ofcom does not attempt to quantify this benefit as it believes it is difficult to estimate the number of consumers being deterred and the value of the switch to them.<sup>8</sup>
36. Ofcom's approach to the impact assessment is meaningless if it does not take into account changes in consumer behaviour following the introduction of its proposals. This omission leads to inaccurate estimates of the consumer benefits associated with its proposals. Instead, Ofcom estimates the benefits resulting from reduced double payment and loss of service and time savings at *the given level of switching*. If Ofcom's proposals make switching less costly for consumers, more switching is likely to occur.
37. Ofcom estimates harm per switcher and assumes that under its proposals this is reduced. However, if the overall number of switchers increases, it may not matter the extent to

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<sup>8</sup> *Making Switching Easier*, paragraph 5.66.

which Ofcom reduces the expected harm per switch as the total cost of switching to consumers may still increase due to an increasing number of switchers incurring this harm. Note that, as a result, Ofcom's assertion that its estimates of consumer benefits are '*likely to significantly underestimate the total benefits to all relevant groups of consumers*' is incorrect. Without evidence on how much switching will change and the benefits of that incremental switching activity, neither of which Ofcom has even attempted to gather, the estimates of consumer benefits based on the current level of switching in the impact assessment are meaningless.

## 2.5. Evaluation should inform new policy development

38. An important aspect of appraisal is the feedback from the *ex-post* evaluation of existing policies to inform the rationale for further intervention. This feedback process allows for lessons to be learned from previous policy interventions – for example, on whether anticipated effects, costs and benefits were in fact realised – and applied when assessing new proposals. Evaluation findings can identify where problems have arisen and identify unintended consequences.<sup>9</sup>
39. A GPL process has been implemented by Ofcom already for other types of switching. As part of its triple play quantitative research Ofcom has obtained survey results in relation to switching within the Openreach platform, which is currently subject to a GPL process. Ofcom has, in some instances, used the survey results relating to within Openreach switching as an input to the estimation of benefits following the introduction of a GPL process for cross-platform switchers (for example, in estimating take-up of a GPL process by consumers). The existing use of a GPL process for within Openreach switches means that it can potentially be used as a guide to the likely behaviour of cross-platform switchers. However, in other instances – for example, the average duration for loss of service – Ofcom has not used the current experiences of within Openreach switchers as a guide to estimated cross-platform experiences following introduction of its GPL option.
40. As we detail later in this document there are instances where the results for within Openreach switching are more or less helpful as a guide for cross-platform switching. While Ofcom notes that under its GPL option the type of process for switching between platforms and within the Openreach platforms would be the same, it also notes that it has considered whether there was anything it could learn from the switching process in place within the Openreach and KCOM platforms. Ofcom found that the underlying issues for cross-platform and within Openreach switches were not always the same (e.g. the causes of loss of service).<sup>10</sup>
41. Where information exists on outcomes or behaviour under an existing GPL process, we have analysed the extent to which the within Openreach experience may or may not provide a guide as to outcomes under a GPL process for cross-platform switches. In some instances there may be good reason to think the outcomes may diverge while in others, other supporting evidence can provide a guide as to the likely similarity of outcomes.
42. More generally, however, it is noticeable that Ofcom has not undertaken a proper evaluation of existing GPL processes to determine the extent to which the benefits it is estimating have been realised in other contexts. As noted above, in many instances,

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<sup>9</sup> See *The Magenta Book: Guidance for evaluation*, HM Treasury, April 2011.

<sup>10</sup> *Making Switching Easier*, paragraph 4.11.

where research does exist that offers a direct comparison (i.e. the triple play quantitative research results on switching within Openreach) it does not always support Ofcom's expected benefits for cross-platform switches.

### 3. CONSUMER TAKE-UP OF THE PROPOSED OPTIONS

43. In this section we show three things:

- First, that Ofcom has *overstated* the proportion of cross-platform switches in which GPL would be used (and that Ofcom should use a *lower figure* for the base case proportion of cross-platform switches using GPL).
- Second, that Ofcom has *understated* the proportion of cross-platform switchers in which EC&R would be used relative to GPL (and that Ofcom should use a figure for the base case proportion of cross-platform switchers using EC&R that is *the same or not much lower than* the proportion of cross-platforms switchers using GPL).
- Third, should there remain any difference in take-up between the two options, these consumers should be excluded from the analysis as they are exercising an option to continue to use C&R, and it should be assumed that, in doing so, they view themselves as deriving benefits from exercising that option.

#### 3.1. The proportion likely to use GPL has been overstated

44. Ofcom relies on the proportion of switches within the Openreach platform that have used the GPL process as the basis for its estimate of the proportion of cross-platform switches that would use GPL if the GPL option were implemented. This 70% assumed take-up of GPL is a key parameter value in Ofcom's estimate of the net benefit to consumers from the GPL option compared to the status quo of cease and re-provide (C&R).

##### **The 'within Openreach' GPL experience may not be a good predictor of cross-platform GPL experiences**

45. The 'within Openreach' GPL experience may not be a good predictor of the likely GPL experience under CPS, precisely because it is a '*within platform*' switching environment. When switching within a platform, there is no option for a consumer to have overlap (i.e. dual services running): the new provider cannot commence until the old provider has ceased. Consumers that actively seek overlap (either to try the new service before cancelling the old one, or because they want the new service as soon as possible and do not want to wait for the GPL process to run its (unpredictable) course) will choose C&R. GPL may therefore be more likely for within platform switches than when there is the option of overlap. This suggests that the 70% assumption regarding the proportion that will use GPL, which is derived from the within Openreach switch experience, is likely to be an overestimate in relation to cross-platform switches. Consumer preferences for contract overlap are considered in greater detail in the assessment of the estimated benefits from reduced double payments in Section 5.

### Concerns with the methodology to estimate GPL take-up

46. The assumed 70% of cross-platform switchers that would use the GPL process is based on results from the triple play quantitative research which shows that 68% of switchers<sup>11</sup> within Openreach made use of the GPL process and did not cancel their previous service themselves. To estimate this, Ofcom explains that it counts those consumers that stated '*I contacted my new provider to start the switch. My new provider then arranged the switch for me*' (QE3) and/or did not answer '*to cancel/give notice*' when asked for the reason they contacted their previous provider (QF5).<sup>12</sup>
47. Below we outline a number of concerns with Ofcom's use of the survey results to estimate usage of GPL for within Openreach switches (68%) and why this is likely to be a significant overestimate of the likely use of GPL for cross-platform switchers.
48. First, in its use of QF5 to estimate those within Openreach switchers which do not use GPL, Ofcom includes only respondents that indicated they contacted their previous provider to cancel their service/give notice. While these respondents are indicating they used a C&R process, there are two additional options that respondents can choose which also clearly indicate use of a C&R process and not a GPL process: (i) to arrange the 'stop date' in order to avoid a break in service; and (ii) to arrange the 'stop date' in order to avoid paying both providers at the same time. In both instances, the consumer is contacting the old provider to coordinate the switch date. As the table below shows, this reduces the estimate for use of GPL by within Openreach switchers from 68% to 63% (comparing methods [1] and [2] in the table below).
49. Second, there are several respondents to the same question that stated they did not know why they had contacted their previous provider. We have estimated the share allocating those that did not know proportionally to those that did know.<sup>13</sup> The effect of this is limited but reduces the figure by one percentage point to 62% (see method [3] in the table below).
50. Third, there is an additional question in the triple play quantitative research that also provides information regarding whether the customer contacted their previous provider to cancel or give notice. Question QF10 asks respondents '*At what point did your previous service(s) provider contact you?*' and one of the potential answers is '*After I had contacted them to cancel my service.*' If a respondent answered positively to this particular question, they are not likely using a GPL process, and this provides an additional check to the two questions that Ofcom used in its analyses. This change in isolation results in reducing the estimate of GPL from 68% to 64%.
51. When combining the three points above, the estimate for GPL take-up for within Openreach switchers is reduced to 58% (see method [4] in the table below).

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11 The survey results provide estimates for 'switchers' and these results are applied to 'switches' to estimate benefits.

12 See *Making Switching Easier*, paragraph A8.8. We understand this figure can be replicated by not counting those consumers that indicate "*I contacted my previous provider to cancel and my new provider to start using them for the service.*" and/or answered "*to cancel/give notice*" when asked for the reason they contacted their previous provider.

13 There is no reason to suggest respondents indicating '*Don't know*' would have different responses to those could recall the reason for contacting their old provider. Note that this proportional redistribution is done at a granular level, i.e. by switching platform (ORS versus CPS) and by the types of services switched (dual play versus triple play versus pay TV).

**Table 1: Estimates of GPL take-up**

Methodology	CPS	ORS	All switchers
1. Ofcom's original estimate	53%	68%	59%
2. <i>plus</i> contacted previous provider to arrange the 'stop date' (QF5 options 6 and 7)	45%	63%	52%
3. <i>plus</i> proportionally including 'Don't Know' respondents (QF5 option 17)	43%	62%	51%
4. <i>plus</i> contacted by previous provider after contact from respondent to cancel their services (QF10 option 2)	37%	58%	45%

Source: CRA analysis of triple play quantitative respondent-level data

Notes: Ofcom's approach uses QE3 and QF5 (option 1) to identify respondents that did not use a GPL process. CRA's approach adds the following questions and answers to identify further respondents not using a GPL process: QF5 (options 6 and 7), proportionally including QF5 option 17 (i.e. the additional respondents who indicated 'don't know' are assumed to have the same distribution of responses as those that were able to provide a reason), and adding QF10 (option 2).

52. Fourth, applying the same methodology used by Ofcom to estimate GPL usage for within Openreach switchers indicates existing use of a GPL process for cross-platform switchers of 53% of all cross-platform switchers.<sup>14</sup> This is despite GPL not having been widely available for this type of switch.
53. If Ofcom treats the survey responses to QE3 and QF5 as reliable (as it does with other responses) and persists with its current methodology to estimate use of GPL, then assuming a 70% take-up of GPL would result in **an increase in take-up of only 17% of cross-platform switchers**, from its current level of 53% to 70%. Even if a more conservative approach is taken and the 70% assumed take-up is applied to the 47% of cross-platform switchers not currently reporting using a GPL process, this would still give a much reduced take-up of only 33% of cross-platform switchers.<sup>15</sup> When including the information in QF10, the increase in take-up would be 21% (from 37% to 58%). The more conservative approach would imply a 36% increase in take-up (i.e. 58% take-up applied to the 63% of cross-platform switchers not currently reporting using a GPL process).
54. The survey finding that 53% of cross-platform switchers used GPL (according to Ofcom's methodology) casts significant doubt on the 68% figure that Ofcom has relied on based on within Openreach switchers. Assuming that is not possible for 53% of cross-platform switchers to have used GPL, there seems to be a bias towards reporting the use of GPL, perhaps because respondents have difficulty recalling what happened when asked: 'Which best describes what you did when you switched to the provider you use now.'

<sup>14</sup> The 53% is based on Ofcom's approach of identifying respondents that did not cancel their previous service themselves (using QE3 and QF5). This seems very high since we understand that currently it is only in special circumstances that customers can use a GPL-like process for cross-platform switches. When including additional information available in QF5 (method [2]), the proportionate allocation of 'Don't knows' and the additional information from QF10 (method [4]) estimated GPL usage by cross-platform switchers is 37%.

<sup>15</sup> Note that Ofcom has already included switching to Sky triple play as, in effect, a within Openreach switch due to the expectation that consumers would follow a GPL process. Further, it seems highly unlikely that these results reflect the GPL followed for cross-platform switchers where numbers are ported.

55. The extent of this bias can potentially be estimated. The revised estimate for GPL take-up for cross-platform switchers is 37%. We estimate that actual GPL take-up for cross-platform switchers would be a maximum of 10% (including those porting a number but excluding those switching to Sky triple play, which have already been included as Openreach switchers),<sup>16</sup> which gives an upwards bias of 73%. This would suggest that out of the 58% of within Openreach switchers that are identified as using a GPL process, only 16% (27% x 58%) would have been actual using a GPL process.
56. Finally, Ofcom suggests that the 68% could be an underestimate because, even if consumers contacted their old provider with an intention to cancel or give notice, they may still have followed the GPL process. This may be true, but there is no mention that, on the other hand, the 68% could be an overestimate. In addition to the points made above, respondents also noted where they contacted their old provider to find out what they needed to do to change provider (10% of within Openreach switchers). In this case, the consumer may have ultimately cancelled via the old provider rather than using GPL. It could also be argued that where respondents contacted their previous provider '*to confirm the service was cancelled*' (19% of within Openreach switchers) is not indicative of a proper GPL process, since surely if the service has not been cancelled then the consumer will discuss this with the previous provider directly. If these respondents did follow a GPL process, the fact they still call the previous provider to confirm suggests these consumers do not realise all of the benefits of a GPL process – for example, because they require the additional peace of mind or have experienced difficulties with the gaining provider (which is common and discussed in more detail later in the report) and feel they also need to obtain confirmation – and should be discounted in Ofcom's analysis. Ofcom therefore does not seem to have interpreted the survey evidence here in an even handed manner.

#### **Alternative estimates also show GPL take-up is overestimated**

57. A 2012 survey commissioned by Sky and other communication providers<sup>17</sup> shows a much higher share of switchers are not using GPL. Around 52% of all switchers would prefer to switch without contacting their current provider, i.e. using a GPL process.<sup>18</sup> When asked whether they preferred to have to contact both the old/current and new provider or to contact the new provider with a third party checking the decision to switch, then **55% of switchers preferred the C&R process**. Even when not required to contact the losing provider, still 43% of switchers would contact the losing provider: of these 49%

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<sup>16</sup> Ofcom states that '*Some cross-platform switchers can use the porting process to switch and follow a GPL-like process. In this case they do not need to contact their old provider as their old service is automatically cancelled when they port their number. We do not have robust analysis to determine incidence levels*' (see *Making Switching Easier*, Annex 8, footnote 62). The scenarios that Sky can envisage this occurring are: (i) where consumers switch broadband and landline from an Openreach line to Virgin Media (in this case, the Openreach line ceases when the number port is activated), likely including all consumer switching from BT or TalkTalk to Virgin Media (that is, where all services from the losing provider are ceased based on the GPL-based number porting process); (ii) where broadband consumers switch to Virgin Media (where broadband and voice would cease based on the GPL-based number porting process) and, less relevant consumers switching landline from Virgin Media to an Openreach line (in this case the Virgin Media landline service ceases when the number port is activated by the gaining provider). Given these circumstances, we have made a rough estimate of 10%.

<sup>17</sup> Sky, BT and Virgin Media jointly commissioned a consumer survey on issues raised by Ofcom's consultation on proposals to change the process for switching fixed voice and broadband providers on the Openreach copper network ('*the 2012 survey*'). The survey was undertaken in May 2012 by Ipsos MORI. The survey was conducted online, and covered a sample of 2,000 respondents. The results from this survey are available at: [http://stakeholders.ofcom.org.uk/binaries/consultations/switching-fixed-voice-broadband/responses/Sky\\_Annex.xls](http://stakeholders.ofcom.org.uk/binaries/consultations/switching-fixed-voice-broadband/responses/Sky_Annex.xls) (Sky Annex Tables 36, 37, 39, 40 and 42).

<sup>18</sup> The figures referred to here all allocate '*Don't know*' responses proportionally.



want to confirm that the provider will cancel their services; and 48% of them want to see if the current provider can make a better offer than the new provider (respondents could provide multiple answers).<sup>19</sup> Finally, even when the losing provider would provide written confirmation of the cancellation, then still 41% of switchers would contact their losing provider. Again, this points to both take-up of GPL being a lot lower than that estimated by Ofcom and, given that take-up, the benefits realised by consumers from a GPL process being even lower.

### **Conclusion**

58. In summary, based on the evidence available, Ofcom significantly overestimates likely take-up of GPL. Taking the points above on the additional information that can be elicited from the survey responses and estimates of likely bias, we estimate an alternative take-up of GPL range of between 16% and 36%. In our view, even with uncertainty, this is likely to be a robust estimate, as the other points noted above – using observed behaviour of within Openreach switches may overestimate GPL take-up for cross-platform switches and other evidence showing a preference from consumers to contact their current provider to cancel – are not taken into account in the revised estimated range. In addition, the alternative estimates showing that consumers will still contact their old provider even when not required to do so will reduce the benefits from GPL and is considered below.

### **3.2. The proportion likely to use EC&R relative to GPL has been understated**

59. Ofcom assumes that fewer consumers would use the EC&R process than the GPL process (from 5% fewer under Ofcom's high case to 25% fewer under Ofcom's low case). This is a *key assumption* that drives the lower net benefits of the EC&R option relative to the GPL option. Ofcom's reasons for assuming less use of EC&R than GPL include:

- Under EC&R the consumer has a choice to hand the responsibility for organising the switch to the new provider, whereas under GPL it is said by Ofcom to be "automatic" for the new provider to organise the switch. Therefore under EC&R where there is an option for the consumer to organise the switch themselves, fewer consumers will make use of EC&R; and
- The GPL option for CPS will align "within Openreach" and CPS under the same process, reducing confusion and leading to greater use of GPL for CPS than there would be use of EC&R for CPS.

60. We consider each of these in turn and show that the proportion likely to use EC&R ought to be similar to the proportion likely to use GPL.

#### **Ofcom's assumption regarding automatic organising of the switch by the new provider under the GPL option**

61. Ofcom suggests that, if the consumer has not already cancelled directly with the old provider by the time the consumer contacts the new provider, then under EC&R the consumer will be given the option to organise the switch themselves (i.e. to proceed under C&R), whereas under GPL it is automatic that the new provider will organise the

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<sup>19</sup> The extent to which Ofcom's proposals may reduce reactive save and the extent to which this may be harmful to consumers is considered further in Section 10.2.

switch. This is not the case as the option for the consumer to proceed under C&R remains an option for the consumer under both EC&R and GPL.

62. If the consumer calls the *old provider first*, then whether the process is EC&R or GPL the old provider may inform the consumer that the new provider can coordinate the switch for them. Alternatively, the old provider may offer to cancel, informing the consumer to contact the new provider to arrange a new service, thereby implementing a C&R process. Therefore, there is no difference under EC&R compared to GPL if the consumer calls the old provider first.
63. If the consumer calls the *new provider first*, then whether the process is EC&R or GPL the new provider will inform the consumer that it can organise the switch, but there will also be the option for the consumer to organise the switch themselves via C&R. It is *not automatic* under the GPL option that the switch will be organised by the new provider, unless Ofcom presupposes the new provider 'forces' the switch (which will not be beneficial to consumers and is considered further below). For example, under a GPL process (as with an EC&R process) if the consumer is concerned that it will take a long time for the switch to occur if the organisation is in the hands of the new provider (because the new provider will have to ensure a simultaneous switch (see below for further details)), the consumer may simply request a new service as soon as possible and not request that the new provider perform a switch. The consumer may then perform the switch themselves under C&R.

**Aligning the process for within Openreach and cross-platform switching processes with GPL**

64. Ofcom notes that introducing EC&R would maintain different processes for switching cross-platform and within Openreach and thus maintain confusion over the switching process compared to GPL which would align the two processes. As a result, the use of GPL is assumed higher than the use of EC&R for cross-platform switches.
65. The impact on reduced confusion of aligning the two processes should not be overstated for a number of reasons. First, in each case the consumer can start with calling the gaining provider. The gaining provider informs the newly acquired consumer whether it will take the lead or if the current provider needs to be contacted to cancel their consumer's existing service. The consumer can then take the appropriate action (if necessary). The scope for confusion may be limited. Second, even when consumers are not required to contact their existing provider to cancel, consumers still do so and may prefer to do so (see Section 3.1 above). Given consumers will still contact their current provider or wish to do so, GPL does not necessarily always lead to a smoother, easier process. Indeed, as outlined below (see Section 10.1) GPL is likely to increase the time taken to switch for cross-platform switchers so may even increase confusion for other aspects of the switch.
66. Third, it is clear from a number of results in the survey that respondents have difficulty recalling details of their switch within the last two years, which Ofcom recognises in the consultation.<sup>20</sup> Given a consumer will generally only switch at a minimum once every year or two, and likely more infrequently than this, the extent to which all consumers will recall details of how the switching process works (irrespective of the actual process).<sup>21</sup> If a

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<sup>20</sup> See *Making Switching Easier*, footnote 44 (page 21).

<sup>21</sup> Ofcom present no evidence comparing consumer confusion

consumer cannot recall the switching process details anyway, the risk of confusing consumers may be limited.

67. Finally, confusion is only a problem where consumers undertake both cross-platform and within Openreach switches over time (i.e. undertake a switch when the previous switch was subject to a different process). Where a customer switches between providers on the same platform this will not result in confusion.

### 3.3. Treatment of consumers that opt to organise the switch themselves

68. There are a group of consumers that Ofcom assumes would still opt to switch themselves using a C&R process when an EC&R proposal is available, which would be switched by the new provider under the GPL proposal. As outlined above, this group of consumers is likely to be small. Nevertheless, the differential take-up rates of the EC&R and GPL proposals assumed by Ofcom suggest these consumers represent up to a quarter of all cross-platform switchers. Ofcom wrongly assumes that these consumers are not actively choosing a preference for C&R.
69. It seems reasonable to assume that consumers that make an active choice to organise the switch themselves (in particular, consumers that choose to proceed via C&R under the EC&R alternative) believe that they will be better off from doing so compared to having the new provider organise the switch taking account of the potential for increased risks of loss of service and double payments. These consumers should therefore not be assigned net benefits from the GPL proposal in relation to reduction in risks of loss of service and double payments, as Ofcom does. As a result of this, Ofcom overstates the benefits of the GPL process and Ofcom's conclusion that there would be greater benefits in relation to reductions in loss of service and double payments under the GPL proposal than under the EC&R alternative (which relies on there being more consumers that would opt to go via C&R under the EC&R alternative) is flawed.
70. The difference between Ofcom's estimates of the benefits to consumers of the GPL proposal and the EC&R alternative is largely driven by the difference in proportions that are assumed to have the new provider organise the switch under the GPL proposal compared to the EC&R alternative (i.e. the differential take-up rates). This difference in turn seems to be largely driven by Ofcom's assertion that under the EC&R alternative consumers will more often choose C&R because consumers will be given *an option* to coordinate the switch themselves, whereas under the GPL proposal the new provider *automatically* coordinates the switch.
71. As outlined above, Ofcom fails to recognise that under a GPL process it is not automatic that the new provider will coordinate the switch. The option for the consumer to coordinate the switch (via C&R) exists equally under EC&R and GPL. However, Ofcom takes the view that the option would be used more often under EC&R.
72. On Ofcom's own logic then, the lower proportion of consumers using EC&R compared to GPL is in large part because a proportion of consumers under an EC&R regime will *actively choose* to coordinate the switch themselves. Under Ofcom's own logic, these consumers have been given *an option*. An option is generally considered valuable, particularly if that option is exercised.
73. Some consumers may, quite reasonably, prefer to coordinate the switch themselves. There may be a variety of reasons for this:

- It might allow for the new service to be provided more quickly (compared to having to wait for the new provider to arrange for a simultaneous switch with the old provider);
  - It might allow for a period of no service, for example, if the consumer is going on holidays and taking the opportunity to both switch service provider and not pay for any service while on holiday; or
  - It might simply be that the consumer derives utility from being in control of the switching process, with the comfort that it is not in the hands of a third party provider that may not be as attentive to the consumer's best interests as the consumer him or herself.
74. Whatever the reason, these consumers may actively consider that they will be better off coordinating the switch themselves rather than leaving it to the new provider to coordinate, notwithstanding the possibly greater risks of loss of service and double payments. It therefore seems presumptive for Ofcom to assign a net benefit to such consumers in relation to a reduction in loss of service and double payments under the GPL proposal, when the consumers themselves, given the option, would prefer to proceed via C&R.
75. For Ofcom to sustain an analysis that assumes a net benefit for these consumers under the GPL proposal, Ofcom would need to provide some evidence that, due to some behavioural issue, these consumers would be mistaken in their decision to opt to organise the switch themselves if given the option. This evidence has not been provided by Ofcom.
76. Indeed, to sustain an argument that the GPL process offers significantly greater benefits than the EC&R process, Ofcom must assume that some aspect of a GPL process – the new provider or the process itself – restricts the consumer from exercising an option it may otherwise have done so. As outlined above, Ofcom's analysis does not recognise the nuanced process through which a consumer engages in a switch. Initial contact with a prospective new provider by the consumer may commonly be for information gathering purposes (for example, to confirm an advertised offer is available to them). The ability of the prospective new provider to potentially 'force' a switch hinders the consumer's ability to exercise the option of following a C&R-like process, particularly when the consumer may otherwise have simply been assessing alternative options. In any event, these consumers should be excluded from the benefits analysis and the assumed take-up of the GPL and EC&R options treated the same.<sup>22</sup>
77. Interestingly, in a different context Ofcom supports the idea that where a consumer actively elects to exercise an option, the consumer is no worse off as a result of this option. When considering consumers that opt to cancel via webchat, Ofcom reasons that, although webchats take longer than other methods of cancellation, it is not safe to assume any additional costs for consumers that choose to cancel via webchat because they have actively opted for webchats over the other methods.<sup>23</sup> The same reasoning ought to apply to where consumers have the option to organise the switch themselves.

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<sup>22</sup> Alternatively it could be argued that the benefits these consumers (that opt for the C&R process under the EC&R option) obtain from a GPL process must be offset against the 'dis-benefits' they obtain from losing control of the process.

<sup>23</sup> See *Making Switching Easier*, footnote 69 of Annexes 6 – 8.

## 4. REDUCTION IN LOSS OF SERVICE

### 4.1. Loss of service as a concern of consumers

78. The proposals by Ofcom to reduce loss of service must be considered in the wider context of how important loss of service is to consumers. Ofcom's own research shows that:<sup>24</sup>
- Only 7% of cross-platform switchers reported arranging the switch so that they had continuous service as a major difficulty and 4% highlighted getting the switch to happen on the date they wanted as a major difficulty. Taking these together, a net 8% of cross-platform switchers highlighted at least one of the two points (and so this is therefore the maximum identifying loss of service as a major concern). Of these, 39% still reported their overall experience of the switch as easy.
  - Only 2% of cross-platform switchers reported arranging the switch to ensure continuous service as the *main* difficulty when switching, equivalent to only around 18,000 cross-platform switches annually while 1% reported getting the switch to happen on the date they wanted as the main difficulty.
79. If Ofcom was to focus its proposals only on the harm arising from those consumers reporting a major difficulty with the switch,<sup>25</sup> the proportion of cross-platform switchers experiencing unwanted loss of service (using Ofcom's methodology) decreases from 17% to 10%. Moreover, many of these major difficulties will not relate to the switching process. If we filter the incidence of loss of service again only where the respondent indicated 'process related' difficulties,<sup>26</sup> it falls to 5%. Using Ofcom's assumptions of forecast take-up of GPL or EC&R, and the estimated reduction in incidence following implementation, its proposals will impact between 57,000 and 89,000 cross-platform switches per year<sup>27</sup> and **will impact only 5,000 to 7,000 who considered loss of service to be a major**

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<sup>24</sup> Note that the results presented relating to difficulties are only flagged by respondents after the survey prompts survey participants with a list of up to 23 possible difficulties. These prompted responses were provided to the consumer without the consumer first identifying or alluding to these as potential issues. By prompting consumers with specific difficulties and including the presumption that a difficulty arose in the question, the research will inevitably lead to over-reporting of the incidence of difficulties. Yet despite this prompting and the questionnaire taking the consumer through a range of possible concerns and questions relating to the switching process, importantly the survey *then* asked the consumer to recall how easy their experience was overall. Consumers overwhelmingly reported an easy switching process (81% 'fairly' easy or 'very' easy) even after having been asked to recall the switching experience and being prompted with possible concerns.

Following prompting, only a fifth of cross-platform switchers reported experiencing at least one major process related difficulty and 8% mentioned a process related difficulty as the main difficulty when switching. Indeed of those that reported a major process related difficulty, 50% still rated the overall switching process as easy. While a little over half highlighted minor difficulties, the vast majority (74%) of these rated the overall switching experience as easy.

<sup>25</sup> This follows Ofcom's approach in its Mobile consultation of only using 'major' difficulties to account for the difficulty consumers have recollecting events and possible biases associated with prompting consumers. Ofcom's Mobile consultation noted that: '*To counter any concerns that issues may have been identified solely because they were prompted, we have taken the conservative approach of focusing principally on issues reported as 'major'.*' (footnote 20).

<sup>26</sup> This is based QC2A in the triple play quantitative research where respondents have experienced major difficulties with regard to '*Cancelling your previous service*', '*Getting the switch to happen on the date you wanted*', and '*Arranging the switch so that you always had access to your services*'.

<sup>27</sup> This uses Ofcom's assumptions of: 17% incidence, 45% (EC&R low) to 70% (GPL) take-up and an 85% reduction in incidence applied to total cross-platform switches.

**difficulty.**<sup>28</sup> Under a more plausible set of alternative assumptions, outlined below, the benefits will be obtained by less than 1.1% to 2.6% of cross-platform switches.<sup>29</sup>

80. Filtering only those respondents that experienced major difficulties for each service, the proportion experiencing loss of service was 8% for fixed landline, 9% for fixed broadband and 5% for pay TV. Focussing on customers with 'process related' major difficulties, the proportion was 5% for fixed landline, 5% for fixed broadband and 3% for pay TV.
81. Based on this evidence, and that discussed in detail below, loss of service does not therefore appear to be a significant concern of cross platform switchers and costly policy changes by Ofcom risk being disproportionate to address only a small proportion of affected consumers.

#### 4.2. Estimating loss of service

82. Below we examine the assumptions used by Ofcom to estimate the incidence of loss of service under the current switching process and the assumed reduction in incidence. These are combined with Ofcom's estimates for the total number of cross-platform switches and take up of the proposed options, examined above, to give an assumed proportion of cross-platform switchers that would benefit from the proposals.

**Table 2: Loss of service incidence**

Stage	Ofcom assumption and calculation	
A1	Loss of service incidence under C&R	17%
A2	Reduction in incidence under proposals	85%

#### 4.3. The incidence of loss of service

83. Ofcom assumes that 17% of cross-platform switchers experience an unwanted break in service. Below we outline why this is the wrong proportion to use to estimate the consumer benefits and, in any event, is overestimated.

##### **Any loss of service cannot be applied to each switch**

84. The estimated incidence is based on results from the triple play quantitative research which showed that 17% of cross-platform switchers experienced a loss of any service (i.e. a loss of either fixed landline, fixed broadband and/or pay TV). The proportion experiencing a loss of service for each of the services was 10% for fixed landline, 12% for fixed broadband and 6% for pay TV.<sup>30</sup>
85. By applying the proportion subject to *any* loss of service being switched to *each switch* Ofcom overestimates the proportion of each service having a loss of service. The 17% incidence of service loss used by Ofcom is based on *any* of the services the customer is

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28 Ofcom's assumptions as above plus 8% of cross-platform switchers highlighting loss of service as a major difficulty.

29 This uses our alternative assumptions of: 13% loss of service incidence (which we still consider an overestimate), a GPL take-up of 16% to 36%, and a reduction of incidence of 65%.

30 This is based on QG9 in the triple play quantitative research: '*Which service or services did you lose for a period of time?*' for switchers over the last two years (available at Table 411 of Ofcom's published results). The proportions apply to total switchers that received an unwanted loss of service as well as those up to 6 weeks or '*Don't Know*'. Only one respondent in fixed landline has a loss of service for greater than 6 weeks.

switching being subject to a loss of service but Ofcom then apply this percentage to each switch, irrespective of what service(s) the customer is actually switching. If a customer is switching only a standalone service or dual play, by applying the composite incidence of service loss across any service, Ofcom will overestimate the incidence on every switch that does not involve triple play. Ofcom's proposals extend far beyond just triple play switches to all cross-platform switching. Measuring the probability that *any* service is lost is very different from the probability *each one* has a loss of service. Ofcom cannot therefore use the proportion suffering any loss of service and apply it to each switch.

86. To see why this is important, consider a simple example with a household switching two services from one provider to another. If each service has a 10% chance of loss of service<sup>31</sup> then the chance that either (i.e. any) of the services has a loss of service is 19% (i.e. one less the probability that neither of the services has a loss of service:  $1 - (0.9 \times 0.9)$ ), despite each service having only a 10% chance of loss of service.
87. In the context of the results of the triple play quantitative research, assuming a 17% incidence of unwanted loss of service and applying this to each switch is clearly not a reasonable approach, given the incidence of unwanted loss across each service is significantly less than that of *any* loss:<sup>32</sup> 12% broadband, 10% landline and 6% pay TV. This error becomes more important the more services are switched (and the more providers involved, although this is not taken into account in Ofcom's research).
88. In light of this, it is important to look at the potential harm a customer experiences due to each individual service being switched, which has two implications. First, if a customer is switching standalone pay TV with a chance of unwanted loss of service of 6%, then applying a composite unwanted loss of 17% (based on the chance the consumer may lose pay TV and/or broadband and/or landline) to this switch is clearly erroneous. The incidence of unwanted loss of service must take into account the service(s) the consumer is actually switching.
89. Second, by assuming an incidence for service loss of 17% and applying this to each switch Ofcom ignores the fact that loss of service may affect only a component of the package a consumer purchases when the package includes multiple services. If a customer switches a triple-play package to another provider's triple-pay package, then on average in 17% of cases there is unwanted loss of any service. However, perhaps only the fixed broadband actually results in a loss of service. This affects the harm estimated by Ofcom and is examined in detail below. For example, if only the fixed broadband is affected, then the harm estimated by Ofcom should not be calculated based, for example, on the value to the consumer of the whole package (including the value the consumer attaches to the fixed landline and/or pay TV components of the package, neither of which is subject to a service loss).
90. Where relevant Ofcom should be using values for each of the assumed inputs specific to the type of cross-platform switch and apply these to the numbers of that type of cross-platform switch. We have not undertaken this task as accurate figures for the number of cross-platform switchers by type of switch has not been made available. We have undertaken this analysis for pay TV switchers using the triple play quantitative research to

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31 This example assumes, consistent with the triply play quantitative research, that incidence of loss for any switch can be due to the gaining provider and/or the losing provider.

32 In addition, the unwanted loss of service share for pay TV is significantly less than the share for broadband and for landline.

provide an indicative view of the separate benefits arising from Ofcom's proposed options for pay TV (see Section 9).

#### **Loss of service is not always the providers' fault**

91. The loss of service quantitative research asks consumers who they thought was responsible for the loss in service. In many instances the consumer indicates that it is not the provider's fault. The consumer ought to have a good understanding of whether the providers are responsible for the loss and, if anything, would be less likely to believe they are responsible. The 17% figure used by Ofcom, aside from the objections above and in any event, should be reduced to take account of instances where the loss of service was not the provider's fault. For switch-related loss of service, the loss is the fault neither of the previous nor the new provider in 27% of cases of loss. This reduces the 17% figure to 13%.<sup>33</sup> However, this clearly will still be an overestimate since this is the probability that *any* of the services results in a loss of service. Obviously for a dual play package switch, there is only a probability that the landline and/or broadband services have a loss and no TV loss of service can occur (despite this being included in the 13% calculation). Hence this 13% should be viewed as an upper bound.

#### **Conclusion**

In our view, Ofcom's current approach significantly overestimates incidence of loss of service in the current C&R process. We estimate a revised incidence of 13% and note, for the reasons given above, this is likely to overestimate actual incidence of service loss. Importantly also estimated incidence for different switch types must be applied to the relevant switch type, rather than an overestimated aggregate incidence for loss of service, which would actually apply only to triple play switches. The incidences that are applied to different switch types must also be reduced to reflect instances where loss of service is not the provider's fault. Note that this revised estimate does not take into account where loss is a major difficulty so this revised estimate is likely to overestimate the true incidence where this incidence is an actual concern to consumers.

#### **4.4. The reduction in incidence of loss of service**

92. There is an important interaction between the duration of double payment and loss of service that Ofcom ignores. If a consumer chooses to have a contract overlap, this will, commonly, be to ensure continuity of service. The greater the contract overlap chosen by the consumer, the greater protection the consumer will obtain from a loss of service and the lower the incidence of service loss. Similarly, the lower the double payment, the greater incidence of service loss. The two effects cannot be considered in isolation. To see this, consider the assumption made by Ofcom that its proposed changes will reduce double payment from an average duration of 14 days to just one day, the day of transfer (this is discussed in detail in Section 5 below). Such a reduction in double payment will

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<sup>33</sup> This is based on QB5 regarding responsibility for loss. Considering only cross-platform switchers, this increases to 38%, although is based on a limited sample. Looking at each individual service, based on all switches (not only cross-platform switches), the share of unwanted loss reduces from 10% to 7% for fixed landline, from 12% to 9% for broadband, and from 6% to 4% for TV. We have taken a conservative approach here by not including respondents that indicated "don't know" to the question.



inevitably increase the starting assumption for incidence of service loss under C&R. It will also affect the extent of the reduction in loss of service resulting from the proposals.<sup>34</sup>

93. Further, Ofcom acknowledges that not all instances of loss of service would be resolved by its proposed reforms and that a residual proportion will continue to experience a loss of service. Underpinning this, Ofcom highlights the proportion of new Openreach lines experiencing failure within 90 days of installation as an example but also points to loss from human error and unforeseen events more generally or where consumers experience difficulty using equipment that is fully functional. According to Ofcom, there is no direct evidence on the extent to which loss of service is likely to remain following the proposals.<sup>35</sup> Consequently, Ofcom assumes there will be an 85% reduction in loss of service under both of its proposed options, with a residual 'natural rate' of loss of service of 15%.
94. Below we look at a number of sources of evidence, which may be helpful in assessing reduced incidence, each of which points to a much lower reduction in incidence likely to result from the proposals and a higher 'natural rate' for the residual incidence.

#### **Evidence from the existing GPL process for within Openreach switches**

95. Evidence is available on the extent of loss of service under an existing GPL process. Based on Ofcom's triple play quantitative research, the incidence of loss of service for switches within Openreach, currently subject to a GPL process, is *higher* than for loss of service with cross-platform switching not currently subject to a GPL.
96. Ofcom explains this higher incidence of unwanted loss of service for within Openreach switching by noting the June 2015 completion date for implementing a new switching process in the Openreach platform, whereas the triple play quantitative research analyses switching in the two year period to November 2015. Ofcom suggests that '*most of the sample switched before the new loss of service protections were implemented.*' However, a GPL process was in place prior to the June 2015 supplementary reforms and most within Openreach switches already followed a GPL process.<sup>36</sup>
97. Using Ofcom's own approach to determining the incidence of loss of service, the proportion that have experienced any unwanted loss of service for switching within Openreach using a GPL process is 21% compared to 17% for cross-platform switches using a C&R. For fixed broadband the incidence of loss of service is 19% (statistically significantly higher than only 12% for cross-platform switches); for fixed landline the loss incidence is 11% (compared to 10% for cross-platform switches). Only for pay TV is the incidence lower under a GPL process, yet the 4% to 6% incidence represents a very small proportion of switchers and this difference is not statistically significant.

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34 This can be shown formally. The current loss of service incidence is assumed to be  $X_0$  and the incidence following implementation of Ofcom's proposals  $X_1$ . Ofcom assumes  $X_1$  is 15% of the current incidence i.e.  $X_1 = (0.15 \times X_0)$ . The reduction in incidence of loss of service  $X_0 - X_1 = X_0 - 0.15X_0 = 0.85X_0$ . However, by reducing the duration of double payments to only 1 day then the incidence of loss of service would be higher at  $(1+\delta)X_0$  instead of  $X_0$ , where  $\delta$  is a positive number. Based on this,  $X_1$  is actually  $0.15(1+\delta) X_0$  and the reduction in incidence  $X_0 - X_1 = X_0 - 0.15(1+\delta) X_0 = 0.85X_0 - 0.15\delta X_0$ . The reduction in incidence is always lower (by  $0.15\delta X_0$ ) than Ofcom's starting point. This is illustrative and based on Ofcom's other assumptions regarding reduced incidence (see below).

35 *Making Switching Easier*, paragraph A8.21.

36 For example, in its August 2013 statement on Openreach switching Ofcom explained that at that time around 90% of migrations went through the GPL process with only 10% going through a losing provider led process

98. While Ofcom point out that the extent to which within Openreach switches can be used as a guide may be limited given the different context, this is not clear from the evidence available. The reasons for loss of service are very similar in each. As a result, it is not clear why this evidence has been ignored by Ofcom as results from within Openreach switches have been used elsewhere in the consultation (for example, on take-up of GPL) as a guide to the outcome under GPL for cross-platform switches. This evidence is helpful in forecasting the effectiveness of a GPL process in reducing loss of service for consumers.<sup>37</sup> At the very least, the loss of service for within Openreach switches provides a lower bound on the impact of introducing GPL. The figures are stark: GPL does not reduce loss of service. The figures are particularly instructive as within Openreach switching is in some respects more straightforward than cross-platform switching (for example not requiring new line provision).
99. Sky has considered the main reasons that drive within Openreach switching service losses and believes the main causes will be:
- Poor engineering practice at Openreach – e.g. not connecting the right line to the right 'port' on the new provider's LLU equipment;
  - Incorrect set-up by the customer – e.g. the customer does not connect their new router correctly or is unable to connect devices to the new router;
  - Customer does not have access to the new router when the switch happens – i.e. the new router has not been successfully dispatched / received by the customer; and
  - Issues with the new provider's equipment – e.g. the 'port' on the LLU equipment does not work correctly or an issue with the customer router.
100. In each case, these outages **are not related to the underlying switching process**. They are just as likely to happen under a GPL or C&R process.
101. This is important because despite Ofcom's best intentions to reduce loss of service, its prescribed policy response is poorly designed, with evidence suggesting a GPL process will have no or limited impact on reducing loss of service (indeed taking the evidence at first sight, loss of service may actually increase).
102. Ofcom's triple play quantitative research allows us to compare the reasons for the loss of service between within Openreach and cross-platform switching. While there are some mixed results – a lower proportion of switchers within Openreach reported problems or a fault with equipment and a delay in landline installation, while a greater proportion of switchers within Openreach reported a delay in service activation and a delay in broadband installation – the evidence suggests that many of the drivers for loss of service that Ofcom expects a GPL process to resolve – such as delays in installation – will persist if its proposed reforms are implemented.

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<sup>37</sup> When comparing within Openreach and cross-platform switching outcomes, it could be argued that regulation aimed at targeting Openreach poor performance may be a more effective means of addressing some of the underlying problems, rather than changing the switching process. If the root cause of many problems was targeted directly, only the incremental benefits associated with the switching process should be included within Ofcom's analysis.

### **Evidence on provision of new lines by Openreach**

103. Ofcom states that the 15% is based partly on Openreach early life line faults. If this is the case, 15% would be a significant underestimate. Sky requires new lines for fixed landline and broadband to be installed by Openreach. New lines are only required for new to market customers (i.e. those that have not had broadband before), home-movers (where the new premises does not have a live or inactive copper line) and switchers coming from another platform to Openreach. A significant number of new lines develop faults soon after being installed. According to Sky data, [CONFIDENTIAL].
104. This will result in a loss of service for these customers. We estimate that of these, around 10% relate to switches (as opposed to new lines).<sup>38</sup> These figures will underestimate the difficulties switching to Openreach as they relate only to switches to Sky and do not take account of switching to other providers reliant on the Openreach platform. Taking account of Sky's position relative to other providers that are also reliant on Openreach, we have scaled this figure to get a rough estimate for the number of faults occurring each year within 28 days of installation that is directly related to a switch of around [CONFIDENTIAL].<sup>39</sup> As the fault develops after the new provider has activated the new service, *these faults will not be resolved through a GPL process.*
105. In the context of only 884,000 cross-platform switches, only 150,000 (17%) of which Ofcom estimates experience loss of service annually under the existing C&R process, [CONFIDENTIAL], provides a robust estimate for a 'residual' loss of service. These figures suggest that the difficulties faced by consumers switching between providers on different platforms may be driven in large part by line faults occurring soon after activation. These faults will occur as a result of the consumer switching but will not be addressed by a GPL process and so would be expected to continue to occur if Ofcom's proposals are implemented. As with earlier evidence, the assumption that introducing a GPL process will reduce loss of service incidence to 15% is not realistic. Rather than assume there is no change, we take a relatively cautious approach and use one third as a revised estimate for the assumed residual loss of service.

### **Evidence on who is responsible for the loss**

106. As noted above, the loss of service quantitative research asks consumers who they thought was responsible for the loss in service. The consumer ought to have a good understanding of whether the new provider or old provider is responsible for the service loss or if the consumer themselves are responsible. Indeed, if anything when asked to attribute blame, individuals are less likely to believe they are responsible. In 65% of cases of any unwanted loss (and 66% of switch-related losses), the consumer believed that it was the provider's fault (noting whether the old provider or new provider, etc.). In the remaining instances, responsibility for the loss was attributed to equipment fault (or no one being responsible), the consumer or someone in the household being responsible, or another reason not the responsibility of the provider. The loss of service that is expected to remain is based on human error or unforeseen events, or where it does not relate to coordination between the old and new providers. This information provides helpful

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38 Sky notes that the only NLPs that should be placed in a switching scenario is where the customer join Sky from Virgin Media (otherwise the order would be a transfer and not a NLP). To estimate this, Sky has identified the proportion of NLPs that have an associated number port request for Virgin Media. Data over the last quarter (to 29<sup>th</sup> September 2016) show that these 'switch-related' NLPs represented [CONFIDENTIAL] of total NLPs.

39 We assume Sky has a share of Openreach providers of around 25% to 28%, giving around [CONFIDENTIAL] annual faults.

evidence pointing to the residual loss of service that remains following Ofcom's reforms. Based on this, Ofcom's assumed 15% residual service loss following implementation of the proposed reforms seems unrealistically ambitious.

107. Evidence suggests loss of service of around 27% would remain.<sup>40</sup> Indeed, this appears, if anything, to be an *underestimate* of the residual loss of service that would remain as only looking at switches that include a cross-platform switch suggests a loss of service of 38% would remain.<sup>41</sup> Note that while this provides evidence on the extent of human error or unforeseen circumstances that might arise, as instances where it is not the provider's fault have already been factored into a reduced incidence for service loss above, we avoid the risk of double counting and do not adjust the residual loss further.

#### **Evidence on the reasons for loss of service**

108. As noted above, Ofcom's loss of service quantitative research specifically asks consumers the reasons a switch related loss occurred.<sup>42</sup> In many instances the responses flagged as causing the service loss suggest a GPL system may indeed, in theory, reduce loss of service, for example, delays in installation, service activation, delivery of equipment, problems with engineer appointments, etc., and issues around the previous service not being cancelled correctly. These ought to no longer occur if the older provider is obliged to continue providing its service until the new service is activated. As noted above, evidence from within Openreach switching suggests that in practice, it is far from clear if a GPL process improves service loss due to these factors.
109. However, in addition there are a number of other reasons commonly highlighted by consumers which suggest from the outset that a GPL process would not resolve the loss of service. Ofcom has not taken these reasons into account and they potentially offer helpful information on the residual 15% loss of service. The table below highlights reasons that would, *prima facie*, not necessarily be addressed by a GPL (or EC&R with opt-in) process. For example, the consumer highlights problems or a fault with equipment and faults with the line. It would be expected that in many of these cases, these issues would arise following activation (i.e. once the new provider has activated the new service but then a subsequent service loss occurs). Importantly, where the fault occurred prior to activation, consumers would *likely report other options available to them in responding to the question* – e.g. that there was a delay in service activation or a delay in installation. Similarly, where a respondent flags that an engineer is unable to fix a problem, this assumes that a problem with the new service has occurred and needs fixing.
110. While this evidence is not determinative, and the selective nature of the possible responses means that it likely underestimates the extent of service loss that a GPL process would not resolve, it provides additional confirmation that the residual loss of service is likely to be greater than 15%.

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40 Switch-related loss is not the fault of either the previous or the new provider in 31 of 114 cases i.e. 27% of times (when not counting 12 respondents who answered "don't know"). See QQB5 loss of service quantitative research.

41 We have focused on the all switchers as cross-platform switches is based on a small number of responses (13 of 34 when not including 2 "don't know" responses).

42 This is based on QB1 in the loss of service quantitative research, Tables 47 to 49 in Ofcom's published tables.

**Table 3: Reason for switch-related loss (QB1)**

Why did you have a period without service?	Fixed landline	Fixed broadband	Pay TV	Triple play
Problems / a fault with the equipment	4%	6%	26%	11%
There was a fault with the line	18%	13%	11%	18%
Engineers not being able to fix the problem	2%	5%	-	4%
Problems with setting up the equipment myself	1%	5%	15%	6%
NET	23%	24%	48%	31%

Source: Tables 47-49, CRA analysis of loss of service quantitative research respondent-level data

Notes: Figures relate to loss for any service and is based on 110 respondents (landline), 110 (broadband), 27 (TV), and 126 (Triple Play). The net figure for *unwanted* loss is 21% for fixed landline, 24% for fixed broadband, 48% for pay TV, and 31% for triple play.

### Summary

111. Taking all of the above factors into account Ofcom's estimate for a reduction in loss of service incidence of 85% is unrealistic. Based on the evidence available, a more plausible assumption would be to assume a residual loss of service of around 34%.

### 4.5. Ofcom's approach to estimating consumer harm from loss of service

112. Ofcom argues that loss of service can result in a range of harmful effects on individual households, including:
- the household is denied the use of a service they value and may have paid for;
  - there can be a range of consequential impacts on households including the inconvenience of not having their service, impacts on their ability to work or study and in some cases direct financial costs; and
  - members of the household must spend time and effort arranging for their service to be restored.
113. Ofcom believes that its proposed options will reduce loss of service and so consumers would benefit through avoiding these harmful effects. Ofcom attempts to quantify four of these costs that it argues will be avoided through reduced service loss: **denial of service, direct financial costs, time unable to work** and **time spent to restore the service**.
114. Ofcom considers these impacts cumulatively, adding together values estimated for each cost and cause of harm to calculate a total value of harm per switcher. However, these costs are not independent and often reflect the same underlying cause of harm. This is particularly important as Ofcom appears to have misinterpreted the survey results, resulting in significant duplication of the estimated costs and overestimation of the assumed harm that arises. For example, and as outlined in more detail below, the estimate for direct financial costs *already includes* work-related impacts and time spent at home to restore the service. Similarly, time spent to restore the service may be the same time the consumer is unable to work and harm from denial of service may reflect time unable to work. Ofcom's loss of service quantitative research estimates these costs but does not clearly distinguish between the incremental costs to the consumer.

Consequently, estimating these causes of harm separately and adding them together significantly overstates the total harm per switcher and the estimated benefits from Ofcom's proposals. For some the estimates are obtained from alternative methods of valuing the same or similar costs and so provide a *potential range* for the total harm per switcher.

115. The steps taken to calculate each of the costs and thus details of these overestimates of the total harm per switcher is shown in the table below. We consider each of the assumptions or stages used by Ofcom to calculate the value of harm per switcher in turn and then provide more reasonable alternative estimates, including correcting errors.

**Table 4: Summary of assumptions on which Ofcom's estimated harm is based**

Ofcom assumption and calculation		
A3	<i>Willingness to pay / price paid</i>	<i>£1.52</i>
A4	<i>Average duration of loss in service</i>	<i>8</i>
<b>A5</b>	<b>Denial of service harm per switcher</b>	<b>£12.16</b>
<b>A6</b>	<b>Direct financial costs harm per switcher</b>	<b>£18.00</b>
A7	<i>Average time unable to work</i>	<i>4 hrs</i>
A8	<i>Average hourly wages</i>	<i>£13.50</i>
A9	<i>Value of leisure time</i>	<i>£6.93</i>
<b>A10</b>	<b>Time unable to work harm per switcher</b>	<b>£26.28</b>
A11	<i>Time trying to resolve service</i>	<i>4 hrs</i>
-	<i>Value of leisure time</i>	<i>£6.93</i>
<b>A12</b>	<b>Time to restore service harm per switcher</b>	<b>£27.72</b>
<b>A13</b>	<b>Step 3: Value of harm per switcher</b>	<b>£83.03</b>

*Notes:* The total value of harm is calculated as £83.03 by Ofcom, while the sum of the individual items is £84.16.

#### 4.6. Willingness to pay to avoid loss of service (A3)

116. Ofcom calculates an average daily price paid across products based on information from providers and weights this by the proportionate split of products that cross-platform switchers switch to. This is estimated to be £1.52 per switcher. Ofcom notes that this is a proxy for, and will only reflect a component of, consumers' total willingness to pay<sup>43</sup> in the absence of any evidence on consumers' actual willingness to pay.

##### **Willingness to pay and compensation values are ignored**

117. Ofcom's loss of service quantitative research attempts to estimate both:
- Consumers' willingness to pay to avoid the loss of service(s) and the pecuniary impact this had on the household (QA11B); and
  - The value that would have compensated consumers for the loss of service(s) and the problems experienced as a result of it (QB3).

<sup>43</sup> Ofcom notes that it would ideally base its estimate on 'the value that consumers place on their services over and above the price they pay' (para. A8.25). Ofcom correctly notes later, in para. A8.24, that willingness to pay is the value consumers place on the service over and above the price *in addition to the price paid*.

118. Ofcom dismisses this evidence and does not use any of it on the basis that few respondents were able to answer the questions or were confused by the questions.
119. Ofcom seeks to use estimates for consumer willingness to pay and required compensation to avoid a loss of service to value the harm specifically arising from **denial of service**. These costs are valued separately from and added to estimates for direct financial costs, costs related to time unable to work and time spent to restore the service. This is clearly not correct. Responses to the willingness to pay and compensation value questions given by consumers encompass all of these costs combined. When a respondent provides a willingness to pay to avoid a loss of service this willingness to pay fully reflects all of the harm that the respondent is avoiding through its payment to avoid service loss. The same is true of compensation value. Ofcom cannot obtain a willingness to pay or compensation value and then assume that this only includes a small component of actual harm because respondents have not included in their willingness to pay or compensation value estimates for direct financial costs and costs related to time unable to work. If these costs are genuinely incremental costs to the consumer, the consumer will have paid to avoid them or expect to be compensated for them.
120. The logical consequence of this erroneous approach is that the sum of costs associated with denial of service along with direct financial costs and other costs will be greater than the consumers' willingness to pay to avoid service loss or compensation value in the event of service loss, in which case the consumer would not purchase the product (i.e. cancel the service or the switch). Consequently, the willingness to pay or compensation value estimates arising from these questions, if elicited effectively, would have represented an estimate for **the total harm per switcher**.
121. To see this, the question put to consumers for compensation value is provided below. The question asks for the amount that would have compensated the consumer for the service loss and **any problems experienced as a result of it**. Any problems as a result of service loss clearly would include what Ofcom describes as direct financial costs, time unable to work, time to resolve the service *and any other costs*. Ofcom currently assumes that 'any problems' excludes these other problems and that additional values should be calculated for these costs and then added to the willingness to pay or compensation value.

**Detailed loss of service questionnaire: QB3**  
**Compensation value**

**ASK ALL. ASK AS SINGLE QUESTION AND SHOW SERVICES LOST FROM QA1.**

QB3 Overall, thinking back to the [[NON SWITCHERS] most recent]] loss of [Fixed landline; Fixed Broadband; Pay TV] service you experienced [[SWITCHERS] when switching]] and the impact this had on your household, what amount do you feel **would have compensated you for that loss of service(s)** and any problems you experienced as a result of it?

Please provide your answer in £ rounding to the nearest £.

Please type in a number.

OPEN NUMERIC BOX INDICATING £.

INCLUDE TICK BOXES FOR 'Didn't need compensation', 'It wasn't provider's fault' AND 'Don't know'

122. For **willingness to pay**, Ofcom appears correct in interpreting that many consumers have misunderstood the objective of the question. A high proportion of respondents (67% of those that experienced an unwanted switch related loss in the preceding two years) did not know or were not sure how much they would have been willing to pay to avoid service loss. This is a flaw in the survey design as participants should have been given sufficient information and framing to understand the question. Survey design to elicit willingness to pay is difficult, which is why questions need to be well constructed and the survey piloted to test its design, possible biases and possible misinterpretation by consumers, and then revised.
123. For **compensation value**, Ofcom also dismisses the results due to few consumers appearing able to answer the questions, as well as responses appearing to take account of 'responsibility', by assigning a £0 value where there is a perception that the loss was not the providers fault.<sup>44</sup> Ofcom asserts that, as a result, the responses therefore do not necessarily reflect the 'harm' resulting from loss of service.
124. Ofcom is wrong to completely dismiss the results on the basis of this supposed bias. The questionnaire itself provides the option for respondents to tick an option that '*It wasn't the provider's fault.*' The survey design generates these biases as it frames the question for the consumer by explicitly introducing the option. Absent such an option, the consumer would not consider who is responsible for the service loss and would consider only the value that would compensate them. Given the reliance by Ofcom on the results from this research, this bias resulting from poor survey design could have been detected and addressed through an effective survey pilot.
125. Nevertheless, only 15% of respondents that had an unwanted service loss (switch related or otherwise) indicated that it wasn't the provider's fault (18% for switch-related unwanted loss of service). Beyond this, there are no evident biases in the data nor is there any indication that the remaining respondents have not answered the question correctly. Only 19% of consumers did not know what their compensation value would be. Such a proportion would not be unexpected given the degree of thought required to estimate a compensation value and the overall length of the questionnaire. Indeed it is a lower proportion of respondents stating that they 'don't know' than in response to other questions in the survey – for example the negative impact on work-related activity, where 30% to 40% of consumers indicated responded 'Don't know' – for which Ofcom has used the results as an input without question in its estimation of harm.
126. The 15% of respondents can be stripped out as there is nothing to suggest the true compensation values for these respondents would not have been proportionate to the compensation values of those that did answer the question correctly. In fact, these respondents did not give a 'false' compensation value in addition to absolving the provider of responsibility. The table below shows the compensation values reported by consumers.

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44 *Making Switching Easier*, Annex 8, footnote 42



**Table 5: Compensation value (QB3/QB4)**

What amount would have compensated for loss and any problems experienced as a result?	Total	Fixed landline only	Fixed broadband only	Pay TV only
Didn't need compensation <sup>45</sup>	<b>30%</b>	33%	33%	25%
£1-30	<b>18%</b>	13%	16%	23%
£31-100	<b>11%</b>	7%	10%	8%
£101+	<b>5%</b>	1%	3%	2%
No amount would have compensated me	<b>1%</b>	1%	3%	-
Don't know	<b>19%</b>	18%	18%	13%
Missing	-	6%	4%	7%
Ofcom mean (excl. outliers)	<b>£57.26</b>	£60.89	£53.72	£28.65
Ofcom median (excl. outliers)	<b>£25.00</b>	£25.00	£25.00	£10.00
CRA mean (excl. outliers)	<b>£29.96</b>	£23.36	£24.73	£16.37
CRA median (excl. outliers)	<b>£5.00</b>	£0.00	£0.00	£1.00

Source: CRA analysis of loss of service quantitative research respondent-level data QB3 and QB4.

Notes: Figures by service were not always provided by the respondent. There are nine respondents for which the split by product has not been provided with unwanted loss and hence these are only included in the 'total' column (affecting 8 times landline, 9 times broadband, and 4 times TV).

The CRA average assigns a value of £0 to 'Didn't need compensation' responses (unless the answer 'wasn't provider's fault' or 'don't know' was also indicated for the same product). If a product-specific answer was not provided but the 'total' (QB3) was filled in with a specific response ('No amount would have compensated me', 'Didn't need compensation', 'It wasn't provider's fault', or 'Don't know') then this was carried over to the product-specific answer.

Total includes all respondents with unwanted loss, whereas any product-specific column includes the compensation value assigned to the product's loss of service (whether this has been for a bundle or single-product switch).

127. Importantly, Ofcom's mean compensation values are overstated because where a respondent indicated that they did not need compensation these should be assigned a £0 compensation value. In addition, Ofcom has not included several £0 compensation figures. For example, if a consumer with unwanted loss of service for all triple play products assigned the total compensation figure across broadband and TV only, then by definition the fixed landline compensation should be treated as £0 (which Ofcom has treated as a missing value). This gives a revised more accurate mean (excluding outliers) of £30.
128. Moreover, it is not clear that the mean is the best measure of the average in these circumstances. Clearly high value compensation amounts indicated by a limited number

<sup>45</sup> Note that for the total, none of these respondents also noted it was not the provider's fault (as these options were mutually exclusive). For the individual services the answers may overlap between "wasn't provider's fault" and "don't know" with the option "didn't need compensation" (this is for 7 answers for landline, 27 for broadband, and 6 for TV). In this case the answer has conservatively been counted as "wasn't provider's fault" or "don't know", respectively.

of respondents can significantly increase the average.<sup>46</sup> In this context, the median figure for compensation may be more appropriate to assess the typical experience of a switcher. When using CRA's approach of appropriately including £0 compensation values gives a median of £5. Importantly, use of the mean means that the majority of consumers would consider they are overcompensated. Indeed, **the majority of respondents indicate they would need no compensation for landline and broadband loss of service**, and almost half of standalone pay TV and 'all bundles' respondents indicate they do not need compensation.

**Monthly average price paid for any service is an overestimate**

129. Ofcom estimates the weighted average daily price paid, a proxy for willingness to pay, at £1.52 per switcher. Ofcom assumes that the price paid will be a significant underestimate of willingness to pay as '*nearly all consumers will in practice value the service much more than the price they are required to pay for it.*' There are a number of concerns with this estimate and assumption.
130. First, the weighted average price paid is for all consumers. As Ofcom is aware, consumers will have different elasticities of demand; some consumers can be categorised as marginal and some as infra-marginal. The focus of Ofcom's proposals to reform switching processes will only benefit switchers. Ofcom accept this by using the number of switchers as its starting point for valuing the benefits of its proposals. The average price paid used by Ofcom should therefore be the price paid by the average *marginal* consumer that switches rather than all consumers. This can be obtained by using the average price paid by new joiners. Any benefits must also be forward looking as they will be realised following implementation of any reforms so must take account of the benefits to *new switchers*. While Ofcom's intention, through these proposals and other reforms, may be to remove barriers to switching thereby encouraging greater switching and a higher proportion of marginal consumers, those additional marginal consumers, by the nature of what makes them marginal, will still be switching and thus paying the price of a new joiner. Equally, while marginal consumers have the potential to be locked-in and become infra-marginal, the fact they are switching suggests they have a higher elasticity of demand and are more likely to switch again.
131. The distinction between the price paid by all consumers and marginal consumers is an important one as there is significant price discrimination taking place, both formal and informal, and particularly so for new joiners. New joiners will be subject to introductory offers. Price discrimination allows a supplier to distinguish consumers based on their elasticities of demand and is neither unique to this industry nor generally harmful to overall welfare. Here price discrimination is based on the extent to which consumers are inclined to switch. Overall willingness to pay will generally be lower for these consumers: in addition to the lower price paid, their consumer surplus is likely to be lower given they are switching or looking to switch and being more price sensitive generally. Consequently, the average price paid by new consumers should be used rather than the average price paid by all consumers. A more accurate estimate of the willingness to pay of switchers is

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<sup>46</sup> This discussion of use of the mean versus the median is independent of the exclusion of outliers, as arguments related to use of the median relate to taking better account of extreme cases when examining the typical experience of consumers. The outliers that are removed are distinct from this as they appear to reflect unreasonable responses to the question that are unlikely to match what happened in reality or capture a range of other issues with that respondent.

- the price paid by switchers, not the average price paid by both switchers and non-switchers.
132. Sky estimates that the average discount received by new customers is [CONFIDENTIAL] for pay TV (standalone or the TV component of a triple play bundle). Customers of standalone pay TV or triple play packages account for over three-quarters of all Sky's customers. The equivalent discount was around [CONFIDENTIAL] for broadband and landline customers (either standalone or the communications component of a triple play bundle).<sup>47</sup> To estimate the willingness to pay of switchers using the average price paid ought to therefore use the average price paid by switchers, which is [CONFIDENTIAL], which should be used in Ofcom's estimate for year one annual benefits. While some of these switchers will become long-term consumers of Sky, the extent to which and the time in which this occurs, or in which they begin to face increased prices following the switch, must be considered within the context of the ten-year time horizon of Ofcom's impact assessment.
133. If it is assumed the first-year average price following a switch (around [CONFIDENTIAL]) increases continuously over the ten year period (i.e. assuming that all consumers that switch nonetheless become inactive customers for the remaining nine-year period, which seems highly unlikely), then the average price paid by those consumers over that ten year period will likely still be lower than the £1.52 average price paid by all consumers.<sup>48</sup> We do not make an adjustment for this in our calculations but note that, as a result of using the price for all consumers rather than new consumers, the final estimate of benefits is just as likely to be an underestimate of consumers' willingness to pay as an overestimate as Ofcom suggests.
134. Second, consumers may be compensated through a refund in the event of a loss of service or waiving of charges until the service is up and running. Ofcom notes this may be the case and that any compensation of charge waiver should be deducted from the valuation of the service.<sup>49</sup> However, no deduction is made in Ofcom's impact assessment. If the consumer values the service at their willingness to pay but is compensated through payment at the price of the service, any losses that would remain should only reflect the difference between what is paid and the consumers' willingness to pay. For some consumers who are paying at their willingness to pay the compensation could completely cover the loss. In any event, compensation will significantly reduce estimates for total consumer harm. [CONFIDENTIAL]. The reasons that compensation is given relate to loss of service, missed engineering appointments, and installation or provisioning delays. Unfortunately, it has not been possible to estimate what proportion of this compensation is attributable to a switch related loss of service. Recognising it is likely to represent a small proportion, if we assume that 2% of this total compensation amount is switch related, this still suggests that **around [CONFIDENTIAL] should be removed from Ofcom's estimate of total annual benefits.**
135. Third, the average monthly price paid by Ofcom indicates the value to the consumer of the package that they purchase. That package may include multiple services and so the

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<sup>47</sup> Note that this discount is as against the combined cost of the package, including line rental and so taking account of the discount gives the average price paid by new joiners or switchers.

<sup>48</sup> The higher prices expected to arise at the end of this ten year period under this scenario would also be increasingly discounted so result in a lower net present value of benefits.

<sup>49</sup> *Making Switching Easier*, Annexes 6 to 8, footnote 38.

value to the consumer is an aggregate of the value of the component parts of the package. If a consumer loses service on only one part of the package then the value used by Ofcom should not be that paid for the whole package but for the component part of the package for which service is lost. For example, for cross-platform standalone pay TV switches where the only service that is switching across platforms is pay TV, only what is paid for pay TV is relevant.

136. To highlight the effect of this, as noted above, Ofcom incorrectly assumes an incidence for loss of any service of 17% and applies this to each switch. If a customer switches a triple-play package to another provider's triple-pay package, then on average in 17% of cases there is unwanted loss of service. However, perhaps only the fixed landline actually results in a loss of service (with the fixed broadband and/or pay TV services running without any loss of service). If only the fixed landline is affected, then the harm estimated by Ofcom should not be calculated based on the value to the consumer of the whole package (including the value the consumer attaches to the fixed broadband and pay TV components of the package, neither of which is subject to a service loss). To do so is unreasonable and significantly overestimates the avoided costs to consumers.

### **Conclusion**

137. The loss of service quantitative research has not been designed effectively and, as a result, it does not give reliable estimates for consumers' willingness to pay to avoid loss of service. However, the research does appear to provide some results for compensation values that are reasonable, or at least comparatively, robust. The compensation value, estimated to be around £30.00, provides an estimate for the *overall* harm per switcher resulting from a loss of service. In trying to estimate more granular component parts of harm, Ofcom has assumed consumers' willingness to pay using the average daily price paid of £1.52. While Ofcom notes that because this willingness to pay is likely to be greater than the price, this value will underestimate willingness to pay. Alongside this, however, Ofcom uses the average daily price paid for all consumers rather than new consumers and adjusting this switching price within the ten year impact assessment horizon. This will overestimate harm to consumers. Further, Ofcom has taken no account of actual compensation paid by providers, which should be deducted from estimates of annual benefits.

### **4.7. The duration of loss of service and assumed reduction (A4)**

138. Ofcom assumes an average duration for unwanted loss of any service (landline, broadband and/or pay TV) of eight days (nine days for fixed broadband, eight days for fixed landline, and seven days for pay TV).<sup>50</sup> Ofcom believes that its proposed options, subject to take-up and incidence, will reduce the duration for any loss of service to zero.
139. Based on Ofcom's triple play quantitative research, the duration for loss of service for switches within Openreach, currently subject to a GPL process, is on average six days for the loss of any service. The assumption that cross-platform switches will reduce this

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<sup>50</sup> These figures are based on the triple-play quantitative research respondent-level data and slide 39 of the *Triple plat switching, online research: Main Findings*, published slide pack. The TV figure is not presented in the slide pack due to the base being too low, and hence Ofcom did a "bespoke analysis using findings from both the BDRC research and the loss of service research" (*Making Switching Easier*, Annex 8, footnote 34). The bespoke TV analysis combines the sample responses to the same question from the two surveys. Although the same question has been asked in both cases, it is unclear whether combining two unweighted samples would provide a better estimate of the service loss duration (despite increasing the sample size from 24 to 38). Nevertheless, the mean loss of service is seven days in both cases.

duration to zero is therefore unrealistic. It is not clear why this evidence has been ignored by Ofcom as results applicable to within Openreach switches, as noted previously, have been used as a guide on the behaviour of consumers and likely outcomes for cross-platform switchers following the introduction of a GPL process elsewhere in the consultation, for example, on take up. We see no reason why the duration of loss of service for within Openreach switches would not provide a guide in this context.

140. Assuming no loss of service for cross-platform switches following the introduction of GPL therefore seems extreme. There may be reasons why the duration of any service loss would differ for within Openreach and cross-platform switchers, particularly related to the extent of the reliance on Openreach, for example on faults relating to new line provision. However, in the absence of more robust and accurate evidence, Ofcom should use the results from within Openreach switching as a guide to the duration of service that would be experienced for cross-platform switchers. On this basis, the duration for loss of service would be reduced from eight days to six days, rather than the one day assumed by Ofcom.<sup>51</sup>

**Table 6: Unwanted average duration of loss for CPS and ORS (days)**

Switch	Average	Any	FBB*	FLL*	Pay TV
CPS	Mean	8	9	8	7
	Median	5.5	5.5	5.5	5.5
ORS	Mean	6	5	6	6
	Median	2.5	2.5	4.0	5.5

Source: CRA analysis of loss of service quantitative research respondent-level data

Notes: The fixed broadband sample in this study includes dual and triple play customers only, accounting for around two thirds of fixed broadband customers.

141. Unless Ofcom can point to specific aspects of within Openreach switching that would account for the loss of service that *would not apply to cross-platform switches* then the figures for within Openreach switching should be used. As detailed above (see paragraph 99), Sky has considered the main reasons that drive service losses for within Openreach switching, including incorrect set-up by the customer and issues with the new provider's equipment. The reasons for these service losses **are not related to the underlying switching process**. They are just as likely to happen under a GPL or C&R process.
142. Consequently, Ofcom's approach to loss of service duration following introduction of GPL for cross-platform switches is unrealistic and we assume that even using a lower estimate based on all products' loss of service will be too high. Again, a loss of service can potentially occur for only one or two services within a triple-play package during a switch. Similarly, a standalone TV switch would result in a duration difference of one day only (so using a 2-day difference based on all products will lead to an overestimate).

<sup>51</sup> These percentages do not take into account the 15% of loss of service assumed to still occur (paragraph A8.21).

#### 4.8. Direct financial costs (A6)

143. Ofcom estimates direct financial costs of £18 from their loss of service research.<sup>52</sup> This figure refers to the average total direct financial costs to all consumers (switchers and non-switchers) as a result of a loss of service (excluding two extremely large outliers).
144. The estimate for direct financial loss is sourced from QA7/A7A/A7B in the loss of service quantitative research.<sup>53</sup> Below we outline two reasons – duplicating values for different sources of harm and biases in self-reported costs – that mean the overall estimate of harm per switcher from a loss of service currently used by Ofcom is a significant overestimate.

##### **The direct financial cost estimate includes all sources of harm from loss of service**

145. In the loss of service survey, QA7 asks respondents to estimate the direct financial costs to the household from *all* of the impacts of a loss of service noted by the consumer in QA6 (consumers can select multiple reasons in QA6). The direct financial costs in QA7 relate to **all of the reasons** noted in QA6. An excerpt showing QA7 is shown below.
146. The financial cost provided by the consumer is therefore an aggregate figure that includes as component parts a number of factors that Ofcom goes on to quantify separately and then add to the direct financial costs, in effect double counting or duplicating the harm caused by a loss of service and overestimating the benefits from reducing this harm. While all of the factors identified in QA6 may involve some financial cost, a number of them clearly reflect impacts that Ofcom goes on to quantify. For example:
- Any portion of direct financial costs attributed by the consumer to *Negative impact on work related activities* (1 below) is duplicated as Ofcom goes on to explicitly quantify **time unable to work** and adds this to the direct financial costs.<sup>54</sup>
  - Any portion of direct financial costs attributed by the consumer to *Took time to resolve loss of service* (4) and/or *Had to stay in to wait for engineer* (17) are likely duplicated as Ofcom goes on to explicitly quantify **time spent to restore service** and adds this to the direct financial costs.<sup>55</sup>
  - Any portion of direct financial costs that can be attributed by the consumer to a cost associated with a denial of service – e.g. *Missed TV shows* (12), *Missed specific sporting events* (11), *Negative impact on study/homework activity* (2), *Unable to complete household tasks* (8) is duplicated as Ofcom goes on to explicitly quantify

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52 This £18 is rounded up from £17.88.

53 QA7 asks the respondents to make estimates for each of (potentially previously selected) the issues that arose with the switch flagged by respondents after prompting in QA6. QA7B provides an overall figure if no categories were previously selected and QA7A a figure for any other direct financial costs that were not previously included.

54 Note that QA7 specifically asks the direct financial costs attributable to 'Negative impact on work related activities' (Option 1 in QA6 as shown in the question). Responses were provided by only seven survey participants, of which six also filled in a positive duration for time unable to work (and another two respondents that flagged time unable to work also reported an overall direct financial cost). The samples are clearly too small to draw any conclusions from the responses to Option 1. The results point to inconsistencies in responses: for example, working hours lost did not result in direct financial costs or participants were prompted to indicate direct financial costs for a negative impact on work but did not lose any working hours. This is important as, by not including the work related financial costs for respondents that also indicated work hours lost, the mean direct financial costs reduces from £17.88 to £14.55, suggesting that, if anything, the estimate for total direct financial costs is likely to be an overestimate.

55 The loss of service quantitative research does not prompt the survey participant with these particular issues or similar issues and so we assume these would be included within that reported in QA7A.

**harm from denial of service** and adds this to the direct financial costs. Indeed, as harm from denial of service is estimated by assuming a willingness to pay for that service any factor (i.e. all factors) that can be attributed by the consumer to determining their willingness to pay for the service contributes to the estimate of direct financial costs that is then duplicated in estimating the harm from denial of service.

147. Question A7B asks respondents to estimate direct financial costs where none of the factors listed in QA6 applied to their switch. QA7A asks for an estimate of any other direct financial costs not associated with any of the above factors. While it's not clear what these additional costs would be – and the survey does not ask for details – the combined overall costs, from the factors above and the additional questions, provides an estimate for **the total harm per switcher**.

**Detailed loss of service questionnaire: QA7**  
**Direct financial costs**

ASK ALLSELECTING ONE OF THE CODES BELOW AT QA6. ASK AS SINGLE QUESTION AND SHOW SERVICES LOST FROM QA1. SHOW ALL RELEVANT CODES SELECTED AT QA6. IF NO RESPONSE AT QA6, DO NOT ASK.

QA7 Thinking about the factors you mentioned, what were the direct financial costs to you and the people in your household **for all of the following** because of your [[NON SWITCHERS] most recent] loss of [Fixed landline; Fixed Broadband; Pay TV] service(s) [[SWITCHERS] when you switched your INSERT SERVICES FROM 'MOST RECENT SWITCH ALLOCATION']]?

Please provide your answer in £ rounding to the nearest £.

Please type in a number.

SHOW CODES SELECTED IN QA6.

1. Negative impact on work related activities
2. Negative impact on study/homework related activities
3. Increased mobile bill (including mobile data, text or calls)
4. Took time to resolve loss of service – i.e. webchat /phone calls
5. Increased landline bill
6. Had to use a different location i.e. café, friends' houses
7. Incurred bank charges/late payment charges
8. Unable to complete household tasks (e.g. internet shopping, online banking, booking tickets)
9. Caused unhappiness or arguments within my household
10. People were unable to contact us / we were unable to contact them
11. Missed specific sporting events
12. Missed TV shows/ catch up
13. Missed/Rearranged gatherings/appointments (e.g. medical appointments)
14. Had to buy mobile dongle
15. Increased anxiety and stress
16. Paid for engineer to fix
17. Had to stay in to wait for an engineer
18. Other (please type in)
19. Losing service did not affect my household [SINGLE CODE]
20. Don't know

148. The consumer is asked to quantify the financial costs to him or her resulting from the loss of service. This is a different method, alongside willingness to pay or compensation value, of estimating the total harm per switcher. Thus the £18 elicited by Ofcom from this question provides a further data point in a range of estimated total harm.
149. The mean direct financial cost is £18, while the median is actually £0. The majority of people believe that the overall cost of service loss is zero. When looking at any switch that incurred unwanted loss of fixed landline service the mean is £15 only, while for fixed



broadband this is £21.<sup>56</sup> For customers that incurred unwanted loss on all three triple play services, the mean is £42. The median is always £0 though.<sup>57</sup>

#### **Biases in self-reported harm**

150. The estimate for direct financial costs comes from a survey where consumers that have experienced a loss of service are asked directly to estimate a monetary amount, taking account of all of the factors that caused them harm with the switch.
151. Self-reported harm where the participant has experienced a loss is likely to be subject to a response bias that is likely to overestimate the scale of actual harm. First, the potential difficulties giving rise to this harm have all been given unprompted to the survey participant (in QA6). These prompted responses were provided to the consumer without the consumer first identifying or alluding to these as potential issues that may give rise to financial costs. Furthermore, the question itself suggests to the consumer that these factors may have resulted in financial costs. Use of the term 'costs' is not balanced or neutral, it provokes the consumer to identify negative impacts of their experience.
152. By prompting consumers with specific issues and including the presumption that costs have arisen in the question, the research will inevitably lead to over-reporting of the financial costs. Even if framed correctly, consumers may be more likely to over-report the extent of harm incurred. Remarkably, despite this prompting and biased framing of the question, the majority of consumers, all of whom experienced a loss of service, did not attribute any direct financial costs to the loss.
153. We make no adjustment to the estimates of direct financial costs for this bias as there is no way to determine how material the bias may be. However, we note that it points to the harm per switcher being overestimated when direct financial costs are used as the estimate.

### **4.9. Time unable to work and time to resolve service (A7 and A11)**

#### **Double-counting must be avoided**

154. Ofcom considers the time unable to work and the time taken to resolve the service separately. Ofcom estimates the time unable to work as being four hours on average and the time spent to resolve the loss of service as also four hours on average. It is important to be clear what actual costs borne by the consumer each of these represents so that the same cost is not captured twice.
155. The loss of service quantitative research asks two questions on time lost to work and to resolve the service: the first, shown below as QA8B asks participants to estimate the length of time they were prevented from working due to the loss in service. The second, QA10 is and also shown below, asks participants the length of time they and other people in the household spent trying to resolve the service (including time spent waiting for an engineer).

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<sup>56</sup> These figures will be overestimating the loss for the product itself since the direct financial loss is provided combined for all services that incurred unwanted loss.

<sup>57</sup> Ofcom shows in Table 26 that the median for all switchers would be £43 but we understand this is based on not including the respondents who indicated £0 direct financial loss.

**Detailed loss of service questionnaire: QA8B**  
**Time unable to work**

ASK ALL. ASK AS A SINGLE QUESTION FOR ALL SERVICES LOST FROM QA1.

QA8B As a result of your [[NON SWITCHERS] most recent]] loss of [Fixed landline; Fixed Broadband; Pay TV] service [[SWITCHERS] when switching your INSERT SERVICES FROM 'MOST RECENT SWITCH ALLOCATION']] were you prevented from working for any length of time?

If you were, then please type in the number in hours you were prevented from working.

OPEN NUMERIC BOX INDICATING HOURS.

Was not prevented from working for any length of time

Don't know/can't recall

**Detailed loss of service questionnaire: QA10**  
**Time taken to resolve service**

ASK ALL. ASK AS A SINGLE QUESTION AND SHOW SERVICES LOST FROM QA1.

QA10 How much time did you and other people in your household spend trying to get your [Fixed landline; Fixed Broadband; Pay TV] service(s) fixed?

Please think about all the things that you and others in your household spent time on to resolve the loss from the point at which the loss occurred until you had service again.

If you spent time staying in to wait for an engineer visit(s) please include this time in your answer.

Please type in number of hours and minutes.

OPEN NUMERIC BOXES INDICATING HOURS AND MINUTES.

Don't know

Did not spend any time trying to get service(s) fixed

PLEASE ASK A FOLLOW UP QUESTION WHERE THE RESPONSE IS 'DON'T KNOW'

Which of the following best describes the length of time you and other people in your household spent trying to get your [Fixed landline; Fixed Broadband; Pay TV] service(s) back?

Again, please think about all the things that you and others in your household spent time on to resolve the loss from the point at which the loss occurred until you had service again.

Please select one. SINGLE CODE.

1. Under an hour
2. Up to half a day
3. 1 day
4. 2-3 days
5. 4-7 days
6. More than 7 days (please type in)
7. Don't know / don't recall

156. Ofcom assumes in each case the consumer spends time to resolve the service and separate from this work time is lost. However, the time a consumer is prevented from working may be the same time the consumer spends resolving the service (although the latter relates to anyone in the household so is wider in scope).<sup>58</sup> For example, time taken to resolve the service includes that waiting in for an engineer. As the consumer is waiting for the problem to be fixed, this period will overlap with the service loss duration. Presumably for many consumers, this will also be the time they are unable to work.

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<sup>58</sup> Note that there are some respondents that experienced a loss of service that gave the same or almost the same answer to both questions, indicating that consumers may not have been able to distinguish between the two and hence include the same length of time twice.

Consequently, Ofcom must avoid capturing the same cost twice and account for any overlap in these time periods. To avoid double-counting Ofcom appears to take a two-stage process to interpreting the data:

- The **time unable to work** comprises the opportunity cost of not working, which is the wage rate that the respondent could have obtained working less the leisure time that is substituted for this lost work time (i.e. the difference between the value of work and leisure time).
- The **time taken to resolve the service loss** is the opportunity cost of this time, which is assumed to be leisure time.

157. Where these two periods overlap, the consumer first substitutes leisure for work (time unable to work) and then bears the cost of lost leisure time (time spent to restore the service). While in theory this approach and interpretation seems a valid one. However, it is not the one that has been applied in the process of data collection as no determination can be made over the extent of overlap from the survey responses. An alternative interpretation for consumers could be that the time unable to work comprises actual income sacrificed or lost cash inflow as a result of the loss of service (which Ofcom then applies the wage rate to less leisure time) while time taken to resolve the service would be the opportunity cost of that time (valued by Ofcom using an estimate for leisure time). For example, a self-employed respondent that spends four hours to resolve the service is unable to work for those four hours. Thus for some consumers the time unable to work and the time taken to resolve the service will be the same time or at least the two periods will overlap (the opportunity cost equals the lost cash inflow less the substituted leisure time). As outlined below in discussing the value of time, this may not always be the case.
158. This confusing data collection process and Ofcom's approach to try to distinguish between these two time periods leads to a number of significant data anomalies. First, many of the results relied on by Ofcom do not pass a simple sense-check test. For example, 15% of respondents experiencing unwanted pay TV loss of service lost more than 11 hours of work time as a result of this loss of service, 7% lost more than 26 hours work time. When focusing on switchers that had at least TV service included in their package, then 32% of respondents lost greater than 11 hours of work time and 16% lost greater than 26 hours. This time might relate to the respondent waiting in for an engineer but, as can be seen from QA10 above, this is time that should have been attributed to the time taken to resolve the service not time unable to work.
159. It is also unclear how such a large proportion of respondents could lose such a substantial amount of time to work (around 1.5 working days) as a result of a loss of service of pay TV. Such results could potentially be explained by a loss of broadband service, which can be a functional requirement for work related activity but not for pay TV.<sup>59</sup>
160. There are also significant inconsistencies in the responses to these questions. There are a number of respondents that report hours spent on restoring their service as considerably *higher than the duration of the actual loss of service*. This clearly cannot be

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<sup>59</sup> Note in this regard that all of the 5 respondents indicating they switched TV only did not lose a single working hour.

true, even when multiple household members spend time restoring the service.<sup>60</sup> It seems unreasonable to spend more than double the actual duration of service loss to restore the service as this would entail more than two people of the household being involved in resolving the service for the entire duration of the loss. Consequently, in estimating the average time unable to work and average time to restore the service, we have not included the responses from those reporting time periods for either greater than twice their actual loss of service. This approach will provide a more accurate average by excluding responses where the consumer has not understood the question or has misreported the length of time. This revision **decreases the average duration for time spent to restore the service from 3.6 hours down to 2.4 hours.**

161. Aside from these data issues, it is not clear that the mean is the best measure of the average in this context as well as where discussed previously. High values for working hours lost indicated by a limited number of respondents can substantially increase the average. The median figure for working hours lost seem more appropriate to assess the typical experience of a switcher and thus the realistic expectation of these time periods for someone that experiences a loss of service. For any switcher, any fixed landline switcher, any fixed broadband switcher, and any pay TV switcher the median is zero working hours lost. Importantly, this means that **the majority of those that experienced a loss of service did not lose any working hours at all.** For time spent to resolve the service, the median is also zero hours for any switcher, any fixed landline switcher, any fixed broadband switcher while 0.2 hours for any pay TV switcher.

**Consumers have differing employment statuses in the sample**

162. In both the triple play quantitative research and the loss of service quantitative research respondents were asked to describe their employment status. The survey results show a breakdown in economic activity as shown below. The results from the loss of service quantitative research are broadly similar to switchers in the triple play quantitative research and the wider population.

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<sup>60</sup> Within the group of switchers there are 14 respondents where this is the case (of which 10 respondents spent more than double the amount of time of the actual loss), which does not include the two outliers of over 120 hours spent on resolving the loss of service. Within the group of non-switchers there were 43 respondents spending more time resolving the loss of service than the actual occurrence, of which 20 respondents spent more than double the amount of time of the actual loss.

**Table 7: Employment status**

'Employment status'	Unwanted loss		Cross-platform switchers	UK population
	Any	Switch-related (last 2 yrs)		
Working full time (30+ hours/week)	44%	43%	47%	44%
Working part-time (8-29 hours per week)	14%	17%	17%	16%
Working part time (< 8 hours per week)	1%	2%	1%	
Unemployed	6%	6%	6%	3%
Student	2%	2%	3%	4%
Housewife / househusband	7%	6%	9%	4%
Retired	26%	25%	17%	22%
Prefer not to say	-	-	1%	-

Source: Unwanted loss: QD2 loss of service quantitative research  
 CPS switchers: QA4 triple play quantitative research  
 UK population: ONS ([UK Labour Market: August 2016](#))

163. Despite a significant proportion of the sample (41%) indicating they do not work – for example, due to retirement, being unemployed or a student – these respondents still responded with a positive value for time unable to work. Reported employment status reflects the status of the respondent on the day of the survey whereas the survey is designed to capture switching activity over the preceding two years. This may therefore explain some of the reported time unable to work by those not currently working. However, as the table below shows the proportions of respondents in some non-work (or non-wage earning) categories reporting time unable to work are huge. In total almost a third (30%) of all non-working respondents reported time for which they are unable to work. This is clearly unrealistic. It is likely that some categories have answered the question in a way that is inconsistent with how Ofcom has interpreted the results. For example, students may have counted lost study time as time unable to work and househusbands may have counted time lost for domestic work as time unable to work. These seem reasonable responses without further clarification over the meaning of the question having been given to survey participants.
164. However, Ofcom cannot then take the overall average reported time unable to work and apply the wage rate to it. Taking use of the wage rate as given (an assessment of the appropriate way to value time is provided below), then those respondents for which the opportunity cost would not have been the wage rate (non-wage earning work or misreporting time unable to work) should be assigned a value of zero for time unable to work. Assigning these non-work categories a time unable to work of zero, and adjusting for results inconsistent with the actual loss of service, gives a more reasonable estimate for the time unable to work of 3.3 hours instead of 4.2. When also not including respondents that lost more working hours than double the actual duration of service loss, then the estimate reduces further to 0.5 hours.

**Table 8: Proportion of each employment status category showing time unable to work**

'Employment status'	Proportion
Working full time (30+ hours/week)	22%
Working part-time (8-29 hours per week)	21%
Working part time (< 8 hours per week)	50%
Unemployed	0%
Student	100%
Housewife / househusband	43%
Retired	11%
Prefer not to say	n/a

Source: CRA analysis of loss of service quantitative research respondent level data

### Conclusion

165. Given the difficulties interpreting consumer responses to questions designed to obtain the time unable to work and time spent to resolve the service, these estimates should be treated with significant caution. Indeed, given estimates of direct financial costs and compensation values already capture time unable to work and time spent to restore the service (by the respondent), including these would, in any event lead to a significant overestimate of consumer harm from service loss. If these estimates are to be used they should be discounted to take account of the factors above, giving estimates of 0.5 hours for time unable to work and 2.4 hours for time spent to restore the service.

### 4.10. Value of work time (A8)

166. To calculate the value of time that householders were unable to work Ofcom uses a value of average hourly wages of £13.50 based on ONS data. Ofcom notes it has used average weekly wages divided by average hours worked per week from the Annual Survey of Hours and Earnings (**ASHE**).<sup>61</sup> ASHE is the official source for UK data on earnings. Both earnings and hours worked are collected at a person-level so ASHE can provide accurate estimates for hourly earnings without requiring additional calculations using separate estimates for weekly hours and weekly earnings as Ofcom has done. ASHE gross hourly earnings for full-time workers for 2015 was £13.36.

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<sup>61</sup> ASHE provides gross hourly pay and is based on a 1% sample of employee jobs taken from HMRC PAYE records (i.e. is obtained from employers). Businesses are surveyed in April of each year for details of their PAYE register in January of the same year. Further details on ASHE are available at: <http://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/annualsurveyofhoursandearnings/2015provisionalresults>.

**Table 9: Alternative estimates for hourly pay: ASHE and APS**

Source	Hourly pay
ASHE gross hourly wages (2015)	£13.36
APS net hourly wages (2015)	£8.32

Source: ASHE and APS, ONS

167. Note that ONS's headline statistics for ASHE are based on the median rather than the mean. The median is the value below which 50% of employees fall. It is ONS's preferred measure of average earnings as it is less affected by a relatively small number of very high earners and the skewed distribution of earnings. It therefore gives a better indication of typical pay than the mean.<sup>62</sup> ONS approach of using the median for wages is consistent with our revised approach to estimating a number of other inputs to the calculation of harm.

168. Below we outline why the full-time gross wage rate used by Ofcom is likely to overestimate the value of work time.

**Take home pay is a more accurate way to value work time lost**

169. Ofcom use gross hourly pay as an estimate for the value of work time lost. Gross pay is before deductions for income tax, PAYE and National Insurance. The consumer does not receive these deductions so the value of time unable to work to the consumer cannot reasonably include them. The value of time unable to work to the consumer must reflect an estimate for the actual value of that time lost to the consumer; the opportunity cost to the consumer does not include money taken by the Government in the form of taxes.

170. A more appropriate input is an estimate for take-home pay. As outlined above, ASHE only provides an estimate for gross earnings. However, other sources of earnings data allow us to obtain estimates for take-home pay. The **Labour Force Survey** (LFS) and associated Annual Population Survey (APS) provide alternative estimates based on a quarterly survey of a sample of the UK population.<sup>63</sup> The data on individuals' earnings captured by the LFS are thought to be of a lower quality than ASHE as LFS information is self-reported through computer-assisted or telephone interview. ASHE gathers information from the employer which is thought to be more accurate as employers can consult payroll records. Individuals may not have such records to hand and their responses may therefore be subject to higher levels of recall error.<sup>64</sup> Nevertheless, the LFS/APS can provide additional information, for example, on both gross and net wages,

<sup>62</sup> See ASHE 2015 Provisional Results, Background Notes, available at the above link.

<sup>63</sup> The Labour Force Survey (LFS) is a rolling survey of households. Each sample is made up of around 90,000 respondents (40,000 responding households). Each household selected remains in the survey for five quarters with information on earnings requested only in the first and fifth quarters (thus enabling year-on year comparisons). The APS is not a stand-alone survey but uses data combined from two waves from the main Labour Force Survey<sup>1</sup> (LFS) with data collected on a local sample boost. The APS with a sample of around 310,000 respondents has the largest coverage of any household survey. The estimated wage rates presented here have been obtained from the variables NETWK (net wages) and GRSSWK (gross wages) and self-reported employment status (FTPT). Further details on the LFS and APS, as well as data queries, are available at: <https://www.nomisweb.co.uk/>.

<sup>64</sup> LFS responses can be given by proxy (by other individuals in the same household) when an individual is unavailable for interview, giving further scope for recall error from respondents. There is also a large percentage of non-response to the questions on earnings with a typical response of around 30% for the APS.



the latter reflecting take-home pay after deductions. The latter is therefore a better estimate of the incremental value of time unable to work.

171. The impact of focusing on take-home pay reduces the appropriate wage rate to be used from £13.40 to £8.30.

#### 4.11. Value of leisure time (A9)

172. To value leisure time Ofcom has used the Department for Transport's (DfT) non-work commuting time as a proxy for leisure time. Ofcom indicate this value is £6.93 per hour. We understand the estimate for non-work commute time has since been updated by the DfT to £5.33 per hour.<sup>65</sup> It seems sensible therefore to use these updated values.

#### 4.12. Revised estimates for loss of service calculations

173. Based on the revised figures noted above, we have calculated revised estimates of the loss of service harm. In summary:

- We estimate incidence for loss of service at 13% instead of Ofcom's 17% but note that this 13% will be a significant overestimate since this is the probability that any of the services results in a loss of service. Clearly for a dual play package switch, there is only a probability that the landline and/or broadband services have a loss and no TV loss of service can occur (despite this being included in the 13% calculation). We therefore consider 13% to be an upper bound.<sup>66</sup>
- Rather than duration for service loss reducing to zero it is more likely that duration will reduce to around 6 days, giving a reduction of just under 3 days ( $8.3-5.7=2.6$  days).<sup>67</sup>
- While ideally we would split the willingness to pay estimate by switch type (since, for example, loss of service might only be experienced for one of the services in a triple play package), an overall estimate across services cannot be accurately provided without number of switches for each individual package. We have therefore used Ofcom's average willingness to pay of £1.52 despite noting that this will result in a significant overestimate of harm. Together, this results in £3.95 of denial of service harm per switcher (compared to Ofcom's £12.16).
- Contrary to Ofcom's interpretation, the estimate of direct financial costs (£18) is an all-encompassing estimate of total harm per switcher and we treat it as such rather than double counting it alongside other component parts of harm. For exposition purposes, we assign this zero in the table below.
- The average time unable to work and time spent to restore the service should be interpreted with significant caution given the confusing responses in the survey and Ofcom's approach clearly leading to inconsistencies in the calculations. Nevertheless, the time unable to work should be reduced from 4 hours to 0.5 hours to reflect employment status and to account for inconsistencies in the data (e.g.

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<sup>65</sup> Value of non-work time where trip purpose is 'Other' (i.e. non-commute) at 2016 prices, 2016 values. Source: WebTAG: TAG data book, November 2016 available at: <https://www.gov.uk/government/publications/webtag-tag-data-book-july-2016>.

<sup>66</sup> Given access to data on number of switches by switch type separate incidences should be applied to each switch type and would urge Ofcom to follow this more accurate approach.

<sup>67</sup> Again, separate durations should be applied to each switch type.

hours of work lost should be reasonably comparable to the actual duration of the loss of service). Together with a more accurate (and reduced) estimate of wages, the revised estimate for time unable to work falls dramatically to under £2.00.

- The time needed to resolve the service is reduced from 4 hours down to 2.4 hours by not including respondents that spent more than twice the amount of time resolving the service as the actual loss of service. Valuing this at the updated value of leisure time (£5.33) reduces the harm for restoring service from Ofcom's £27.72 down to £12.79 i.e. 54% lower.
- Adding up these figures reduces the harm per switcher due to loss of service from Ofcom's £83.03 down to £18.23 i.e. a reduction of around 78%. The total annual benefit is reduced from Ofcom's £7.4m down to a range between £0.2 million and £0.5 million.<sup>68</sup>

174. A full summary of the revised estimates is provided below.

**Table 10: Summary of assumptions on which Ofcom's estimated harm is based**

Ofcom assumption and calculation	Ofcom estimate	Revised estimate
A3 <i>Willingness to pay</i>	£1.52	£1.52
A4 <i>Average duration of loss in service</i>	8	2.6
<b>A5 Denial of service harm per switcher</b>	<b>£12.16</b>	<b>£3.95</b>
<b>A6 Direct financial costs harm / switcher</b>	<b>£18.00</b>	-
A7 <i>Average hourly wages</i>	£13.50	£8.30
A8 <i>Average time unable to work</i>	4 hrs	0.5 hrs
A9 <i>Value of leisure time</i>	£6.93	£5.33
<b>A10 Time unable to work harm / switcher</b>	<b>£26.28</b>	<b>£1.49</b>
A11 Time trying to resolve service (hrs)	4 hrs	2.4 hrs
Value of leisure time	£6.93	£5.33
<b>A12 Time to restore service harm / switcher</b>	<b>£27.72</b>	<b>£12.79</b>
<b>A13 Step 3: Value of harm per switcher</b>	<b>£83.03</b>	<b>£18.23</b>
<b>Total annual benefit</b>	<b>£7.4m</b>	<b>£0.2-0.4m</b>

*Notes:* The total value of harm is calculated as £83.03 by Ofcom, while the sum of the individual items is £84.16. Revised estimate uses 16% to 36% uptake and 13% incidence.

175. Note that an alternative estimate of total value of harm per switcher is given by the direct financial costs reported by consumers, which Ofcom had estimated at £18, i.e. very close to the £18.23 we obtain. Further, the compensation value provides a further alternative estimate for the total harm per switcher, which was estimated as £30.00. This seems to provide an upper bound to the estimated harm per switcher. In that case, the total annual benefit would be between £0.4 million and £0.8 million, still considerably below Ofcom's estimated £7.4 million.

<sup>68</sup> This is a range due to the different assumptions made on GPL usage.

## 5. REDUCTION IN DOUBLE PAYMENTS

### 5.1. Double payment as a concern of consumers

176. Like loss of service, the proposals by Ofcom to reduce double payment must be considered in the wider context of how important double payment is to consumers. Ofcom's own research shows that:<sup>69</sup>
- Only 8% of cross-platform switchers, after prompting, reported that avoiding paying for the old and new services at the same time was a major difficulty and 4% noted getting the switch to happen on the date they wanted as a major concern. Taking these together, a net 10% of cross-platform switchers highlighted at least one of the two points (and so this is therefore the maximum identifying double payments as a major concern). Of these, 43% still reported their overall experience of the switch as easy.
  - Only 1% reported arranging the switch to avoid paying for old and new services at the same time as their *main* concern, equivalent to around only 9,000 cross-platform switches while 1% reported getting the switch to happen on the date they wanted as their main concern.
177. If Ofcom was to focus its proposals only on the harm arising from those consumers reporting a major difficulty with the switch,<sup>70</sup> the proportion of cross-platform switchers, (using Ofcom's methodology (see below)) incurring double payments falls from 22% to 13% (including one day). When looking at only customers who incurred *unwanted* double payment and reported a major difficulty with the switch, then Ofcom's estimated incidence falls from 16% to 11%.<sup>71</sup> Taking Ofcom's assumptions on incidence of double payment, forecast take-up of GPL and the reduction in incidence following introduction of GPL, its proposals will impact between 84,000 and 130,000 cross-platform switches<sup>72</sup> and **will impact only 8,000 to 13,000 who considered double payment to be a major difficulty**.<sup>73</sup> Under a more plausible set of alternative assumptions, outlined below, the benefits will be obtained by 1% to 3% of cross-platform switches.<sup>74</sup>
178. Many of the major difficulties reported by consumers will not relate to the switching process. If we filter incidence of double payment only where the respondent indicated 'process related' difficulties associated specifically with double payment, then double

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69 As with loss of service, these results relate to difficulties flagged by respondents only after prompting the consumer with potential difficulties without the consumer first identifying or alluding to these as issues. See footnote 24 above for details of why this will lead to an overestimate and of how, despite this prompting and even where consumers encountered difficulties, they still found switching easy.

70 This follows Ofcom's approach in its Mobile consultation of only using 'major' difficulties to account for the difficulty consumers have recollecting events and possible biases associated with prompting consumers. Ofcom's Mobile consultation noted that: '*To counter any concerns that issues may have been identified solely because they were prompted, we have taken the conservative approach of focusing principally on issues reported as 'major'.*' (footnote 20)

71 Taking Ofcom's approach of excluding double payment for one day reduces the incidence of double payment from 21% to 13% (where the respondent reported any difficulties) or 6% (process-related difficulties associated with double payment). For unwanted double payment the incidence falls from 16% to 10% (or 6%).

72 This uses Ofcom's assumptions of: 21% incidence, 70% take-up and an 85% reduction in incidence.

73 Ofcom's assumptions as above plus 10% of cross-platform switchers highlighting double payment as a major difficulty.

74 This uses our alternative assumptions of: 10% to 13% of incidence of double payment (which we still consider an overestimate), a GPL take-up of 16% to 36%, and a reduction of incidence of 65%.

payment falls to 6%.<sup>75</sup> If we were to exclude durations of unwanted double payment of over one month then this is reduced even further to 4% for cross-platform switches and 3% for all switches (the reason for this is explained below).

179. Based on this evidence, and that discussed in detail below, double payment is not a significant concern of consumers and costly policy changes by Ofcom risk being disproportionate given that they address only a small proportion of affected consumers.

## 5.2. Estimating double payment

180. Ofcom's estimates for the number of cross-platform switchers and the proportion that are expected to take-up the new processes proposed by Ofcom are examined above. Below we examine the assumptions used by Ofcom to estimate the incidence of double payment under the current switching process and the assumed reduction in incidence. Ofcom assumes a reduction of double pay incidence by 100% and estimates an average duration of double pay of 14 days, which is assumed to fall to just one day as a result of its proposals. These estimates are used as inputs to calculate an overall value of harm per switcher. Each assumption and step used to estimate this value of harm is summarised in the table below and we consider each in turn before then presenting a set of alternative estimates addressing a number of concerns identified with Ofcom's approach.

**Table 11: Summary of assumptions on which Ofcom's estimated harm is based**

Ofcom assumption and calculation		Ofcom estimate
B1	Double payment incidence under C&R	21%
B2	Reduction in incidence under proposals	100%
B3	Average contract overlap (days)	14
B4	Residual contract overlap (days)	1
B5	Average payment per day	£1.52
<b>B6</b>	<b>Value of harm per switcher</b>	<b>£19.76</b>
<b>Total annual benefit</b>		<b>£2.6m</b>

## 5.3. The incidence of double payment

181. Ofcom assumes that the incidence of contract overlap of greater than one day for cross-platform switchers is 21% under the existing C&R process (if customers with one day of contract overlap are also included then this incidence is 22%). Ofcom believes this incidence is under-reported because to avoid a loss of service it is necessary to double pay for at least a day yet only 22% of cross-platform switchers report double paying and only 17% report an unwanted loss of service. Ofcom also notes that consumers cannot recall details of the notice periods that applied to the switch.
182. Below we outline a number of reasons why the incidence of double payment estimated by Ofcom is a significant overestimate. To address the latter issue relating to recall, rather

<sup>75</sup> This is for cross-platform switches. The share for all switchers is lower at 5% for 'process related' difficulties. These specific questions are from QC2A on experiencing major difficulties with regard to "Cancelling your previous service", "Getting the switch to happen on the date you wanted", and "Arranging the switch so that you were not paying for your old and new services at the same time".

than interpret lack of consumer recall in this survey as indicative of lack of awareness of notice periods, a more sensible solution would be to compare the results for customers that switched within the last twelve months to the results for switches within the preceding two years where concerns over recall arise. In the assessment below, we present results for switchers in the last year and two years to see if this makes a material difference to the results.

#### **Confusion between ETCs and double pay**

183. It is not clear from the survey results the extent to which consumers have distinguished between double pay and ETCs. For example, if a consumer is required to pay an ETC does the consumer consider this to be a double payment? We have been unable to test if this might be the case and so make no adjustments to Ofcom's figures on this basis. Nevertheless, we note that this may be a source of bias and would lead to an overestimate of the incidence of double pay and potentially the additional amount paid as a result of double pay.

#### **Consumers may desire contract overlap**

184. Ofcom use the average incidence of double payment (21%) from all those with a contract overlap rather than just those that do not want a contract overlap (16%). However, there may be good reasons why consumers wish to have a contract overlap and some reported double payment likely reflects a consumer preference. This may include situations where the consumer is still in the previous contract period and has chosen to begin a new service anyway.
185. Ofcom has not asked consumers if a contract overlap was driven by consumer preference or if the decision to switch was taken in spite of the existing contract and notice period with the old provider. As a result, we are left to infer where this may be the case from a set of specific choices put to the consumer when asked the question. Given we are limited to inferring a preference from a series of specific responses noting the reason for overlap which are limited in scope, the extent to which consumers may actively seek contract overlap is likely to be underestimated.
186. Despite being limited to only the specific reasons for double pay presented, responses do show a preference by consumers for contract overlap and suggest that a consumer incurring double payment will commonly choose to do so to upgrade or switch as soon as possible. These responses should be excluded from Ofcom's analysis. For example, where a consumer stated that they sought to upgrade to faster broadband as soon as possible, the consumer signals that the more immediate upgrade is more important than serving the notice period and hence is willing to incur the double payment. This applies even where the consumer has indicated that it does not want a contract overlap (i.e. *these situations are distinct from reported unwanted contract overlap*). Clearly, the consumer would choose to pay less overall (and not want an overlap) given the choice but there is no indication of harm where the consumer actively chooses to double pay to seek an immediate upgrade.
187. As the table below shows, 28% of consumers actually desire a more immediate upgrade or switch as soon as possible. These consumers signal that *double payment did not result from difficulties co-ordinating the switch* between the old and new provider. In these cases, a GPL (or EC&R) process would make no difference to the incidence of double payment relative to the current C&R process; the consumer simply wants to upgrade to

the new provider as soon as possible, independent of how the switch is coordinated with the previous provider.

188. Additionally, where the consumer seeks to ensure they always have a service during the switch *and* did not previously have that service (from the old provider), these responses also mean that the consumer is choosing to upgrade immediately, rather than seeking to ensure continuity of an existing service (as the consumer did not have that service). As the consumer did not have the service previously, the double payment was due to the consumer wanting to have a service they did not previously have – i.e. they were double paying to have a more immediate upgrade. Again these situations are distinct from reported unwanted double payment. These results (again showing 28% of respondents) should also therefore be excluded from estimates of harm.

**Table 12: Reasons for contract overlap that signify consumer preference**

Reason for double pay		Any	Unwanted (2 yrs)	Unwanted (1 yr)
Desire for more immediate upgrade or switch as soon as possible	(8) To switch to a better service immediately	15%	17%	17%
	(7) To sign up with a new provider before a deal ran out	9%	8%	8%
	(12) To get faster broadband speed as soon as possible	5%	3%	3%
	(10) To get the channels I wanted as soon as possible	2%	-	-
	(13) To get inclusive calls as soon as possible	1%	1%	1%
	(11) To get a channel in time to view a specific event	1%	-	-
NET		28%	26%	26%
Where the consumer did not have this service previously, these response would indicate a desire to upgrade immediately	(4) To ensure I always had a BROADBAND service(s) during the switch	19%	13%	13%
	(6) To ensure I always had a PHONE service(s) during the switch	13%	8%	8%
	(5) To ensure I always had a PAY TV service(s) during the switch	11%	3%	2%
	NET	28%	18%	19%
<b>NET</b>		<b>49%</b>	<b>41%</b>	<b>40%</b>

Source: CRA analysis of loss of service quantitative research respondent-level data.

Notes: Results are presented for overlapping contracts up to and including a month. Results excluding one day overlaps and overlaps between one day and one month are not materially different.

189. In total (or net), 49% of consumers indicated any of these nine reasons. When focusing only on those with an unwanted contract overlap, 41% of these consumers still indicated any of these reasons. To be clear, **between two-fifths and half of incidences of double payment occurred for reasons that would not be addressed by a GPL process**; these incidences of double payment would remain following introduction of a GPL (or EC&R) process and should be excluded from Ofcom's estimated benefits. Note that

issues of recall are not important here as the results for those switching in the last 12 months are similar to those for the last 24 months (40% vs. 41%).

#### 5.4. Assumed reduction in incidence and duration of double payment

190. Ofcom assumes the incidence of double payment will fall by 100% following its proposed changes. It also assumes that the average length of a double payment will fall from 14 days currently to one day for all switches taking up the new process.

##### **The assumed reduction in double pay incidence is inconsistent with the LoS analysis**

191. To assume that a GPL (and EC&R) process will reduce incidence of double payment by 100% is inconsistent with Ofcom's analysis on loss of service. When consumers experience a loss of service it is unreasonable to assume double paying also occurs at the same time and both can be reduced. Ofcom concedes that under its proposals there will likely still be some loss of service due to, for example, human error or unforeseeable events. This residual loss of service is assumed by Ofcom to continue in 15% of switches. If the consumer is suffering a loss of service in these instances, there can be no simultaneous double payment.<sup>76</sup> Consequently, the benefits of double paying are not accrued to these switches and the reduction in incidence should be considered, as a starting point, 85% under Ofcom's assumptions. As outlined above in Section 4.4, under the more plausible set of alternative assumptions this is at least as low as 66% (but likely significantly lower).

##### **Contract overlaps of greater than a month should be excluded**

192. Those cross-platform switchers with a reported contract overlap of over a month (13% for any double payment and 17% for unwanted double payment) should not be included in an estimate of benefits. The maximum notice period that applies across the sector for any package is a month so overlaps greater than a month are likely to *reflect circumstances unrelated to the switching process*, such as:

- Situations in which consumers have exited a long-term contract early for some reason and choose to pay out the remaining months, rather than pay an ETC;
- Consumer error, unforeseen circumstances or other consumer-behavioural issues not related to the switching process; or
- Misreporting or other issues related with the ability of a survey to capture double pay duration.

193. In each case, these are issues that would not be resolved by the introduction of a GPL switching process. Consequently, removing double pay of a duration greater than one month lowers the average (mean) duration from 14 days to 11 days.<sup>77</sup> The median is between one to two weeks or 10.5 days using Ofcom's methodology and when not including double payments of a duration greater than a month this is reduced to one week or seven days. This holds for both all switches and cross-platform switches and is

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<sup>76</sup> Ofcom assumes that 'the new provider would not start charging for the new service until the service is up and running' (*Making Switching Easier*, Annex 8, footnote 43). This is consistent with Sky's understanding and practice.

<sup>77</sup> This is conservative for the even when not including customers experiencing a one-day contract overlap. When also including one-day overlaps then the average duration is 10 days. This holds for both CPS and all switches.

independent of whether one day contract overlap switches are included or not. Therefore even using the mean of 11 days seems a conservatively high estimate.

**Evidence from within Openreach switches does not suggest incidence of double pay will fall as much**

194. Ofcom assumes that all instances of double pay will be prevented using a GPL (and EC&R) process, and in each case the duration will be reduced to a single day. However, the incidence for double payment for switches within Openreach, currently subject to a GPL process, is not zero, and the duration not one day.
195. Using Ofcom's approach (not including overlaps of a single day) the incidence for within Openreach switchers is 8% (this is equivalent to the estimated 21% incidence for cross-platform switches). The duration of contract overlap for within Openreach switchers, subject to GPL, is almost identical to that of cross-platform switchers, not subject to GPL (14.2 versus 14.1 days). When looking only at contract overlap (and not including durations over 1 month), the average contract overlap incidence for cross-platform switchers is 18% compared to 6% for within Openreach switchers, while average duration for the former is 10.6 days and 10.2 days for the latter. When also looking only at unwanted contract overlap for those respondents that had major difficulties with double payments, then the incidence difference is marginal with 4% for cross-platform switchers and 2% for within Openreach switchers, while the mean duration is 13.7 days for cross-platform switchers and 11.6 days for within Openreach switchers.
196. While overlapping services should not in practice be possible for a within platform switch, there may be reasons why contract overlap still occurs, for example, because the consumer exits a contract early, formally through ETCs or continuing to pay the old provider, because they want to try the new service before cancelling the old one, or because they want the new service as soon as possible. In any event, within Openreach switchers are reporting double payment and this should still be a useful guide as to the expected incidence of double pay, and the duration of any contract overlap, following the introduction of GPL for cross-platform switchers, particularly in the absence of more robust and accurate evidence. On this basis, the expected reduction in incidence is much more limited at only 13%, reflecting a reduction from 21% to 8% based on method [1] below. The duration would fall by 0.3 days (from 10.6 days to 10.2 days) based on method [2] below.<sup>78</sup>

**Table 13: Double payment incidence and duration (days)**

Methodology	Incidence		Duration	
	CPS	ORS	CPS	ORS
1. Ofcom approach (incl. >1 month)	21%	8%	14.2	14.1
2. <i>plus</i> excl. > 1month	18%	6%	10.6	10.2
3. <i>plus</i> Unwanted with major DP difficulties	4%	2%	13.7	11.6

Source: CRA analysis of triple-play quantitative respondent-level data questions QG5, QG6, and QG7.

Notes: Contract overlaps of 1 day are not included, and for methods [2] and [3] also over one month are not included.

<sup>78</sup> We combine methods [1] and [2] here because respondents we consider that those respondents with a contract overlap of over 1 month may well incur a contract overlap but the responses relating to the duration of the overlap seem unreliable.



## 5.5. Value of harm from double payment

197. Bringing together all of the factors discussed above, we have calculated revised estimates of the harm arising from double payment. In summary:

- The incidence of double payment has been reduced significantly to take account of those that actively sought a contract overlap as around two-fifths to half of incidences of double payment occurred for reasons that would not be addressed by a GPL process. Therefore the incidence is estimated between 10-13%. This verifies the result from the survey where the respondent has indicated that they sought the contract overlap, which was dismissed by Ofcom.
- This share is reduced further due to the 15% of times that there is loss of service for which the gaining provider is assumed to not charge the customer and hence only 85% of incidences are considered.
- The average duration of double payment has been calculated based on those respondents that had more than one day but adjusted so that instances of more than one month of double payment are excluded,<sup>79</sup> giving a revised duration is of 10.6 days. Instead of using Ofcom's assumption that in future this will be reduced to one day only, we have used the mean contract overlap for within Openreach switching of 10.2 days.<sup>80</sup>
- Combining these adjustments reduces the harm per switcher due to double payment from Ofcom's £19.76 down to £9.58, a reduction of over 50%. The annual benefit is reduced from Ofcom's £2.6m to only £0.01-0.02m.

198. A full summary of the revised estimates is provided below.

**Table 14: Summary of assumptions on which Ofcom's estimated harm is based**

Ofcom assumption and calculation		Ofcom estimate	Revised estimate
B1	Double payment incidence under C&R	21%	10%-13%
B2	Reduction in incidence under proposals	100%	65%
B3	Average contract overlap (days)	14	10.6
B4	Residual contract overlap (days)	1	10.2
B5	Average payment per day	£1.52	£1.52
<b>Value of harm per switcher</b>		<b>£19.76</b>	<b>£0.61</b>
<b>Total annual benefit</b>		<b>£2.6m</b>	<b>£0.01-0.02m</b>

Notes: Revised estimate uses 16% to 36% uptake.

<sup>79</sup> Note that for incidence we have conservatively included respondents that had more than one month of double payments since we presume that it is more likely to be correct that they incurred double payment. However, when looking at the average duration then it seems reasonable to not include those respondents since the duration estimate cannot be considered an accurate reflection of what consumers would experience in reality.

<sup>80</sup> We understand that double payments due to contract overlap is normally not possible for within Openreach switches since a new service cannot start when the old service is still active. It is not clear whether this would be the case for all different services (landline, broadband, and/or pay TV), nor is it clear whether if a consumer is required to pay early termination charges that the respondent then considered this to be a double payment of some kind. Here we just note that ORS is 10.2 days compared to (in theory) 1 day, and hence CPS's 10.6 days could also be heavily overestimated. This should be partly covered by our approach of taking the difference between CPS and ORS.

## 6. TIME SAVINGS FROM AN EASIER SWITCHING PROCESS

199. Ofcom believes its proposals will reduce the time and effort needed to switching by making the switching process easier for consumers. To quantify this benefit, Ofcom has estimated the time savings to switchers, noting that this would understate the benefit as this covers only one part of the benefits of making the process easier.
200. Ofcom estimates the time it takes consumers to switch under the current switching arrangements then estimates the time it believes consumers would take under both the EC&R and GPL proposals. The difference between these produces time savings estimates associated with the proposed options. Each assumption and step used to estimate the time savings is summarised in the table below. The total annual benefits for time saved are significantly lower than that for loss of service and double pay so we provide only a summary of a number of particularly stark assumptions where Ofcom's approach could usefully be revised and where its estimates could be improved. While we recognise the evidence base regarding time savings is not as strong as that for other quantified benefits, Ofcom must apply realistic assumptions that reflect this limited evidence.

**Table 15: Summary of assumptions on which Ofcom's estimated harm is based**

Ofcom assumption and calculation	EC&R	GPL
C1 <b>Step 1:</b> Take-up of online/IVR options	25%	40%
C2 Time taken to cancel: phone (mins)	14.8	14.8
C3 Phone use to cancel	80%	80%
C4 Time taken to cancel: direct debit (mins)	14.8	14.8
C5 Direct debit use to cancel	15%	15%
C6 Time taken to cancel: webchat (mins)	29.6	29.6
C7 Webchat use to cancel	5%	5%
C8 Weighted average time taken	15.54	15.54
C9 <b>Step 2:</b> Average time saved	25%-75%	100%
C10 <b>Step 3:</b> Weighted average extra time to join (mins)	1.45-1.65	1.7
C11 <b>Step 4:</b> Value of time (£/min)	£0.12	£0.12
<b>Total annual benefit</b>	<b>-£55K-£110K</b>	<b>£461K</b>

### **There is only limited preference for webform and no preference for IVR**

201. Ofcom notes that there was demand for channels that do not require interaction with an agent (for example, 30% of switchers said their preferred method of cancellation would be email (19%) and webform (14%)). This does not reflect independent demand for use of webform. Over half of those respondents that noted webform also noted a preference for email, phone or webchat.
202. Further, there is no evidence of any demand for or preference for IVR. IVR does not even appear as an option in the research question. Despite this, based on no evidence of IVR demand and only 6% of consumers reporting a *distinct* preference for the webform method, Ofcom then assumes that 25% of switchers would use IVR and webform following their introduction. Ofcom states that: '*This figure [25%] is somewhat lower than*

*the percentage of customers who have stated that those [IVR and webform] are their preferred options and so we consider this assumption is conservative.*<sup>81</sup> As detailed above, this is not correct.

203. While it is not clear how an IVR option would even work in practice alongside an alternative phone cancellation method, two separate processes based on whether the consumer wishes to go through an IVR process or speak to an agent would *risk confusing consumers more rather than reducing confusion*. Where IVR gives the option of speaking to an agent or going through an IVR process, consumers may be forced into an IVR process when they would otherwise prefer to speak to a customer services agent. Ofcom's research shows that the most widely reported major difficulties cross-platform switchers experience with contacting their previous provider relates to the length of time to speak to someone and difficulty getting to speak to the right person. Further, independent evidence suggests that IVR is very unpopular with consumers. It requires users to follow a fixed script, can be slow (see below), tedious and frustrating for users. Evidence generally shows that users seek customer service agent assistance at the first opportunity.<sup>82</sup>
204. In our opinion, take-up of IVR, given the choice with alternatives including speaking to an agent on the phone, would be very limited and should therefore assumed to be zero. The evidence from Ofcom's research shows that independent demand amongst cross-platform switchers for the web-form method is 6%. No evidence has been presented which justifies an alternative approach to take-up.

**The time taken to cancel via webchat is significantly overstated.**

205. Ofcom recognises webchat time is overestimated by noting that "*it is not clear that consumers spend all of this time engaging with a customer service agent as webchat can be undertaken in bursts while undertaking other activities*" and "*the total duration of a webchat may overstate the actual time taken as consumers may be able to multi-task during the webchat*"<sup>83</sup> yet no allowance is made for this in the subsequent calculation. This means that the time saved as a result of using an alternative to webchat is less than estimated. A more appropriate approach would be to assume webchat takes as long as a phone call to cancel. Indeed, this is likely to be an overestimate of the webchat time. While the same information is passed from consumer to agent, it will take less time than on the phone as the switcher can (and does it seems) fill any waiting time with other activities.

**Confirmation calls following email or letter are significantly shorter than standard cancellations**

206. Ofcom assumes that it takes as long to cancel via direct debit, email and letter as to cancel by phone, because the old provider will in any event call the customer to verify the cancellation. In fact, a call to confirm cancellation is significantly shorter than a standard cancellation call. We understand that Sky has provided to Ofcom data on average length of cancellation, which shows that the average length of a verification call (required

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81 *Making Switching Easier*, paragraph A8.48.

82 See, for example, *A Data-Driven Methodology for Evaluating and Optimizing Call Center IVRs*, B Suhm & P. Peterson, *International Journal of Speech Technology* (2002) 5 (1), 23-37.

83 See *Making Switching Easier*, paragraph A8.42 and footnote 69.

following receipt of an email or letter cancellation) is around [CONFIDENTIAL] of the average length of a standard (dual play or triple play) cancellation call.

**Ofcom assumes that cancellation via IVR and webform would take half the time of existing methods**

207. Ofcom expects both IVR and webform to be quicker and easier than cancelling by phone, direct debit or webchat. No evidence is provided for this assumption nor is any available in Ofcom's research commissioned to support the consultation. Ofcom recognises that it is difficult to predict the extent of the time savings associated with these new processes so assumes they take half the time of existing methods (an average time saving of 7.3 minutes) with a low and high scenario of a 25% and 75% time saving, respectively, to account for the uncertainty.
208. However, it should not be assumed that these methods would lead to time savings without robust evidence. These methods could in fact take longer. IVR can be a very slow, tedious process for consumers. Both IVR and webform could fail due to connectivity, incorrect ID or due to the extent of information the customer is able to access during the cancellation (for example, the customer realising that there are ETCs or other implications of switching) and then calling the old provider anyway in order to understand these implications better. Due to the slow scripted nature of IVR, missteps by consumers as they seek to quicken the process can lead to further delays or the consumer becoming frustrated and giving up and calling back again (possibly at another time).
209. Rather than assume a degree of time saving and apply a 25% and 75% range due to uncertainty, the absence of evidence pointing to these methods leading to actual time saving should instead mean that Ofcom applies a neutral range around zero of +/-25% savings.

**The additional call time with the new provider is underestimated for both EC&R and GPL**

210. Ofcom assumes that for switches where the new provider organises the switch (under both the EC&R and GPL options) there will be just one extra minute associated with account verification.
211. First, the time taken to discuss coordination (EC&R), to inform the consumer of the implications of switching (GPL), and for the new provider to collect information to make sure the right account is switched (EC&R and GPL) represent additional time the consumer will spend on the phone with the new provider. Ofcom's allowance for these – an extra one to two minutes – significantly underestimates the additional call time required. This will particularly be the case where the consumer is switching multiple services. If information needs to be collected about the cancellation of two services, Sky estimates this is likely to add around an extra [CONFIDENTIAL] minutes on to the call per service to confirm details of the account to be switched. It is important this additional time is not underestimated as the information gathered on these calls will enable the new provider to avoid the risks of slamming, avoid risks of excessive orders and subsequent cancellations, avoid the significant stress and inconvenience these can cause consumers, and inform the consumer about the implications of switching.
212. Second, this assumes no complications: that the consumer always provides the right information and that there are no failures in the communication systems between providers. Regarding the latter, under the Cartesian mechanisms the new provider will

need to contact the old provider (or some intermediary system) in real time to confirm the account to be switched. If this fails, the call length could be considerably longer. Additionally, the time may depend on whether the switch is from a single triple-play provider or from two different providers.

213. Third, Ofcom does not allow for extra time in the call to the new provider under EC&R and GPL due to customers becoming aware of the implications of switching and deliberating over whether or not to switch given these implications. In the current C&R process this occurs during the call to the old provider to cancel. Under the proposed EC&R and GPL options this will occur during the call with the new provider or the consumer may hang up with the new provider, call the old provider to clarify the implications of switching and then call back the new provider to confirm that the consumer wishes to switch. In either event, Ofcom has not accounted for any of this time and effort under the EC&R and GPL options.
214. While we have not been able to provide accurate estimates for the potential increased call time, and this is likely to vary dependent on the number of services being switched and the number of services and providers the consumer is transferring (see below), we suggest a reasonable starting point would be to assume at least an extra five minutes for a single service being switched and another two minutes for additional services, giving a range for the extra time taken to join of around five to seven minutes, significantly higher than that estimated by Ofcom.

**The time savings take no account of the services and packages being switched**

215. In relation to the package being switched, Ofcom uses the number of switches, rather than the number of switchers as consumers switching between different products may undertake more than one switch at the same time. Ofcom's approach therefore does not accurately reflect the change in time saved from contacting old and new providers for some consumers, dependent on the packages being switched from and to. For example:
- (i) If the consumer is switching from standalone fixed broadband and fixed landline to a dual play bundle, Ofcom counts this as two switches. Under C&R, the consumer contacts two old providers and one new provider while under GPL the consumer contacts the single new provider. By counting this as two switches, Ofcom double counts the additional time speaking to the new provider (there is only one new provider not two as with two switches).
  - (ii) If the consumer is switching from a dual play bundle to standalone fixed broadband and fixed landline, Ofcom counts this as two switches. Under C&R the consumer has to contact one losing provider and two new providers while under GPL the consumer has to contact two new providers. The benefit in time saved is not equivalent to two switches. Under C&R the consumer contacts three providers (one old provider and two new providers) while under GPL the consumer contacts two new providers.

**Conclusion**

216. By reducing the expected take-up of the EC&R methods of cancellation, the time taken to cancel using webchat and, in particular, fully taking account of the anticipated additional time it would take for a customer to join under GPL, the result is a benefits range for the GPL option of around £0.1 million above and below zero with a mid-point around zero. Any time savings from the consumer no longer having to speak to the old provider would

be offset by time spent ensuring the gaining provider has sufficient information to transfer the correct service(s) for the consumer.

## 7. REVISED ESTIMATES OF QUANTIFIABLE GROSS BENEFITS TO CONSUMERS

### 7.1. Discounting future benefits

217. In calculating the net present value of consumer benefits over a ten year period, Ofcom assumes the benefits accrue at the start of every year. This means that the benefits attributable to the year following implementation of the proposed changes accrue immediately when the changes are introduced. Clearly this is unrealistic and a more standard approach should be used where the benefits that arise within any given year are accrued at the end of that year. The benefits are then discounted from year-end in which they were accrued. The revised estimates below follow this assumption.

### 7.2. Revised estimates

218. Taking account of the changes outlined above for reduced loss of service and double payment and time savings, the total annual quantifiable benefits estimated by Ofcom are reduced from £10.5 million to a maximum of around £0.6 million. On a 10 year NPV basis, the total benefits are reduced from almost £87 million to under £5 million. Ofcom's original estimates are provided below.

**Table 16: Ofcom's estimated total annual and ten year discounted benefits**

		EC&R (low)	EC&R (med)	EC&R (high)	GPL
<b>Loss of service</b>	Annual benefit	£4.8m	£5.8m	£6.9m	£7.4m
	@10 yr NPV	£39.7m	£48.5m	£57.3m	£61.7m
<b>Double payment</b>	Annual benefit	£ 1.7m	£2.0m	£2.4m	£2.6m
	@10 yr NPV	£13.7m	£16.8m	£19.8m	£21.4m
<b>Time saving</b>	Annual benefit	£0.0m	£0.0m	£0.1m	£0.5m
	@10 yr NPV	-£0.4m	£0.3m	£1.1m	£3.8m
<b>TOTAL</b>	Annual benefit	£6.4m	£7.9m	£9.4m	£10.5m
	@10 yr NPV	£53.0m	£65.6m	£78.2m	£86.9m

Source: *Making Switching Easier*, Annex 8, Tables 2, 4 and 6.

219. The revised estimates significantly reduce the benefits attributable to loss of service, double payment and time savings. The resulting total annual benefits of less than £1 million are *very small*. The revised estimates mean that the proposed changes will not deliver significant quantifiable benefits to consumers and consequently, Ofcom must show significant caution in using the conclusions on consumer benefits to justify implementing its proposed options.

**Table 17: Revised estimates for total annual and ten year discounted benefits**

		Low	High
<b>Loss of service</b>	Annual benefit	£0.2m	£0.5m
	@10 yr NPV	£1.8m	£4.1m
<b>Double payment</b>	Annual benefit	£ 0.0m	£0.0m
	@10 yr NPV	£0.05m	£0.14m
<b>Time saving</b>	Annual benefit	-£0.5m	£0.1m
	@10 yr NPV	-£4.6m	£0.6m
<b>TOTAL</b>	Annual benefit	-£0.3m	£0.6m
	@10 yr NPV	-£2.7m	£4.8m

Source: CRA analysis

## 8. SCENARIO AND SENSITIVITY ANALYSIS OF OFCOM'S QUANTITATIVE ASSESSMENT OF CONSUMER BENEFITS

220. In this section, we briefly consider the robustness and sensitivity of the estimated consumer benefits to changes in the assumptions used in the analysis. Two separate estimates have been considered above, Ofcom's original estimates and the CRA revised estimates. The latter show how an alternative set of assumptions can significantly change the estimated benefits. In this case a more plausible set of assumptions resulting from a more detailed analysis and interpretation of the supporting evidence substantially reduces the consumer benefit estimates.
221. Here we explore the sensitivity of both sets of results – the Ofcom and CRA revised estimates – to the assumptions applied and, in particular, to assumptions which are based on limited supporting evidence or may be subject to particular uncertainty. This sensitivity analysis is particularly useful in this context as in addition to being reliant on a number of assumptions, the estimates of consumer harm are based on very limited evidence. For example, significant components of the overall harm estimates are based on responses from fewer than 150 consumers.
222. Below we present the effect each of the different assumptions on Ofcom's original estimate of total annual benefits. To be clear, we examine the impact on Ofcom's total annual benefits from using each of CRA's revised assumptions individually. This includes figures for loss of service, double payment, and time savings in a single table. We focus on those assumptions for which significant uncertainty exists (for example, due to the results being based on a small sample of consumers) and/or where the results have a significant impact on the final results.

**Table 18: Effect on Ofcom's estimated annual harm of each revised assumption**

<b>Assumptions and calculation</b>	<b>Effect of revised estimate</b>	<b>Evidence base (respondents)</b>
<b>OFCOM TOTAL ANNUAL BENEFIT</b>	<b>£10.5m</b>	<b>-</b>
<b>Loss of service</b>		
+ Reduced take-up of GPL process	-£3.6m to -£5.7m	681 and 451
A1 + Reduced loss of service incidence under C&R	-£1.7m	681 and 112
A2 + Increased 'residual' service loss under proposals	-£1.7m	tbc
A3 + <i>Reduced willingness to pay</i>	-	N/A
A4 + Reduced duration of service loss	-£0.7m	170 and 150
A5 + Reduced denial of service harm per switcher	-£0.7m	-
A6 + Reduced direct financial costs harm per switcher	-£1.6m	255
A7 + <i>Reduced average hourly wages</i>	-£1.9m	N/A
A8 + <i>Reduced average time unable to work</i>	-£2.1m	239 and 197
A9 + <i>Reduced value of leisure time</i>	+£0.6m	N/A
A10 + Reduced time unable to work harm per switcher	-£2.2m	-
A11 + Reduced average time to resolve service	-£1.0m	180 and 138
A12 + Reduced time to restore service harm per switcher	<b>-£1.3m</b>	-
<b>A13 Value of harm per switcher</b>	<b>-£5.8m</b>	
<b>Double Payment</b>		
+ Reduced take-up of GPL process	-£1.2m to -£2.0m	681 and 451
B1 + Reduced double payment incidence under C&R	-£1.0m to -£1.3m	681 and 89-151
B2 + Increased 'residual' incidence under proposals	-£0.9m	tbc
B3 + Reduced average contract overlap	-£0.7m	136 and 116
B4 + Increased residual contract overlap	-£1.8m	27
<b>B5 Value of harm per switcher</b>	<b>-£2.5m</b>	
<b>Time saving</b>		
C1 + Reduced take-up of online/IVR options	-£0.6m to £0	N/A
C6 + Reduced time taken to cancel webchat	-£0.03m	N/A
C9 + Reduced assumed time saved	-£0.6m to £0	N/A
C10 + Increased weighted average extra time to join	-£0.5m	N/A
C11 + Reduced value of leisure time	-£0.1m	N/A
<b>C12 Value of harm per switcher</b>		
<b>CRA REVISED TOTAL ANNUAL BENEFIT</b>	<b>-£0.3m to £0.6m</b>	

Notes: Each row indicates the impact on Ofcom's total harm estimate based on adjusting only that particular element of the calculation to CRA's revised figures. The column 'Respondents' indicates the number of respondents that underlie the figure of Ofcom and/or CRA (potentially split into CPS and ORS).

223. The table shows that the five factors that appear to fit this criteria most include:

- Take-up of GPL, reducing both loss of service and double payments in total between £4.9 million and £7.7 million. While sample sizes are (relatively) large, the methodology used to estimate this by Ofcom is complex;
- Reduction in incidence under proposals, reducing both loss of service and double payments a total of £2.6 million;



- Average time unable to work, reducing loss of service harm by £2.1 million and based on the responses of less than 200 consumers; and
- Residual contract overlap, reducing double payments harm by £1.8 million, based on a sample of less than 140 consumers.

224. Taking each of these 'key parameters', the table below shows the impact of changing the input estimates +/-10% on the total annual benefit revised estimates as a sensitivity test. CRA's revised benefits estimate ranges from -£326,000 to £579,000. Varying any of the inputs by +/-10% widens this range to a dis-benefit of £354,000 to a benefit of £635,000. The range of the revised estimate does not widen substantially: the lower end of the changes in aggregate is 18% lower than the CRA revised estimates 'base case' and the upper end of the changes in aggregate is 33% higher than the CRA revised estimates 'base case'. The figures still remain low (below £0.8 million) and are considerably below Ofcom's estimates.

**Table 19: Effect on Ofcom's estimated annual benefits for 'significant' revised assumptions**

Assumption and calculation	Minus 10%	CRA Revised Estimate	Plus 10%
Take-up <sup>[1]</sup>	-£354k	-£326k to £579k	£635k
Reduction in incidence under proposals <sup>[2]</sup>	-£350k	-£326k to £579k	£633k
Average hourly wages <sup>[3]</sup>	-£332k	-£326k to £579k	£591k
Average time unable to work <sup>[4]</sup>	-£328k	-£326k to £579k	£583k
Residual contract overlap (days) <sup>[5]</sup>	-£332k	-£326k to £579k	£624k
All combined	-£385k	-£326k to £579k	£772k

Notes: Each row indicates CRA's estimated harm based on adjusting only that particular element of the calculation of CRA's revised figures.

1. CRA Revised Estimate uses a range of 16% to 36% take-up, which has been amended to 14% to 40% for the 'minus 10%' and 'plus 10%' scenarios i.e. rounded on full percentages.
2. CRA Revised Estimate uses a 65% reduction in incidence, which has been amended to 58% to 72% for the 'minus 10%' and 'plus 10%' scenarios i.e. rounded on full percentages.
3. CRA Revised Estimate uses an £8.3 average wage per hour, which has been amended to £7.40 to £9.20 for the 'minus 10%' and 'plus 10%' scenarios i.e. rounded on 10p.
4. CRA Revised Estimate uses a 0.5 hours unable to work, which has been amended to 0.45 to 0.55 hours for the 'minus 10%' and 'plus 10%' scenarios.
5. CRA Revised Estimate uses a 10.2 residual contract overlap, which has been amended to 11.3 to 9.1 days for the 'minus 10%' and 'plus 10%' scenarios i.e. rounded on a tenth of a day. Since 11.3 is higher than the average contract overlap, the difference has been set equal to 0 days difference and no benefit accrued by Ofcom's proposals.

## 9. THE BENEFITS OF THE PROPOSALS FOR PAY TV

225. The proposals by Ofcom are framed with respect to a cross-platform switch of any package of services. The benefits are therefore estimated by Ofcom assuming the proposals are implemented across all packages of services so long as the switch is cross-platform. However, the types of packages that are being switched are very different. The problems inherent in switching dual-play from one provider to another cross-platform will be very different to those that may arise when switching standalone pay TV cross-platform.

226. The rationale for change must apply to each package of service, particularly where these packages raise fundamentally different issues when switching. The effectiveness and

impact of any proposed change to the switching process will also therefore differ depending on the service that is being switched. This is particularly important in light of the underlying cause of some of the difficulties consumers face when switching fixed landline and fixed broadband service(s) to providers on the Openreach platform. As outlined above, Ofcom must distinguish between benefits that arise from its proposals as a result of addressing difficulties faced with the cross-platform switching process and difficulties faced because the consumer is switching to Openreach.

227. Below we therefore extend Ofcom's analysis and our revised estimates, which focused on all cross-platform switches, to provide separate estimates for standalone pay TV. We analyse estimates for these using Ofcom's approach and our revised estimates for loss of service and double pay in particular to show that the benefits to consumers associated with Ofcom's proposals for these packages is limited.
228. As noted above, Ofcom's research to support the consultation has focused on dual play and triple play consumers.<sup>84</sup> As a result, the extent to which the research can be used to obtain separate results for standalone pay TV is very limited. The figures used to estimate the benefits of Ofcom's proposed options are often based on small sample estimates. The results for pay TV are commonly therefore, as defined in the research, only indicative (based on less than 50 responses) and are consequently subject to a high degree of uncertainty. This is a significant gap in Ofcom's evidence base. Ofcom is proposing changes to the switching process for pay TV services but does not have the evidence on which to undertake a robust assessment of the impact of the changes on consumers of pay TV. Despite this, we have analysed and summarised the results for pay TV specifically below. While the results are not robust, they raise a helpful illustration of the need for additional supporting evidence by Ofcom and raise additional questions over the underlying rationale for intervention.

### 9.1. Loss of service

229. Using Ofcom's approach, the incidence of unwanted loss of service for pay TV is only 9%.<sup>85</sup> Using CRA's revised approach, we reduced the incidence by around a third to account for where the loss of service was not considered the providers' fault, resulting in an estimated incidence of only around 7%.<sup>86</sup> For take-up we have used the same estimates as for the general calculations above (i.e. Ofcom's 70% and CRA's revised 16% to 36% GPL usage), since take-up of GPL is estimated using figures for within Openreach switchers and there are no separate figures for pay TV.
230. To provide a guide as to the harm per switcher for pay TV consumers, we have used the following assumptions:
- The **willingness to pay** of consumers – estimated using the average daily price paid at £1.52 – is broken down to reflect the average daily price paid for Pay TV, giving an average of £1.36 per day. Since we do not have the underlying data

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84 This is noted in the research objectives of the triple play qualitative research in reference to both the triple play qualitative and quantitative research undertaken by BDRC.

85 This is based on standalone pay TV switchers experiencing a loss of (pay TV) service. Result is based on 15 respondents on a base of 158.

86 This is based on 25 responses for which 12 indicated the new provider was responsible, 4 indicated the previous provider was responsible, 11 indicated neither was responsible (of which 3 indicated they did not know who was responsible). Therefore the reduction is  $(11-3=8)$  divided by  $(25-3=22)$  or 36%.

based on figures from all providers, this estimate is based on an analysis of Ofcom's triple play quantitative research.<sup>87</sup>

- The **duration** for loss of service for pay TV is 6.7 days for cross-platform switchers (including any switcher with a pay TV loss of service irrespective of the bundle they have) using Ofcom's approach. CRA's revised approach compares this to the duration for loss of service for within Openreach switchers, which is 6.4 days, giving a difference of only 0.3 days.<sup>88</sup> Given the very low sample base for each estimate, we have rounded the figures to give a still indicative difference between seven days (cross-platform) and 6 days (within Openreach) of one day.
- **Direct financial costs** for standalone pay TV are estimated by consumers to be only £7.50 based on all respondents that experienced unwanted loss only of their pay TV service (i.e. irrespective of the bundle the respondent has or switched to).<sup>89</sup> As before, although Ofcom includes this component in their overall figure, the estimate for direct financial costs provides an estimate for total consumer harm per switcher as a result of loss of pay TV service and is not an additive component to the overall figure and hence has not been included within CRA's revised estimate below.
- The average time unable to work is estimated at 1.9 hours using Ofcom's approach based on respondents that experienced an unwanted loss only of pay TV service, irrespective of the bundle sourced or switched to. CRA's revised estimate is 0.0 hours, when not including extreme values (respondents with more than double the working hours lost than the actual duration of the loss) and not including the hours for respondents without a job.<sup>90</sup>
- For the time needed to resolve the service, respondents with only unwanted TV loss of service (irrespective of the bundle sourced or switched) report a mean of

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<sup>87</sup> Based on a monthly average value of £39 for Pay TV only CPS switchers (154 respondents) and £44 for all CPS switchers (648 respondents). Triple-play quantitative research respondent-level data: QD3: 'How much do you pay per month for your current package (including line rental)?' combined with Ofcom's £1.52 per day. Average calculated using the following averages per price range: £10.50 (up to £20), £25.50 (£21-30), £40.50 (£31-50), £65.50 (£51-80), £90.50 (£81-100), £125.50 (£101-150), £175.50 (£151-200).

<sup>88</sup> The loss of service duration for standalone pay TV is not available for cross-platform switchers as none of the 15 respondent with a loss of service provided a duration for the loss. The figure presented is for all 24 cross-platform switchers that did have a loss of pay TV service (i.e. including switchers with a triple-play package). Duration of loss is unlikely to be dependent on the package the consumer has. The CPS figure is also consistent with Ofcom's bespoke TV analysis. For within Openreach switchers the figure is based on 18 respondents independent of bundle.

<sup>89</sup> This is based on 18 respondents that experienced unwanted loss of pay TV service irrespective of the bundle. Given the limited number of respondents this figure is based on, we have undertaken a sensitivity test to broaden the base, including all 58 respondents who had TV in their current package (i.e. triple-play or combined with broadband or landline, alongside standalone pay TV). This provides a higher mean of £20.97 but will obviously include costs associated with the loss of other non-pay TV related services so is a significant overestimate.

<sup>90</sup> This is based on 16 respondents that experienced an unwanted loss of TV service pay TV service irrespective of the bundle. The CRA revised estimate is based on 13 respondents. Similar to direct financial costs, given the small samples, we have undertaken a sensitivity test to broaden the base, including all respondents that had pay TV loss (irrespective of whether there was also loss of service for broadband and/or landline). This gives a mean of 6.5 hours using Ofcom's approach and 1.0 hours for CRA's revised estimate based on 55 and 42 respondents, respectively. As with direct financial costs, this will include working hours lost due to other non-pay TV related services so these are significant overestimates.

1.9 hours under Ofcom's approach and 1.6 hours under CRA's revised approach.<sup>91</sup>

231. Taking all of these separate estimates for pay TV together gives an estimate for harm per switcher of £42.70 under Ofcom's approach and £9.90 under CRA's revised approach. These are summarised below. Alternative estimates are provided where we have sought to increase the sample size but knowing this may bias or overestimate the results. These alternative estimates are based on respondents with loss of pay TV service, even where they may also have suffered loss of another service during the switch.

**Table 20: Assumptions for estimating loss of service benefits: 'all bundles' and Pay TV**

Assumption and calculation	All bundles		Pay TV only	
	Ofcom	Revised	Ofcom	Revised
1 Willingness to pay / price paid	£1.52	£1.52	£1.36	£1.36
2 Average duration of loss in service <sup>[1]</sup>	8	2.6	7.0	1.0
<b>3 Denial of service harm per switcher</b>	<b>£12.16</b>	<b>£3.95</b>	<b>£9.52</b>	<b>£1.36</b>
<b>4 Direct financial costs harm per switcher<sup>[2]</sup></b>	<b>£18.00</b>	<b>£18.00</b>	<b>£7.50</b>	<b>£7.50</b>
Alternative estimate <sup>[2]</sup>			£20.97	£20.97
5 Average hourly wages	£13.50	£8.30	£13.50	£8.30
6 Average time unable to work <sup>[3]</sup>	4 hrs	0.5 hrs	1.9 hrs	0.0 hrs
Alternative estimate <sup>[3]</sup>			6.5 hrs	1.0 hrs
7 Value of leisure time	£6.93	£5.33	£6.93	£5.33
<b>8 Time unable to work harm per switcher</b>	<b>£26.28</b>	<b>£1.49</b>	<b>£12.48</b>	<b>£0.00</b>
9 Time trying to resolve service <sup>[4]</sup>	4 hrs	2.4 hrs	1.9 hrs	1.6 hrs
Alternative estimate <sup>[4]</sup>			2.7 hrs	2.1 hrs
10 Value of leisure time	£6.93	£5.33	£6.93	£5.33
<b>11 Time to restore service harm per switcher</b>	<b>£27.72</b>	<b>£12.79</b>	<b>£13.17</b>	<b>£8.53</b>
<b>12 Value of harm per switcher</b>	<b>£83.00</b>	<b>£18.20</b>	<b>£42.70</b>	<b>£9.90</b>
<b>Total annual benefit</b>	<b>£7.4m</b>	<b>£0.2-£0.5m</b>	<b>£0.5m</b>	<b>£0.01-£0.03m</b>

Source: CRA analysis of loss of service quantitative research, triple play quantitative research and ONS data.

Notes: Take-up is estimated at 70% (Ofcom and Ofcom-style Pay TV) and 16-36% (CRA Revised and CRA Revised Pay TV), respectively. Incidence is estimated at 17% (Ofcom), 13% (CRA Revised), 9% (Ofcom-style Pay TV) and 7% (CRA Revised Pay TV), respectively. Alternative estimates are based on any TV loss of service instead of TV only loss of service, and hence seems to provide an overestimate.

1. Based on only 24 CPS respondents (both approaches) and 18 ORS respondents (CRA revised approach only).
2. Estimate is based on only 18 TV only unwanted loss respondents. The alternative estimate is based on 58 respondents with at least TV unwanted loss (with possibly also broadband and/or landline unwanted loss).

<sup>91</sup> These figures are based on 16 and 13 respondents, respectively. As before, we also therefore looked at those respondents that had unwanted pay TV loss of service (irrespective of whether this also included broadband and/or landline loss of service): this shows slightly higher figures of 2.7 hours (42 respondents) under Ofcom's approach or 2.1 hours (34 respondents) under CRA's revised approach. Again, this will include hours lost due to other non-pay TV related services so will be an overestimate.

3. Estimate is based on only 16 (Ofcom) and 13 (CRA revised) TV only unwanted loss respondents. The alternative estimate is based on 55 (Ofcom) and 42 (CRA revised) respondents with at least TV unwanted loss (with possibly also broadband and/or landline unwanted loss).
4. Estimate is based on only 16 (Ofcom) and 13 (CRA revised) TV only unwanted loss respondents. The alternative estimate is based on 42 (Ofcom) and 32 (CRA revised) respondents with at least TV unwanted loss (with possibly also broadband and/or landline unwanted loss).

232. Without a breakdown of the number of cross-platform switchers by type of switch, we are unable to provide an estimate for total annual benefit. We have therefore estimated this based on the triple play quantitative research respondent level data, which suggests that 23% of cross-platform switchers relate to standalone Pay TV, giving an estimated 205,000 switchers.<sup>92</sup> Therefore the total annual benefit is estimated at £0.5 million using Ofcom's approach and between £0.01 million and £0.03 million under CRA's revised approach.

## 9.2. Double payments

233. Using Ofcom's approach, the incidence of double payments for pay TV is 19%.<sup>93</sup> Using CRA's revised approach, incidence is reduced to between 9% and 11% (since we estimate that between two-fifths and half of incidences of double payment occurred for reasons that would not be addressed by a GPL process and in 35% of contract overlap occurrences there is loss of service for which the gaining provider is assumed to not charge the customer).

234. In relation to the harm per switcher, using Ofcom's approach the average duration of double payment for pay TV is 11 days, calculated based on those respondents that had more than one day of double payment for pay TV and that switched (cross-platform) pay TV only.<sup>94</sup> Ofcom assumes this will be reduced to one day only. Under CRA's revised approach, the figure excludes respondents with greater than one month of double payment, giving an average of 8.8 days. We assumed that this is reduced to the mean for within Openreach switchers of 5.0 days.<sup>95</sup>

235. Taking these separate estimates for pay TV together gives an estimate for harm per switcher for double payment of £13.6 under Ofcom's approach and £5.17 under CRA's revised approach. The table below presents an overview of Ofcom's estimates and CRA's revised estimates across all types of cross-platform switch and those specific to pay TV only switches. While only indicative due to the low base some of the figures are based on, the Pay TV estimated harm per switcher is lower than for all types of switch (or all bundles) under Ofcom's approach, while the CRA revised estimates for Pay TV is higher than for all types of switch (driven by the longer difference in contract overlap). Total annual benefits using the split for cross-platform switchers outlined above, also fall under

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<sup>92</sup> This is based on 158 out of 681 cross-platform switchers.

<sup>93</sup> This is based on those respondents that had a cross-platform TV only switch and had a double payment for more than 1 day, giving 30 respondents from a base of 158.

<sup>94</sup> The Ofcom approach and revised estimates are based on 30 and 28 respondents, respectively.

<sup>95</sup> This is based on a single observation only. If we were to include respondents with longer than 1 month of double payment, an additional observation increases the within Openreach average to 20 days. Doing the same for cross-platform switchers increases the duration to 14.2 days, resulting in a negative difference i.e. cross-platform switching is more efficient when it comes to double payments. Moreover, when examining the duration across all types of switches then the duration for cross-platform switches (10.6 days) and within Openreach switches (10.2 days) is very similar. Therefore we consider that using 3.8 days is a reasonable approach, despite the low ORS base.

Ofcom's approach and are higher under the CRA revised estimate.<sup>96</sup> Alternative estimates are provided where we have sought to increase the sample size but knowing this may bias or overestimate the results. These alternative estimates are based on respondents with double payment of pay TV, irrespective of whether they switched standalone pay TV or a triple-play package.<sup>97</sup>

**Table 21: Assumptions for estimating double payment benefits: 'all bundles' and Pay TV**

Assumption and calculation	All bundles		Pay TV only	
	Ofcom	Revised	Ofcom	Revised
1 Double payment incidence under C&R	21%	10-13%	19%	9-11%
2 Reduction in incidence under proposals	100%	65%	100%	65%
3 Average contract overlap (days) <sup>[1]</sup>	14	10.6	11.0	8.8
<i>Alternative estimate<sup>[1]</sup></i>			13.8	10.3
4 Residual contract overlap (days) <sup>[2]</sup>	1	10.2	1	5.0
5 Average payment per day	£1.52	£1.52	£1.36	£1.36
<b>Value of harm per switcher</b>	<b>£19.76</b>	<b>£0.61</b>	<b>£13.60</b>	<b>£5.17</b>
<b>Total annual benefit</b>	<b>£2.6m</b>	<b>£0.01-0.02m</b>	<b>£0.4m</b>	<b>£0.01-0.03m</b>

Notes: Take-up is estimated at 70% (Ofcom and Ofcom-style Pay TV) and 16-36% (CRA Revised and CRA Revised Pay TV), respectively. Incidence is estimated at 21% (Ofcom – 143 out of 681 with more than 1 day of overlap), 10-13% (CRA Revised – with a 40-50% reduction of Ofcom's figure), 19% (Ofcom-style Pay TV – 30 out of 158) and 9-11% (CRA Revised Pay TV – with a 40-50% reduction of Ofcom's figure), respectively.

1. Estimate is based on only 30 (Ofcom) and 28 (CRA revised) CPS TV only respondents that had TV only overlap. The alternative estimate is based on 43 (Ofcom) and 37 (CRA revised) CPS respondents that had TV only overlap i.e. with potentially a triple-play bundle switch.
2. Estimate is based on only 1 (CRA revised) ORS respondent that had TV only overlap.

### 9.3. Total benefits for pay TV

236. The time savings for pay TV should not be materially different per switcher to those for all bundles. Where a consumer is switching only a single service, the extra time taken to join will be more limited so any dis-savings associated with additional time spent on the phone under a GPL process will be at the lower end of the range provided for all switches. Taking account of the number of pay TV cross-platform switchers, annual time savings benefits ranges between a dis-benefit of £0.1 million and a benefit of £0.1 million.<sup>98</sup>

<sup>96</sup> Note that this provides no information on the annual benefit for triple-play or dual play switchers. The 'all bundles' approach is not a bottom-up approach as it is not based on figures for each individual switcher type, and hence product specific figures may be inconsistent with the total across bundles.

<sup>97</sup> Using these alternative estimates, the value of harm per switcher is estimated at £17.41 (Ofcom's approach) and £7.21 (CRA's revised estimate). The total annual benefits is £0.4m (Ofcom's approach) and £0.01-0.04m (CRA's revised estimate).

<sup>98</sup> For time savings, harm estimates differ for the EC&R and GPL options. The time savings are estimated to range from -£0.01 million for the EC&R (high) scenario and £0.1 million for the lower estimate of the GPL scenario under Ofcom's approach, and from -£0.1 million for the EC&R (high) scenario and £0.02 million for the lower estimate of the GPL scenario under CRA's revised estimates (assuming five extra minutes rather than seven to complete joining).

237. Overall, combining the benefits from reduced loss of service and double payment and time savings, gives an estimated annual impact for pay TV alone of between £0.8 million and £0.9 million benefit under Ofcom's approach, and between £0.1 million dis-benefit and £0.1 million benefit under CRA's revised approach. The ten year net present value impact therefore ranges between £6.9 million to £7.9 million under Ofcom's approach, and from a £0.9 million dis-benefit to a £0.6 million benefit under CRA's revised approach.

## 10. FROM GROSS BENEFITS TO NET BENEFITS

238. A complete impact assessment must take account of both the gains to consumers from any proposed option and any offsetting losses the consumer may experience compared to the status quo. Ofcom has considered benefits to consumers (and separately implementation costs to providers) but it has not considered any potential negative consequences or losses arising to consumers of the proposed options.<sup>99</sup> By neglecting to consider these 'costs' or dis-benefits to consumers, Ofcom does not distinguish between gross consumer benefits and net consumer benefits. By equating these Ofcom, in effect presupposes that the gross benefits it estimates result in positive net benefits and that the proposals therefore enhance consumer welfare.
239. While not all of the potential negative consequences on consumers can be quantified, where this is possible they should be offset against estimated *gross* benefits and where this is not possible they should be given due consideration. We consider a number of the potential losses that consumers are likely to incur as a result of Ofcom's proposed options below, and attempt to quantify these where possible, including:
- Consumers will take **longer to switch** to a more valuable service compared to under the status quo thereby incurring 'costs of delay';
  - Consumers will have reduced scope to obtain a matched or better offer from their existing provider while also **avoiding going through the hassle of switching**;
  - Consumers will be less likely to be informed about early termination charges (ETCs) thereby more often **incurring and/or paying higher charges for switching**; and
  - The stipulation that consumers can begin the switching process, subsequently cancel the switch and not be liable for any installation and activation costs incurred by the provider will likely lead to some of the **increased provider costs being passed on to consumers**.

### 10.1. Delayed switching to better products and services

240. The focus of Ofcom's assessment of consumer benefits is on reducing loss of service and double payment. However, these are unintended errors associated with the switch, in some cases the switching process. Ofcom ignores the primary reason that consumers choose to switch – to obtain a better service that is more valuable to the consumer; otherwise the consumer would not be motivated to switch. Consumers will undoubtedly, to different degrees, want to have this service as soon as possible, rather than continue

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<sup>99</sup> Ofcom has taken into account one possible 'disbenefit' in its estimate of time savings by including possible additional time taken by the consumer when contacting the gaining provider. As outlined in Section 6 this has been underestimated.

with a perceived inferior service. The time taken to begin the new service will therefore be important to consumers. This is supported by extensive consumer research, which we outline below. Any delays to the new service commencing therefore represent delayed incremental value to the consumer.

**Ofcom's proposals will increase the time taken to switch**

241. Ofcom's proposed options stipulate a ten working day transfer period – once the order is placed up to the actual transfer happening – to be reasonable for the steps to effect a coordinated switch, without there being a justification for the old provider to impose a longer contractual notice period.<sup>100</sup> This time period also enables consumers to change their mind and cancel their new service(s) without liability. By imposing a ten working day transfer period, Ofcom will increase the time it takes for many consumers to receive their new service.
242. As the table below shows, Sky's own new joiners data for the year ending 24<sup>th</sup> March 2016 shows that on average TV activation (standalone or triple play) is [CONFIDENTIAL]. Over [CONFIDENTIAL] of activation times are actually below 14 days and over [CONFIDENTIAL] are below nine days. Ofcom's proposal for a 10 working day period for a switch is likely to result in delays to many customers. For example, [CONFIDENTIAL] of pay TV customers would have to wait on average for an extra [CONFIDENTIAL] days. For broadband (standalone or triple play) the mean activation time is [CONFIDENTIAL], but there are still over [CONFIDENTIAL] of customers who will see their activation delayed by on average [CONFIDENTIAL] days.
243. More starkly, when a consumer switches a package with multiple services all services need to switch at the same time. Given the average time to install where an engineer is required has averaged 14 working days over the last year,<sup>101</sup> consumers switching triple play, for example, will now be forced to wait for their pay TV service until the other services are activated. Consumers will experience a delay in activating their new service as a result of switching to a GPL process.

**Table 22: Sky activation times for broadband and TV**

[CONFIDENTIAL]

244. To see this, the chart below shows the time to activation for pay TV and for broadband. Based on this, there is a risk that Ofcom's proposals 'regulate downwards' shifting the stronger performance of pay TV activation [CONFIDENTIAL] to the existing performance for Openreach switches currently using GPL [CONFIDENTIAL]. The switch will be slower for consumers, and may alter the incentives of providers to activate services quickly.

**New Joiners: Time to Activation by Platform**

[CONFIDENTIAL]

245. Ofcom's triple play quantitative research points to a GPL process leading to delays in the new service being provided. For example, the survey participants were asked the reasons for their loss of service. In the vast majority of cases, the loss of service is the

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100 *Making Switching Easier*, paragraph 4.29.

101 [http://www.homeandwork.openreach.co.uk/kpi-pages/KPI\\_overview.aspx?kpi=4](http://www.homeandwork.openreach.co.uk/kpi-pages/KPI_overview.aspx?kpi=4)



responsibility of the gaining provider: 73% of switchers give reasons related to the gaining provider only, 4% the losing provider only, and 3% both the losing and gaining providers.<sup>102</sup> Similar shares hold for cross-platform switchers and within Openreach switchers separately and for each of the bundles switched (with gaining provider being mentioned 67-77% and the losing provider up to 7% of the time). Similarly, where asked who was responsible for the loss of service, in two-thirds of cases where this was the providers' fault, it was perceived to be the gaining provider's fault.

#### **Importance of a quick switch to consumers**

246. Ofcom has noted the importance of the speed of a switch to the overall switching process.<sup>103</sup> Additional research also highlights the importance to consumers of a quick switch. Sky commissioned YouGov to undertake a survey in early September 2016, which shows that people want to switch their *pay TV service* in no more than seven days, after which they become dissatisfied with the switch. For switches of one day, three days or seven days the majority of people are satisfied or very satisfied with the duration. When the duration is 10 days or more then the majority of people are dissatisfied or very dissatisfied, with 83% of consumers being dissatisfied or very dissatisfied when the switch would take over 14 days.<sup>104</sup>
247. The 2012 survey commissioned by Sky and other communication providers<sup>105</sup> also shows that consumers also want a quick switch for their broadband or landline services. When asked what would be a reasonable length of landline switch, 43% of switchers indicate they consider 1 or 3 days a reasonable length of time, and for 1, 3, or 7 days this is 76%. For broadband, similar results were obtained with 44% of switchers indicating one or three days as reasonable and 76% indicating one, three, or seven days as reasonable. Indeed only 13% of total respondents considered 10 days or greater to be a reasonable length of time.
248. Moreover, the survey results show that 52% of switchers consider the length of time to switch as very important (9 or 10 on a 10-point scale) and 72% rate this between 8 and 10. Only 7% of consumers consider the time taken to switch as either not important or 'neutral' (scores of 1 to 5).

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102 Based on Ofcom's triple-play quantitative research respondent-level data. QG12, including for the losing provider the answer "Previous service not cancelled correctly", while for the gaining provider the following answers: "The new provider gave me a starting date that was after the end of my previous contract", "Delay in landline installation", "Delay in satellite dish installation", "Delay in cable installation", "Delay in broadband installation", "Delay in service activation", "Delay in delivery of the equipment", "The wrong equipment was provided /needed something extra", "Problems/a fault with the equipment (e.g. satellite dish/ cable box/ broadband router)", and "There was a fault with the line". Other answers are not directly related to either provider and have not been included ("I cancelled my previous service before arranging my new one", "To switch on a particular date that I wanted", and "Other"). Respondents indicating "Don't know/can't recall" have not been included in the calculations.

103 See *Strategic review of consumer switching: A consultation on switching processes in the UK communications sector*, Ofcom, September 2010 (the '*Switching review*'), para. 1.1. HM Government includes as one of the principles that the switching process itself **should be quick**, easy and at an agreed date. See *Switching Principles*, Department for Business, Innovation & Skills, October 2015.

104 The survey was conducted by YouGov using an online interview administered to members of the YouGov's panel of 800,000+ individuals who have agreed to take part in surveys. Total sample size was 2,017 adults. Fieldwork was undertaken 7-8 September 2016. The results are based on a weighted sample to make them representative of all GB adults aged 18 and over.

105 *The 2012 survey* (see footnote 18), Sky Annex Tables 32 to 34. The results from this survey are available at: [http://stakeholders.ofcom.org.uk/binaries/consultations/switching-fixed-voice-broadband/responses/Sky\\_Annex.xls](http://stakeholders.ofcom.org.uk/binaries/consultations/switching-fixed-voice-broadband/responses/Sky_Annex.xls).

249. The triple play quantitative research supports this. As outlined in the Table 12 above (Reasons for a contract overlap that signify consumer preference) a net 49% of consumers experiencing double payment have indicated a strong preference to have an immediate switch. The value of an immediate switch is greater than any double payment incurred. Where a GPL process prevents or delays this from occurring, this value to the consumer over and above any double payment is lost and represents a cost of the proposed options. This harm has not been valued by Ofcom.<sup>106</sup>
250. The harm to those consumers that have expressly signalled a more immediate desire to switch will represent only a small proportion of the overall harm as where consumers have expressed a desire for an upgrade – through entering a switching process – they would benefit from this update sooner rather than later. Where consumers are delayed from getting this upgrade, they will suffer detriment, even if the consumer has not signalled a sufficient need to avoid this detriment through double paying.
251. In the current consultation, Ofcom cites the findings of the Financial Conduct Authority's review of consumer switching in retail banking as support for the assertion that *"consumers prefer a certainty over the switch date and a reliable process over speed"*. However, this examines a situation where the timing of the switch is uncertain so is not an appropriate guide. The installation/activation dates Sky offers its new pay TV customers are certain. This also takes no account of the extent to which a consumer is more likely to seek a quicker switch when the new product is highly differentiated from the old product.

#### **Valuing the 'cost' of delay**

252. The extent of the 'costs of delay' to consumers will be determined by the additional value the consumer associates with the new service and the additional length of time the consumer is forced to continue with an inferior (and unwanted) service from the old provider, despite having already formally made a switch.
253. To quantify the potential negative impact on consumers from these delays, we assume a delay of [CONFIDENTIAL] days. This takes account of the evidence available on current activation times for Sky customers and time taken to switch under GPL currently.
254. To estimate the incremental value of the new package sourced by the consumer we have analysed data from Sky on a sample of new joiners that have switched cross-platform (this includes switches from BT and Virgin). The data provides a sample of consumers that have switched from these competitors, the previous product sourced by the consumer and the product sourced from Sky. Due to the large number of previous and current product combinations, we have analysed only consumers switching from the five most common products that joiners previously sourced from Virgin and BT for the six month period to August 2016.<sup>107</sup> Consumers switching from these products accounted for [CONFIDENTIAL] of all switchers from these providers to Sky over the period. For simplicity we have focused only on switchers from Virgin and BT and, due to data availability, inevitably focus only on switchers to Sky. Any estimate of the negative consequences of a delayed switch that excludes cross-platform switches from other providers (such as TalkTalk) to Sky and excludes cross-platform switches from Sky to

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<sup>106</sup> The research has not asked consumers directly about their preference for quick switching and the value they attach to this.

<sup>107</sup> [CONFIDENTIAL].

other providers and between other providers will there be a significant underestimate of the total dis-benefits associated with the proposal.

255. We have taken the average monthly price of the product the consumer was on prior to the switch and the average monthly price of the Sky product following the switch. The *absolute* difference in price provides an estimate of the incremental value of the new product. Where the price is higher, the consumer signals an increased willingness to pay for the new product. This applies irrespective of whether the consumer upgrades the content or quality of the package or sources more services. For example, if the consumer switches from a basic pay TV package to a full pay TV package, any delay prevents the consumer experiencing the preferred more comprehensive product, which we assume the consumer will value in accordance with the difference in price paid. Equally, where the price is lower, the consumer has signalled a preference for a cheaper product. By delaying the switch, the GPL process as proposed by Ofcom will, in effect, 'force' the consumer to continue paying a higher price. While the price paid will not fully capture the incremental value, as Ofcom has noted in its own estimates, in our view this provides a reasonable estimate for the incremental value.
256. The prices assumed for each of the main products of Sky, Virgin and BT are provided in the table below. The data is [CONFIDENTIAL]. Prices have been taken from data over the six month period to August 2016 to match the joiners' survey data. Where a price has changed during this period, it is weighted dependent on when the change occurred within the six months.<sup>108</sup>

**Table 23: Estimated weighted pricing of main packages of leading providers<sup>109</sup>**

[CONFIDENTIAL]

257. The *absolute* difference in price between each package is applied to a matrix that splits all switchers (to Sky) proportionately based on their previous and new packages, giving the weighted difference in price.<sup>110</sup> The weighted average change in price for switchers over the six month period to August 2016 is estimated to be [CONFIDENTIAL], giving an incremental daily value of [CONFIDENTIAL].<sup>111</sup> While this figure seems high, a more detailed look at the most common switching pair products confirms that the change in price paid by consumers before and after a switch is indeed substantial. To see this, we have presented the price difference for the eight most common switch pair products in the table below.

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108 [CONFIDENTIAL].

109 [CONFIDENTIAL].

110 As outlined above in Section 4.6, switchers likely pay much less than the average price paid by all consumers. We make no adjustment for this here and recognise this may lead to an overestimate of the difference in price (although not necessarily the incremental value) as the price paid by a new joiner is likely to be discounted more than the previous price paid by a switcher (assuming both previous and current providers discount at the same level). This follows out earlier approach where this concern was noted but no adjustment made to Ofcom's estimates to account for this.

111 As Ofcom has noted, consumers switching triple play packages from BT to Sky are currently, in effect, likely to be following a GPL process. Ofcom recognises that its proposals may therefore not impact these consumers by excluding them from forecasts of GPL usage. While we take account of the number of affected consumers (through forecast usage of GPL), the price differentials used will also be affected. If we adjust for this, the weighted average price differential increases to [CONFIDENTIAL] but the daily figure remains [CONFIDENTIAL].

**Table 24: Price differential for most common switch-pair products<sup>112</sup>**

[CONFIDENTIAL]

258. We apply this weighted average price change resulting from a switch – an estimate for the incremental value to the consumer of the new package – and the expected delay in obtaining that incremental value to an estimate of the number of affected consumers. Those consumers affected will be those cross-platform switchers that would be expected to use a GPL process if it is implemented and would be expected to face a delay in the new service being activated (i.e. those consumers that currently have their new service(s) activated within 14 days).<sup>113</sup> On this basis, **we estimate** [CONFIDENTIAL].<sup>114</sup>
259. These estimate of the 'costs of delay' are based on a number of assumptions and reliance on data from Sky's joiners' survey. We have therefore undertaken a number of sensitivities to test the extent to which these results are reliant on less certain input data. Specifically, we have sought to address three possible causes of uncertainty in the estimates:
- [CONFIDENTIAL].
  - BT does not offer standalone pay TV. In our main estimates above, we have therefore included line rental in all BT prices. However, the weighted average for Sky across triple play and TV only bundles may not be comparing like-with-like if consumers are generally only switching triple play from BT to Sky. To stress test this uncertainty, we have used only Sky's prices for triple play to estimate the price differential between Sky and BT. The impact of this is to increase the estimated daily incremental value from [CONFIDENTIAL] and increase the estimated 'costs of delay' to between [CONFIDENTIAL].<sup>115</sup>
  - Analysis of the joiners' survey and pricing information relates to a six month period from March to August 2016. Due to a change in the marketing and branding of the products of competitors immediately preceding this period, there is possible uncertainty as to whether survey respondents are allocated to the correct package. To stress test this uncertainty, we have used data for the six month period from July to December 2015 (the branding change appears to have taken place around February 2015).<sup>116,117</sup> The impact of this is to increase the estimated daily incremental value to [CONFIDENTIAL] and increase the estimated 'costs of delay' to between [CONFIDENTIAL].<sup>118</sup>

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112 [CONFIDENTIAL].

113 We assume this proportion to be [CONFIDENTIAL] but note this is based on those suffering a delay in broadband activation. The equivalent figure for pay TV is [CONFIDENTIAL] so our approach is a very conservative one likely to underestimate the number of consumers affected. GPL usage is assumed to be between 16% and 36%.

114 The incremental daily value of [CONFIDENTIAL] and the average length of delay of [CONFIDENTIAL] days applied to the estimate of affected consumers, taking account of assumed GPL usage between 16% and 36%.

115 Incorporating both of the changes lowers the daily incremental value to [CONFIDENTIAL] and lowers the estimated 'costs of delay' to between [CONFIDENTIAL].

116 In addition, as noted above, some of the prices of competitor products could not be matched between the joiners' survey data and the price tracker. This stress test also therefore accounts for this uncertainty.

117 [CONFIDENTIAL].

118 [CONFIDENTIAL].

260. In summary, while the estimates of the costs of delay are subject to uncertainty due to the underlying data and assumption used, sensitivity tests of this uncertainty suggest that the initial estimates of between [CONFIDENTIAL] for the cost of delay are relatively robust.

## 10.2. Reduced welcome save activity and associated unnecessary hassle of switching

261. Consumers can use the threat of switching including using an offer from an alternative provider to obtain a similar or improved offer from their existing provider. If the existing provider is able to match or improve the offer, the consumer benefits while also avoiding the hassle and costs associated with switching. This responsiveness of providers, or 'save' activity reflects a key part of the competitive process that benefits consumers as the ability to credibly threaten to switch is a more effective means of obtaining an improved offer for an individual marginal consumer where they avoid incurring switching costs.

262. Ofcom recognises this in the consultation, noting that some consumers welcome and benefit from save activity while for other consumers it can make the switching process difficult or deter consumers from switching. Ofcom has noted in the past its concern that the overall impact of reactive save activity may be to increase switching costs and reduce competition. Ofcom is attempting to increase switching activity to facilitate more intense competition between providers.<sup>119</sup> Ofcom believes that the introduction of switching processes, such as GPL and EC&R, which minimise switching costs through limiting the amount of save activity, will therefore increase competition.<sup>120</sup>

263. In the consultation, Ofcom does not include as part of its proposed reforms a prohibition on reactive save activity. Instead Ofcom, recognising that save activity can be both welcome and unwelcome, seeks to give consumers the choice as to whether to seek or avoid save attempts.<sup>121</sup>

264. However, Ofcom's current proposals are likely to reduce save activity, *including that which is welcome and beneficial*, leading to unnecessary (and costly) switching where this is the case. If Ofcom recognises the benefits of positive save activity, it must ensure that consumers' ability to obtain that welcome save activity is not restricted, or the likelihood of them doing so not reduced, by its proposals. This ought to be as important as allowing the consumer to avoid negative save activity.

265. Given that save activity can have offsetting positive and negative impacts for consumers, the balance between these must be considered in the context of each major policy change. This is important in the context of the current consultation as Ofcom has previously stated that **the case for restricting save activity – i.e. the positive impact on competition – may be more limited with C&R switching processes.**<sup>122</sup> The reason

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119 See *Making Switching Easier*, paragraphs 5.67 to 5.73.

120 *Strategic review of consumer switching: A consultation on switching processes in the UK communications sector*, Ofcom, September 2010 ('*the Switching Review*'), Section 5. Ofcom notes that save activity may dampen competition and create an uneven playing field between incumbents and new entrants which can deter entry. Overall the evidence suggests that GPL processes minimise switching costs and remove the built in save activity thereby fostering competition to a greater extent. (Section 5 Strategic Review)

121 *Making Switching Easier*, paragraph 4.40.

122 See the *Switching Review*, which notes in paragraph 5.87: '*for the C&R process we recognise there may be some potential concerns around save activity, although these may not be as significant as LPL processes where the consumer has to contact LP before they switch*' and '*overall, save activity in a C&R process may not be as much a concern as in a LPL process*'.

given by Ofcom for this is the extent to which a C&R process may not allow providers to distinguish the consumers who wish to switch *before* the consumer has signed up with a new provider such that the consumer could be 'saved' by the losing provider without incurring any penalty. Interestingly, the triple play quantitative research shows that **over one-third of cross-platform switchers contact their previous provider after signing up with an alternative provider**. We have explored this key rationale that drives Ofcom's prior belief about the balance of effects relating to save activity in the triple play quantitative research. As shown in the table below, there is no difference between cross-platform and within Openreach switchers. Therefore at a general level Ofcom needs to consider if the purported negative effects of save activity offsets the positive ones (outlined below) and the impact on competition of its proposals specifically for cross-platform switchers.

**Table 25: Point at which switchers contacted their previous provider**

Timing of contact with previous provider	CPS	ORS
After I had looked at alternatives but before I had made a final decision	29%	29%
After I had made a decision on an alternative provider but before I had signed up	47%	45%
<i>NET before signing up</i>	68%	67%
After I had signed up with an alternative provider	36%	35%

Source: CRA analysis of triple play quantitative research respondent level data:

Notes: Based on QF3c: 'And at what point or points did you contact your previous service provider?' (ALL PROVIDERS) Respondents answering 'Don't Know/Don't Recall' have not been included in the share calculation.

266. Below we outline evidence showing the extent of welcome save activity for cross-platform switchers. Considering the positive impacts and the potential for welcome save, the starting point for assessing the scope for Ofcom's proposed options is recognising that consumers, actively choosing their own provider over an alternative, benefit from the retention offers and continued competitiveness of their existing provider. We then seek to show why welcome save activity will fall under Ofcom's proposals. Consumer benefit from obtaining offers from their existing provider and do so without having to incur the costs associated with switching (for example, waiting in for an engineer to install new equipment). We therefore provide illustrative estimates for the harm that arises from consumers switching and will be suffered unnecessarily by consumers no longer able to obtain welcome save activity. Finally, we provide estimates for the value for this likely negative consequence of the proposals.

**Distinguishing between welcome and unwelcome save**

267. Ofcom acknowledges that when consumers call their current provider with the intention of switching, this can be viewed as a positive experience that gives consumers the opportunity to obtain a favourable offer from their current provider:<sup>123</sup>

*"Our consumer research 2010 and our MNP research 2009 suggests attempts by providers to retain customers can be seen in a positive way by some consumers, as*

<sup>123</sup> Strategic review of consumer switching A consultation on switching processes in the UK communications sector, Sept. 2010.

*long as they do not put too much pressure on consumers to stay. Some consumers expressed disappointment where there was no effort to retain them.”<sup>124</sup>*

268. Ofcom's previous research has also noted that, of those considering a switch that were in contact with their current provider about their intention to switch, around half experienced save activity. Around four in five of these accepted the save offer and one in five said they felt put under pressure by the losing provider to stay. From this, around two-fifths of customers are benefiting from save activity, actively choosing to remain with their existing provider having been offered a better deal and avoiding the hassle of switching, and indicating that they did not feel under pressure to stay.<sup>125</sup> Indeed, Ofcom's research also noted that the discounts offered by some providers to retain consumers appear to be large, suggesting the benefits of staying with the existing supplier may be significant, in addition to avoiding the costs and hassle of switching (discussed below).
269. Ofcom has confirmed this in its current consultation noting that '*some consumers appear to welcome, and may benefit from, the possibility of obtaining a better deal from their old provider*'.

#### **Ofcom's own research supports significant welcome save activity**

270. Ofcom's triple play quantitative research provides substantial evidence showing that consumers value contact with their existing provider and commonly negotiate a better deal with them. It also provides direct evidence of the extent of welcomed save activity. Rather than analysing cross-platform switchers, which has been the focus of the earlier part of this report, here we analyse respondents that considered and actively started looking at changing provider but decided to not switch (**DNT**) or are categorised as being **Inactive**.<sup>126</sup> Those in the DNT and Inactive groups each account for 28% of all respondents.<sup>127</sup>
271. During the process of considering switching, the vast majority (92%) of the DNT group compared different providers' offers and almost two-thirds (64%) both contacted their current provider and actively tried to negotiate a better deal with them.<sup>128</sup> The results suggest that the majority of these consumers make an informed choice to remain with their existing provider. The save activity of the existing provider is more attractive for these consumers than switching. This could be because the offer from the existing provider is better than that available from alternatives, in which case a policy change that results in some of these consumers switching when they would not have done so

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124 When inactive consumers were asked why they had not considered switching provider, the actual switching processes did not appear to be the key barrier. Instead, the key reason given by the vast majority (between 80 - 86%) of these consumers not even considering switching is satisfaction with their existing supplier/inertia. See the *Strategic Review*, para.4.23. The ability of consumers to contact their existing provider and negotiate a better deal will be a key driver of this satisfaction. This is supported by Ofcom's own research for the current consultation, as outlined below.

125 *Strategic review of consumer switching: A consultation on switching processes in the UK communications sector, Sept. 2010.*

126 Inactive consumers includes those that have not considered changing provider in the last 12 months and those that have considered changing provider in the last 12 months but did not start looking and decided not to change provider.

127 The remainder is made up of cross-platform switchers (27%) and within Openreach switchers (18%).

128 A separate question, QC3AE: '*When you negotiated/accepted a better deal who made the first contact?*', shows that 87% of respondents called their provider first, and only 13% of respondents were contacted by their provider first. There were also 21% of respondents indicating they were contacted by their previous provider just before or just after they had decided to change provider (QF9). The results from the tables below are not materially affected by not including respondents who were contacted by their previous provider.

otherwise is unnecessary and costly to the consumer. Similarly, the existing provider may broadly match that available from alternative providers, in which case the consumer is able to stay with the existing provider and avoid the hassle of switching. Again, a policy change that leads to some of these consumers switching when they would not have done so otherwise results in the consumer incurring costs.

**Table 26: Respondents who did not switch**

Actions when considering switching...	Respondents	Share (%)
Compare what different providers were offering	645	92%
Find out what you need to do in order to switch	453	65%
Contact your current provider	444	64%
Contact any potential new provider(s)	283	40%
Experience your current provider trying to persuade you to stay	377	54%
Try to negotiate a better deal with your current provider	444	64%

Source: CRA analysis of triple play quantitative research respondent-level data:

Notes: Based on QC3: 'While considering switching your provider(s) did you...?'

272. This is supported further by the reasons given by DNT and Inactive consumers for deciding not to switch and stay with their current provider. Over two-thirds of the DNT group negotiated or accepted an improved offer with their existing provider and flagged this as factor in deciding not to switch (52% considered this a major factor and 26% the main factor<sup>129</sup>). This is an underestimate of the extent of positive and welcome save activity these consumers are experiencing, however, as over 90% of them (see Table 26 above) are actively comparing what different providers offer. Given these consumers are clearly aware of alternative offers and, knowing these, actively choose to stay with their existing provider other response options that point to the existing provider still being the best deal, cheapest provider or having the best quality of service must also be included. When these are included (see Table 27 below), the net figures show that 90% of this group, equivalent to 818,000 consumers, are highlighting the deal offered by their existing provider as a factor in deciding not to switch (74% consider it a major factor and 43% the main factors, equivalent to 674,000 and 394,000 consumers, respectively).<sup>130</sup>
273. Interestingly, similar results can also be observed when looking at *Inactive* consumers. Half of these consumers highlighted negotiating or accepting a deal with their current provider as a factor why they have not switched or actively considered switching (30% considered this to be a major factor). While it could be assumed that Inactive consumers are less well-informed about offers from alternative providers as they have not actively looked for alternatives, there may still be reasons why the consumer is well-informed of what else is available without actively having looked to switch in the last 12 months. Taking the consumers responses at face value, and including the additional responses suggesting an active choice to remain with their existing provider, the combined or net

129 This is confirmed in a separate question: QF5b: 'And which if any of these were reasons you contacted your previous provider?': 39% of respondents indicated this was to negotiate a better deal, and 14% indicated this was to talk about the current provider's products and services.

130 The DNT sample size has been estimated using the triple-play quantitative research showing a DNT sample of 699 compared to 681 CPS respondents and a total of 2,529 respondents. Ofcom estimated the CPS segment at 884,000 and hence we estimate the DNT segment roughly at 907,000.



results suggest that the active selection of their existing provider as the best option was a factor for 93% of this group (78% considered these major factors and 35% the main factors), equivalent to 839,000 consumers (equivalent to 707,000 and 314,000 consumers, respectively).<sup>131</sup>

274. These figures showing a majority of consumers are able to negotiate a better deal with their existing provider are particularly stark when compared to the proportion of consumers that highlight the hassle of needing to contact more than one provider (i.e. previous provider(s) or new provider(s)) as a factor in not switching. Only 18% of the DNT group considered this a major factor and only 1% considered it the main factor.

**Table 27: Factors making consumer stay with current provider**

Factor	DNT		Inactive	
	Was a factor	Major factor	Was a factor	Major factor
Current provider is still the best deal/cheapest	75%	49%	80%	58%
Current provider has the best quality of service	74%	42%	82%	61%
I negotiated/accepted a deal with my current provider	67%	52%	50%	30%
NET	90%	74%	93%	78%

Source: CRA analysis of triple play quantitative research respondent-level data

Notes: DNT based on QC3A: 'Which if any of the following were factors that made you decide to stay with your current provider?' and QC3AA: 'And which if any of these was the main factor that made you decide to stay with your current provider?'. Questions were answered by 670 (Major only and Main) and 692 (Major and minor combined), respectively. 37 respondents answering 'Don't Know' for the main reason have not been included in the share calculation.

Inactive is based on QC4A: 'Which if any of these are factors why you have not switched or actively considered switching your current provider to another provider or providers?' and QC4AA: 'And which if any of these was the main factor for not switching or actively consider switching your service to another provider or providers?'. Questions were answered by 638 (Major only and Main) and 673 (Major and minor combined), respectively; 36 respondents answering 'Don't Know' for the main reason have not been included in the share calculation.

275. The triple play quantitative research also provides details of the actual benefit realised by consumers when they obtain an improved deal from their existing provider, as shown in Table 27. This also provides a useful robustness check showing that consumers are answering this question correctly and there are a range of benefits consumers can obtain through the competitive process and from their existing provider. For example, for the DNT group, in over two-thirds (69%) of cases the consumer reduces the cost of their service. In 33% of cases the consumer obtains an upgraded package (e.g. additional channels or faster broadband speed) and in 11% of cases a downgraded package. In any of these latter cases the new package will be an improvement for the consumer.

<sup>131</sup> The inactive sample size has been estimated using the triple-play quantitative research, which suggests there are 698 inactives of a total of 2,529 respondents, giving total inactives of 906,000 (using a pro-rata approach).

**Table 28: What did the negotiated/accepted deal with current provider involve?**

Outcome of negotiation	DNT	Inactive
1. Reduced the cost of my services/package	69%	57%
2. Increase in broadband speed	16%	22%
3. Decrease in broadband speed	1%*	1%*
4. Added a new channel package (e.g. BT Sport)	5%*	7%*
5. Added inclusive calls	7%*	10%*
6. Added other TV or video services (e.g. Netflix)	8%*	7%*
7. Increased cost of services/package	4%*	4%*
8. Reduced content/channel package (e.g. removed Sports channel package)	10%*	7%*
9. Added a mobile phone service in your package	5%*	6%*
10. Other	9%*	6%*
11. None of these	5%*	10%*
<i>NET upgrade package (2, 4, 5, 6, 9)</i>	<i>33%</i>	<i>41%</i>
<i>NET downgrade package (3, 8)</i>	<i>11%</i>	<i>9%*</i>

Source: CRA analysis of triple play quantitative research respondent-level data

Notes: DNT: QC3AD: 'You mentioned you negotiated/accepted a deal with your current provider. Which, if any, of the following did this involve?'. Fifteen out of 462 respondents answering 'Don't Know' have not been included in the share calculation.

Inactive: QC4AE: 'You mentioned you negotiated/accepted a deal with your current provider. Which, if any, of the following did this involve?'. 24 out of 339 respondents answering 'Don't Know' have not been included in the share calculation.

276. It seems clear that for both switchers and non-switchers there is a significant amount of welcome save activity and consumers benefit from contact with their previous provider. This can lead to an improved package and/or improved deal for the consumer thereby avoiding the hassle of switching.

**Previous research also shows welcome save activity**

277. The 2012 survey commissioned by Sky's and other communication providers<sup>132</sup> shows that many customers want to contact their old provider to negotiate a better deal: even when not being required to contact the losing provider, still 40% (or 43% when accounting for "Don't know" responses) of switchers would contact the losing provider. Out of these customers 48% would want to see if the current provider can make a better offer than the new provider i.e. attempt to obtain these reactive savings. Therefore Ofcom's proposals would prevent almost half of the switchers to obtain a reactive save, or alternatively many more customers than Ofcom's assumed 30% of switchers would actually not go through a GPL process.

**'Welcome' save activity will be reduced leading to unnecessary switching**

278. The benefits of welcome save are commonly available through contact with the existing provider. If contact with the existing provider is reduced, then the extent of the benefits achieved by consumers through welcome reactive save specifically resulting from that contact will be reduced and there will be an increase in unnecessary switches.

132 This research is available at <http://stakeholders.ofcom.org.uk/consultations/switching-fixed-voice-broadband/?showResponses=true&pageNum=3#responses> (Sky Annex Table 40).

279. Ofcom's triple play quantitative research shows that the proportion of cross-platform switchers contacting their previous provider is 68% compared to 57% for within Openreach switchers. Similarly, those experiencing their current provider trying to persuade them to stay is 65% compared to 51% for within Openreach switchers. These are shown in the table below and provide an initial guide for the reduced contact between the consumer and provider under a GPL process but note importantly that these are switchers so by definition those that have not been saved.<sup>133</sup>
280. Alongside this, 33% of switchers prefer to cancel without having a conversation with their existing provider.<sup>134</sup> An internal study by Sky suggests that [CONFIDENTIAL] of incoming calls would like to cancel without having a conversation. These figures suggest that the reduction in calls that enable retention may be around [CONFIDENTIAL] under GPL. This will not fully capture the reduction in the potential for save activity to occur as providers will still be able to present the customer with retention offers, for example, online or via IVR. To address this, we take the lower bound of this expected reduction in potential for reactive save activity.

**Table 29: Respondent activity when last changed provider(s)**

Activity	CPS	ORS
Contact your previous provider	68%	57%
Compare what different providers were offering	84%	83%
Experience your previous provider trying to persuade you to stay	65%	51%
Try to negotiate a better deal with your previous provider	41%	36%

Source: CRA analysis of respondent level switching data

Notes: QC1A: 'When you last changed your provider(s) did you...?' SUMMARY. Questions were answered by 676 CPS and 446 ORS.

281. Where consumers contact Sky, Sky estimates that it can retain around [CONFIDENTIAL] of these consumers. In addition, of any additional cancellations that result from GPL or EC&R compared to the current process, Sky believes it can still retain around [CONFIDENTIAL] of these customers by calling them within the 31 day notice period and offering improved discounts to reactivate the account (i.e. there may still be an opportunity for save activity initiated by Sky during the notice period).
282. If we assume that the DNT group has 907,000 consumers and around half of these decided not to switch due to *welcome* save activity.<sup>135</sup> Note that this does not include any of the inactive group that may have been subject to welcome save activity. Of the DNT group subject to welcome save activity, [CONFIDENTIAL] fewer will contact their current provider and, of these, Sky expect to still retain [CONFIDENTIAL] of consumers that

133 A separate question, QF1: 'Once you had decided to switch your service(s) who did you contact first?' shows that once the customer decided to switch they contacted their provider first (as opposed to the provider contacting them) in 30% (CPS) and 20% (ORS) of cases. In question "QF5a And which if any of these were reasons you contacted your previous provider?": 18% of CPS respondents indicated this was to negotiate a better deal, and 4% of CPS indicated this was to talk about the current provider's products and services (for ORS these figures are 19% and 10%, respectively).

134 Based on slide 16 this includes online email, online web-form, by letter, via an app, by a text message, and by a social networking site.

135 For example, 52% stated that negotiating a better deal with their provider was a major factor in them deciding not to switch.

decided not to switch no longer be saved that otherwise would have been.<sup>136</sup> Taking account of expected usage of GPL of between 16% and 36%,<sup>137</sup> and assuming Sky's retention is similar to that of other providers, this provides an estimates of between [CONFIDENTIAL] consumers that will be subject to unnecessary switches.

**Consumers incur costs in switching provider**

283. When consumers switch they incur costs. Some of these switching costs have been considered above: the consultation and proposed options are aimed at making switching easier and more reliable through reducing switching costs associated with the switching process. However, there are other costs incurred by consumers that are incurred as a result of switching but are unrelated to the switching process.
284. For example, a consumer may require an engineer visit to install a new service. As outlined in relation to loss of service, an engineering visit can be costly for consumers. As Ofcom has noted, an engineering visit can involve time where a consumer is unable to work or has to wait in for them to arrive. As outlined, the loss of service quantitative research provides an inadequate evidence base to support some of the assumptions that Ofcom makes in its assessment of reduced loss of service. At a more general level, Sky offers most customers an AM (8am–1pm) or PM (12pm–5pm) appointment for an engineer. In addition, the Sky engineer will provide an estimated time of arrival before 9am on the morning of the appointment window to confirm their arrival time (providing a narrower slot normally of three hours). A Sky TV engineer visit typically takes [CONFIDENTIAL] minutes for a single box installation and to introduce the product to the consumer. It is possible therefore that if a consumer is the first customer of the day, the total duration of the appointment is only [CONFIDENTIAL]. At most installation may take half a day unless difficulties are encountered. Currently [CONFIDENTIAL] of customers require a second visit within 90 days.<sup>138</sup> While these figures provide further evidence refuting the results of Ofcom's loss of service quantitative research, they provide a realistic guide as to the number of hours lost for this aspect of the switch.
285. Taking the above factors into account, we assume for illustrative purposes, a 2.5 hour wait time for an engineer. Using Ofcom's approach of applying the (CRA revised) wage rate less (CRA revised) leisure time, adjusting for the proportion that are likely to be employed as in the CRA revised set of assumptions, this gives an average level of harm of around £20.75 for each switcher.
286. There are other costs associated with switching. For example, as noted above, around [CONFIDENTIAL] instances of new line failure occur within the first 28 days of installation that is directly related to a switch and will not be impacted by Ofcom's proposals. This will result in a loss of service for [CONFIDENTIAL] of cross-platform switchers or [CONFIDENTIAL] of those that experience a service loss related to switching and will not be resolved by the introduction of a GPL switching process. We assume loss of service harm per switcher is equivalent to the revised estimates above of £18.23. Together with the harm above this gives a total harm per switcher of £39.

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136 [CONFIDENTIAL].

137 This usage is already captured by the reduced call numbers so including take-up here ought to lead to an underestimate.

138 Information provided by Sky and <http://www.sky.com/shop/tv/setup-installation/>.

287. Ofcom's triple play quantitative research shows other costs. For example, 11% of those that decided not to switch reported learning a new service as a major factor impacting their decisions. While clearly new providers want to – and take steps to – minimise the learning costs for consumers, inevitably consumers will have to learn about new equipment, new support services, and possibly new content. We do not try to value this but note the presence of other costs unrelated to the switching process that a consumer can avoid by remaining with their existing provider (and potentially obtaining an equivalent or improved offer).

**The impact on the size of the offer from current and new providers**

288. In addition to the costs saved from avoiding the hassle of switching, consumers may also obtain a better offer from their existing provider. The incremental value of this improved offer would be lost to a consumer that is saved under the current C&R process but switches under Ofcom's proposals. By only focusing on avoided switching costs, this assumes the consumer obtains a matched offer from their current provider. However, more often than not, the consumer will obtain an improved offer from its existing provider that may be better than that offered by an alternative provider. The consumer benefits from remaining with its existing provider.
289. In addition, under the current system the consumer may use an offer that it obtains from its existing provider to negotiate a better offer with an alternative provider. This leverage will be reduced in the new system as consumers will be more likely to directly contact the gaining provider and less likely to do so having spoken to their existing provider first. The impact of this will likely be to reduce the offer that the new provider makes to consumers under GPL than currently, all else equal.<sup>139</sup>
290. We have not quantified the extent of these effects but note they will lead to an underestimate of the cost to consumers of restricting save activity.

**Summary**

291. Ofcom assumes that its proposals will allow consumers that welcome save activity to still benefit from it while also enabling other consumers to avoid it. However, the proposals are likely to reduce even welcome save activity. By reducing contact between the consumer and their current provider, save activity is likely to be reduced, a proportion of which will be welcome save activity. This will lead to unnecessary switches. Given consumers incur costs associated with switching – costs unrelated to Ofcom's proposals or the switching process – these unnecessary switches will lead to overall harm from the proposals that should be deducted from the gross benefits Ofcom has calculated. If we assume that around [CONFIDENTIAL] consumers will be affected and the harm per switcher is around £39, this could give **an offsetting negative impact of the proposals of between [CONFIDENTIAL]**.

**10.3. Increased incidence of Early Termination Charges (ETCs)**

292. Ofcom's proposals will reduce the amount of contact the consumer has with their current provider. Limiting contact with the current provider will likely reduce the amount of information consumers can readily access about the implications of switching since the

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<sup>139</sup> In addition to this, the benefit received by consumers that do contact their existing provider is also likely to be reduced as a consumer contacting their existing provider signals that they are more inclined to remain with the provider than switch. This additional information affects the price discrimination process that underpins reactive save activity.

current provider seems to be the general source of information on these implications, for example, when it comes to early termination charges (ETCs). To obtain relevant information under a GPL system, the consumer has to, in effect, begin a switching process. While the consumer can still contact their existing provider – and Ofcom's proposals may make this information more accessible to consumers on a regular basis – the extent of contact the consumer has with the losing provider is likely, as outlined above, to reduce significantly under a GPL process and thus so will consumers' ability to obtain information about the implications of switching. At the very least, it seems the most commonly used options to obtain this information will be restricted by the proposals. This has the potential to reduce the flow of information about the implications of switching to consumers and, consequently, increase the incidence of early termination charges (and other charges relating to ending the contract) paid by consumers and these must be taken into account in Ofcom's analysis.

293. These ETCs or other charges can be quite substantial (as outlined below) and increase the costs of switching for consumers. If a consumer can be saved by the current provider before switching or the consumer can be informed about these charges before starting a switching process (and hence the consumer may postpone the switch until the end of the minimum contract period), these charges can be avoided. A GPL process would prevent this option from occurring where the information is either not passed or not as effectively passed to the consumer (for example, because the consumer is more reluctant to contact the prospective gaining provider for information as this invests them into or risks the start of a switching process which they may not have intended if only seeking information about the implications of switching) and hence would result in higher overall costs for consumers.
294. Although only a minority of consumers end up paying charges when terminating their contract, the amount can be quite substantial:<sup>140</sup>
- 9% of switchers had to pay their existing provider for leaving before the end of their minimum contract period (also 9% cross-platform switchers). ETCs paid by switchers range up to over £200, with a mean charge of £88 and median of £91. For cross-platform switchers these figures are slightly lower with a mean of £84 and median of £66;<sup>141</sup>
  - 23% of switchers found out they had to pay disconnection charges (22% of cross-platform switchers). There is no information available from the triple play quantitative research on the amount paid for these disconnection charges;<sup>142</sup>

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140 These figures are based on the triple-play quantitative research respondent-level data: QC1AB: '*Did you have to pay a charge for leaving before the end of your minimum contract period?*'; QC1A: '*When you last changed your provider(s) did you...?*'; QC1AC: '*How much did you personally have to pay to leave your contract early?*'; QC1AD: '*Approximately how long was left on your contract when you stopped using the service?*'; QC1AE: '*You said you found out that you had to pay a disconnection charge(s) (i.e. a charge for ending the service). Did you pay this charge?*'; QC1AF: '*You said you found out that you had to pay a charge for not returning equipment. Did you pay this charge?*'; QC1AG\_1: '*Which of the following best describes when you found out you had to pay a charge for leaving before the end of your minimum contract period (i.e. an early termination charge)?*'; QC1AG\_2: '*Which of the following best describes when you found out you had to pay a disconnection charge(s) (i.e. a charge for ending the service)?*'; QC1AG\_3: '*Which of the following best describes when you found out you had to pay a charge for not returning equipment?*'. Whenever there are 'Don't know/don't recall' answers these have been excluded from the percentages.

141 The duration covered by these ETCs can extend to more than 6 months, with a mean duration of 13 weeks and median duration of 15 weeks.

142 Although in about half of the cases (52% of switchers and 47% of cross-platform switchers) the consumer appears not to actually have paid the disconnection charge in the end.

- 14% of switchers found out they had to pay a charge for not returning equipment (16% of cross-platform switchers). Again there is no information on the amount paid for these charges.<sup>143</sup>
295. Generally consumers seem to find out about these charges before signing up with a new provider: 65% of switchers found out about ETCs before signing up with a new provider (for cross-platform switchers this figure is 75%). Hence still roughly one-third of respondents had found out about these charges only after signing up with an alternative provider.
296. Some consumers who currently obtain information about the implications of switching from their existing provider decide not to switch on the basis of this information. The introduction of a GPL system would reduce the information flow to some of these consumers who will then (make a poorly informed) switch when they otherwise would not have. For example, 19% of consumers who decided not to switch (as per the category in the triple play quantitative research) indicated as a major factor in staying with their current provider that they were either still under contract or would need to pay to leave as a major factor in staying with their current provider. For 34% of these this was a factor and for 3% it was even the main factor.<sup>144</sup> For inactive consumers (again defined in the triple play quantitative research), 21% indicated that they need to wait until the end of the contract or until they can switch without paying a charge in not switching as a major factor in not switching. For 41% of inactive consumers this was a factor (major or minor) and for 4% it was even the main factor.<sup>145</sup>
297. We have explored the triple play quantitative research to try to estimate the extent to which consumers currently call their current (or losing) provider about early termination charges. To do this, we examined multiple responses to the reasons consumers gave for contacting their previous provider.<sup>146</sup> As the table below shows, for cross-platform switchers, the reasons indicating the consumer was seeking information relating to charges and the final bill account for around 38% of those that call their previous provider. Taking account of additional responses that indicate the consumer has sought information about the contract or notice period that also may relate to the implications of switching, three other reasons (options 8-10 in the table below) show that around one-quarter of cross-platform switchers called with the intention of gathering this information. Combining all these factors gives a net of around a half of all cross-platform switchers that contacted their previous provider sought information relevant to determining the implications of switching. For consumers who decided not to switch, these figures are lower for the first three reasons: only 18% seemed to have wanted to find out about ETCs and their final bill from their current provider. Combined with the other reasons, a total of 37% of this groups called their previous provider to gather information relevant to determine the implications of switching.

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143 Although in over three-quarters of cases (79% of switchers and 77% of cross-platform switchers) the consumer appears not to have actually paid the charges for not returning equipment.

144 This is based on the triple-play quantitative research: QC3A (option 7) and QC3AA.

145 This is based on the triple-play quantitative research: QC4A (option 7) and QC4AA. It seems that these consumers knew about the existence of ETCs without actively trying to find information on (better) deals with different providers.

146 This analysis focuses on ETCs rather than the other charges.

**Table 30: Which if any of these were reasons you contacted your previous or current provider?**

Reason	CPS	DNT
4. To find out about any charges for ending my contract early	11%	8%
5. To find out about any other charges for ending my contract	13%	8%
12. To check how much my final bill would be	28%	10%
<i>NET 4, 5, 12</i>	<i>38%</i>	<i>18%</i>
8. To obtain information about my contract e.g. my usage patterns/spend	4%	9%
9. To find out when my contract ended	11%	16%
10. To find out if I had a notice period	17%	12%
<i>NET 8, 9, 10</i>	<i>26%</i>	<i>30%</i>
<b>NET TOTAL</b>	<b>49%</b>	<b>37%</b>

Source: CRA analysis of triple play quantitative research respondent-level data

Notes: QF5: 'And which if any of these were reasons you contacted your previous provider?' Respondents answering 'Don't know/don't recall' (22 out of 467 for cross platform switchers and 21 out of 466 for DNTs) have not been included in the share calculation.

298. Interestingly, we can examine the reasons given by consumers alongside information on whether the switching consumer actually paid ETCs in the end. We observe that those cross-platform switchers that did pay ETCs discussed them much more often than those that did not. This tells us that the information obtained by consumers from their previous providers as shown above is valuable to consumers, since consumers seem to want to know the extent of any ETCs before deciding to go ahead with their switch so that they can make an informed decision. This is not to say that switchers that did not pay ETCs were not discussing them: around 37% directly discussed ETCs/the final bill, and around half sought information for any of the six reasons outlined below.

**Table 31: Which if any of these were reasons you contacted your previous provider?**

Reasons	ETCs	No ETCs
4. To find out about any charges for ending my contract early	33%	9%
5. To find out about any other charges for ending my contract	26%	11%
12. To check how much my final bill would be	40%	26%
<i>NET 4, 5, 12</i>	<i>51%</i>	<i>37%</i>
8. To obtain information about my contract e.g. my usage patterns/spend	12%	3%
9. To find out when my contract ended	30%	9%
10. To find out if I had a notice period	23%	16%
<i>NET 8, 9, 10</i>	<i>47%</i>	<i>23%</i>
<i>NET</i>	<i>70%</i>	<i>47%</i>

Source: CRA analysis of triple play quantitative research respondent-level data

Notes: Figures relate to cross-platform switchers only.  
 QC1AB: 'Did you have to pay a charge for leaving before the end of your minimum contract period?' and QF5: 'And which if any of these were reasons you contacted your previous provider?' For CPS ETCs 2 out of 28 respondents, and for CPS no ETCs 19 of 412, answering 'Don't know/don't recall' have not been included in the share calculation.



299. Recognising it is possible that the previous provider contacted the switcher (instead of vice-versa), we have explored data on this also. Over half (56%) of cross-platform switchers were contacted by their previous provider while 21% of those that decided not to switch got a call from their current provider. However, only in a limited number of cases was this to discuss ETCs: 13% of cross-platform switchers and 11% of DNTs. This implies for DNTs that only around 2% were called by their previous provider to discuss ETCs. For those cross-platform switchers that did pay ETCs, a call was received from the previous provider in 57% of cases, and of these the reason for the call was ETCs in 48% of cases for cross-platform switchers.<sup>147</sup> Of DNT consumers that indicated ETCs were a major factor in their decision,<sup>148</sup> 73% called their previous provider of which 37% to 60% said that this was to discuss charges (based on the reasons listed in the table above). For those that said ETCs were a factor, 72% called their previous provider and 32% to 54% of those discussed charges.<sup>149</sup>
300. A consumer receiving a call from their current provider once a switching process has already started is not an effective means for the consumer to obtain information about the implications of switching or for them to make an informed decision about the switch. Three-quarters of cross-platform switchers currently find out about ETCs before signing up with a new provider and contact with their existing provider is a key source of this information (see paragraph 294). Clearly, the current provider will not pro-actively inform a consumer about ETCs until they are told a switching process has started. While Ofcom has tried to address this by ensuring greater information on bills, this cannot replace the information and the frequency of information currently received by consumers through contact with their existing provider. Consequently, the proposals are likely to lead to more switches involving ETCs that would not have happened otherwise or this will lead to more switching process being started by consumers and subsequently cancelled, therefore leading to more costs for the providers and more hassle for the consumer. This latter point is considered further below.
301. To estimate the overall increase in charges that may result, we note that currently 67% of consumers who decided not to switch contacted their previous provider, and 18-37% of those consumers discussed charges for leaving their contract. We therefore assume that, of these consumers, those that opt to use the proposed GPL process (assuming a take-up of between 16% and 36%), some will no longer contact their previous provider and will no longer be informed of any relevant ETCs.<sup>150</sup> Around 34% of consumers who decided not to switch, reported that ETCs were a major or minor factor in not doing so. We take a cautious approach and consider only those that highlighted ETCs as a major factor (19%) in deciding not to switch. Hence we estimate that between 0.5% and 2.5% of consumers that decided not to switch would switch under the proposed changes, use the new GPL

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147 This is based on 29 CPS who did get a call i.e. a limited sample. For those cross-platform switchers that did not pay ETCs the figures were 56% receiving a call from their previous provider, and of these the reason for the call was ETCs in 9% of cases and hence we presume that these ETCs were waved in the end.

148 The respondent-level data does not provide information on which consumers (that decided not to switch) actually were told to pay ETCs in case they had decided to switch provider. Therefore we focus on consumers who have indicated ETCs to be a factor in their decision.

149 These figures are based on 124 and 235 consumers indicating ETCs were a major factor and a factor, respectively. Out of these, 91 and 170 called their previous provider, 34 and 55 indicated any of the first three reasons, while 55 and 92 indicated any of the six reasons.

150 Although the previous provider could still call these consumers to make them change their mind about the switch given the ETCs, but since this happened for around 2% of cross-platform switchers only this does not seem likely.

process and pay ETCs.<sup>151</sup> We estimate this is equivalent to between 5,000 and 23,000 consumers that would pay ETCs under the proposed GPL process that do not do so under the status quo.<sup>152</sup> As outlined below, some of these consumers may still subsequently cancel the switch during the transfer period (and so not be liable for any ETCs). We have not been able to estimate the extent to which these 'excessive orders' where the consumer subsequently cancels are likely to occur but in our view this is unlikely to be a high proportion. As noted above, the estimated mean ETC for cross-platform switchers is £84 (whether or not they knew about these charges before the switch was concluded). As a result, we estimate **the additional ETCs would lead to total increased ETCs to consumers of between £0.4 million and £1.9 million** and thus a reduction in the annual gross benefits to consumers of the same amount.

### Summary

302. We estimate that under a GPL process there will be additional consumers that will incur ETCs due to the less effective means of consumers obtaining information about the implications of switching. This is another example of likely negative consequences arising from Ofcom's proposals that have not been taken into account in the impact assessment. By not including these additional charges likely to be faced by consumers, Ofcom overstates the benefits of its proposals. We estimate this effect of additional ETCs to lead to a reduction in the annual gross benefits to consumers of at least £0.4 million.

## 10.4. Impact of excessive orders and cancellations

303. Ofcom's proposals will impose additional costs on providers. The scope of this report is on the quantifiable consumer benefits that Ofcom has estimated. Nevertheless, it is instructive to consider the possible impact on consumers of some of the more direct cost increases to providers. Ofcom proposals stipulate that '*during the transfer period, the new provider would be required to provide the consumer with any equipment necessary for the operation of the new service(s)*' (paragraph 4.28) and that '*at any time during this transfer period the consumer may cancel the switch without liability.*' (paragraph 5.51)
304. This places a significant burden on providers. If a consumer signs up to switch, the new provider begins the process for activating the new service to enable it to supply the customer by the end of the transfer period. The provider incurs costs in doing so. For example, to activate the new service, Sky will send out an engineer to install a satellite dish and cabling and provide an introduction to the service to the consumer. If the consumer then subsequently decides to cancel the switch during the transfer period, Sky still incurs the costs of installation and activation. For example, Sky estimates that its installation fees for pay TV of installing a dish and box exceed [CONFIDENTIAL].
305. The extent to which consumers will begin a switching process and then cancel is not known and may well be low (particularly those that cancel after the engineer visit). Nevertheless, for every consumer that does this, providers will incur these additional costs. Even if the provider is able to absorb some of these costs, it is highly likely that some will be passed on to consumers.

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151 This is based on 18-37% of consumers who decided not to switch that discussed ETCs with their previous provider during a call initiated by the consumer, and multiply this by the 19% of consumers who decided not to switch for which ETCs were a major factor in this decision.

152 The DNT sample size has been estimated using the triple-play quantitative research showing a DNT sample of 699 compared to 681 CPS respondents and a total of 2,529 respondents. Ofcom estimated the CPS segment at 884,000 and hence we estimate the DNT segment roughly at 907,000 (using a pro-rata approach).

306. If we assume that only 0.5% of all current cross-platform switches that began a switching process subsequently cancelled after the engineer visit, this would still result in additional costs (based on Sky's figures) of [CONFIDENTIAL]. Even if we assume a pass-through of only 40% of these costs from providers to consumers, this would still mean **increased costs to consumers of [CONFIDENTIAL]**. If the proportion of current cross-platform switchers that would begin a switch and then cancel was instead 2%, the increased costs to consumers would be [CONFIDENTIAL]. While we have no evidence to estimate the incidence of these excessive orders and cancellations, the costs to providers are so substantial that it would take only a minimal amount of consumers to use this proposal by Ofcom for it to actually result in significant *harm* to consumers. Even making very cautious assumptions on this incidence (and pass-through) in this illustrative example shows that the policy is likely to result in consumer harm. Ofcom must take these costs into account.

### 10.5. Total net benefits

307. Together the potential negative consequences of the proposals outlined above could give rise to annual costs to consumers of between £1.3 million and £3.2 million. While these estimates are illustrative we believe they are relatively conservative. Ofcom has given no account of these potential costs to consumers at all in its impact assessment. This is a significant omission that, if not rectified, will lead to Ofcom drawing incorrect conclusions about the impact of its proposals.

308. When considering these potential costs to consumers alongside the revised estimates for annual gross benefits of at most £0.6 million points to **potentially significant overall net costs (or 'disbenefits') to consumers of the proposals** and the inadequacy of Ofcom's impact assessment in determining if the proposals should be implemented. While Ofcom will have to consider these quantifiable benefits and costs to consumers alongside other unquantified benefits (and other costs), each of which is beyond the scope of this report, these results show that Ofcom cannot rely on its estimates of net benefits as outlined in its impact assessment to justify its proposals. Ofcom must recognise that its proposals risk causing harm to consumers.

## 11. CONCLUSIONS

309. A more detailed examination of the evidence available, including the research commissioned by Ofcom for the purposes of the consultation, leads to a more plausible set of assumptions underlying Ofcom's assessment of the quantifiable consumer benefits resulting from its proposals. This analysis provides a revised estimate of the benefits likely to arise as a result of Ofcom's proposals. The revised estimates are considerably lower than Ofcom's original estimates and close to zero (if not negative under some sensitivities). We therefore conclude that Ofcom must revisit its analysis and undertake a more detailed assessment of the likely consumer benefits, correcting for errors and reconsidering how it interprets the available evidence. Where there is limited evidence on which to draw conclusions, further analysis ought to be undertaken.

310. Our estimates of the quantifiable benefits raise questions about the effectiveness of the proposals even before unquantifiable effects are considered. Without significant quantifiable benefits to consumers, the justification for implementing the proposals is significantly reduced. This is before unquantifiable negative impacts and implementation costs to providers are considered.

311. Ofcom has also failed to take account of potential negative consequences for consumers of its proposals. Any proposal is likely to have both aspects that benefit consumers and aspects that harm consumers. Ofcom must take account of negative impacts as well as positive impacts if it wishes to arrive at an assessment of the net impacts on consumers. We have identified a number of potential negative impacts that should form part of Ofcom's impact assessment (delayed switching, reduced save activities and associated unnecessary hassle of switching, and increased incidence of ETCs).
312. Finally, it is important that Ofcom estimates the impacts of its proposals with respect to *each* type of cross-platform switch, rather than the impacts of its proposals across all cross-platform switches in aggregate. There is a danger in Ofcom's aggregate approach of erroneously concluding that the proposals result in consumer benefits with respect to all types of cross-platform switches when in fact, for some types, consumers would realise little benefit or may even be harmed. In particular, switches involving standalone pay TV are likely to have different impacts on consumers compared with other types of cross-platform switches.



# A Review of Market Research used in the Triple Play consultation

Prepared by Philip Malivoire

Date: 18<sup>th</sup> October 2016



## Introduction

Following a brief summary of my overall conclusions, this report is divided into five main sections. A re-cap of the methodology, followed by a review of the samples, the questions, the way the data have been used, and a final section discussing the samples of non-switchers.

In the preparation of my report I have reviewed the following documents:

- The BDRC Slidepack
- The BDRC data tables
- The Quantitative questionnaire
- The “Triple Play” consultation document
- The “Mobile Switching” consultation document

## Overall conclusions

- The sample is heavily weighted towards people who have switched within the last 6 months.
- There is an absence of questions allowing people to express their experience in their own words. I believe this is an unfortunate omission and means it is difficult to assess the real-world impact of issues since they are only identified via prompted questioning
- I believe the reliance on a single prompted question to understand possible difficulties with the process is likely to overstate the impact of process-related issues
- The decision to base the key analyses in the Triple Play Switching consultation on a combination of both major and minor difficulties has exacerbated the impact of the prompted question. Other data in the survey illustrate this point and suggest that this decision has led to further overstatement of the impact of process-related issues.
- There seems to be an implicit assumption that a ‘difficulty’ automatically represents a deterrent. This is not supported by some of the data in the survey. In addition, some of the issues described as difficulties do not seem to be difficulties as such.

## The survey methodology

The quantitative survey was undertaken by BDRC. The data were collected online. This seems a pragmatic and appropriate approach.

The survey summary does not include some details I might expect to see. For example, there is no detail about the identity of the panel provider, no detail about the response rate or how many people failed at various stages of the screening process. There is also no detail about quality control measures and the number of interviews that needed to be rejected as inadequate. With an online survey, I might expect 5%-10% of respondents to be identified as people who do not take the survey seriously, either providing implausibly consistent answers (“straight lining”) or providing verbatim answers that indicate that they did not take the survey seriously or people who completed the survey in an impossibly short period of time.

However, the absence of these details does not lead me to believe that the survey was not conducted to an appropriate standard.

### **Sampling – is the sample representative and the impact of the recall period**

There are three main sub-samples within the overall sample.

- Switched – those who had switched provider within the last 2 years
- Decided not to – those who actively started to look but decided not to switch within the last 12 months
- Not switched/Not actively considered – those who considered but didn't actively look or those who did not consider within the last 12 months

The main consideration of this report is the switchers sample; I briefly consider the non-switchers in the final section.

As seen above, the first of these – referred to as “switchers” in the consultation document – comprises people who switched provider within the last 2 years (the “recall period”). The selection of recall period is an important consideration in work of this type and it is often a case of trading off the desire to have a shorter recall period (where people will be better able to remember an event) and cost of research (a shorter recall period means the proportion of those who qualify in the population is reduced and the cost of data collection becomes more expensive).

A compromise needs to be agreed and on this occasion the period of 2 years was selected. A period of 2 years can introduce challenges. Asking questions of people who may have switched nearly 2 years ago does introduce the particular challenge of respondent recall – can a person be reasonably expected to remember sufficiently clearly what occurred then? The Mobile Switching consultation addresses this point; footnote 19 in that document states:

“... this quantitative study probed on consumers’ switching experiences, before asking them to recall how easy their experience was overall. This was designed to aid recall of an event that may have occurred several months previously and reports a more considered response on ‘ease of switching’”

Although it has not been discussed, I assume that the same rationale has been used for the Triple Play survey. There are some elements of this statement I will discuss in detail below but for the moment, I will concentrate on the sample and the issue of aiding recall.

There was no single question that asked when the respondent most recently switched a service; instead three questions asked this separately for telephone, broadband and TV. I have reviewed the results of QB3 as shown in table 71 of the BDCR data tables. In the table below I have excluded those people who have not switched the particular service or who switched it more than two years ago. So among those who switched within the past 2 years:

	Fixed landline	Fixed broadband	Pay TV
Weighted base:	1107	1129	739
In last 6 months	40%	40%	38%
Between 6-12 months	26%	27%	26%
Between 13-24 months	33%	33%	35%

Looking at the column of data under fixed landline, the figures show that there were 1107 (weighted) respondents who have switched this service in the last 2 years. Of this total exactly two-fifths have done so in the 6 months prior to the interview; a greater proportion than the 33% who did so in the full year between 13-24 months. Given the consistency of the findings across the three different groups, I believe that about two fifths of all switchers made the change within the last 6 months. I have considered why the sample should be so heavily weighted in favour of more recent switchers. I can think of four possibilities:

- There has been a twofold increase in switching over the last two years and particularly within the 6 months prior to the survey
- There is a group of 'serial' switchers who will have switched more than once within the recall period and only reported the most recent occasion
- People who have switched within the last 2 years are incorrectly allocating the time within that period and fewer did actually switch within the last 6 months than claimed.
- People are less likely to recall switching the longer ago they switched

Looking at the four possibilities, the consultation does not refer to a twofold increase in switching in its introduction so I assume that the first has not occurred and I can reject the second possibility based on the results of another table in the data tables (table 76) who shows that very few people have switched more than once in the past 5 years.

The third and fourth possibilities relate to issues of recall. I would assume that someone is more likely to recall whether they did something 6 months ago or not than whether they did something 2 years ago or not. Therefore, I believe that the most likely explanation for this pattern of response is that people who switched longer ago have failed to report this. This begs the question of "why not?" and it seems logical to assume that such people have simply forgotten the event, which was presumably not that memorable. If this be the case is the sample of people who have taken part in the survey representative of all those who switched longer ago? Or is it possible that the sample is more likely to include those people who had a more memorable experience (possibly a more problematic one) when they switched?

Overall, assuming that there has been a broadly consistent rate of switching over the past 2 years, the sample as collected is heavily biased towards people who have switched more recently. This means that the sample will contain a disproportionately large proportion of people for the switching process is fresher in their minds. This is not necessarily a bad thing but may not be predictive of how someone will behave in the future when the time comes to



consider switching again. By contrast, the sample may under-represent people who had an unmemorable switch longer ago. It also means that the sample under-represents people whose contract with their current provider has ended (or is approaching its end) and who are therefore 'in the market'; are these people unwilling to act because of a previous poor experience?

This leads to an issue relating to the relevance of the sample. I noted above that common practice is to reduce the recall period as much as possible so that people remember as much as possible but in a market where minimum contracts are typically 12 or 18 months, it could be argued that it is these people who are the most relevant. They are the people who are in a position to enter the market and whose recall of their previous experience will be relevant to future switching.

### **The questionnaire - the types of question that were employed in the survey and those that were not**

There are different types of question that can be used to obtain feedback about events or (in the case of those who decided not to switch) decisions. This survey is based largely around closed questions – where the respondent is asked a question and then offered answers to choose from. I will briefly describe another type of question – open questions – and why I believe it should have been included in this survey.

Open questions can be entirely non-leading, such as “How was it for you...?” or more leading but still open questions “Do you recall any issues...?” / “Did anything happen that would deter you from switching in the future?” I believe that the benefit of such questions is that they obtain spontaneous responses to questions and would represent a good indication of peoples’ thoughts about a subject; what is in their mind when the subject is mentioned. I believe that this type of question should have been used in this survey, for two reasons:

- As described above, footnote 19 in the Mobile Switching consultation is the key source of the rationale for the types of questions asked. However, while it explains why “probed” (or what Ofcom more accurately describes as “prompted”) questions were used, it does not explain why open questions were *not* used. The use of prompted questions does not preclude the use of open questions. It is perfectly feasible, and I would suggest desirable, to use both types of question; open questions to obtain more top-of-mind feedback and then closed questions to aid recall, as the consultation describes. The addition of two open questions towards the start of the interview would not have increased the length of the interview unreasonably.
- One reason for a substantial sample size is the ability to dis-aggregate the sample. Within a sample of over 1,000 switchers there will be many people who have switched more recently and who may not require the aid of prompting; indeed, the table shown in the previous section suggests that the sample comprises over 450 people who switched at least one service within the past 6 months. It would be extremely simple to isolate these people at the analysis stage and review the responses to open questions given by people who should surely recall their experience. Instead, the types of

questions used would appear to have been driven by the relatively small number of people in the sample who switched longer ago.

I agree that the passage of nearly 2 years could impact upon memory and I would agree that the results of open questions among such people would need to be taken with a degree of caution. However, their entire absence means that the survey does not attempt to record the unprompted state of mind of people who, some (known) period after they switched, may consider switching again. I believe that responses to open questions would provide more compelling evidence (or otherwise) of deterrence. Further, the adoption of open questions before closed questions would have allowed for a more nuanced analysis of responses so it would be possible to elicit factors that are in peoples' minds (and therefore more likely to represent a deterrent) and then see what factors arise when people are prompted.

In the absence of such questions, the core of the research findings cited in the consultation are taken from the prompted questions (for example q2CA) where respondents are presented with a number of 'difficulties' (although some of these do not necessarily strike me as difficulties) and asked to respond to them.<sup>1</sup> I will discuss the way in which these questions are used in the next section.

#### *Alternative sequence of questions*

Rather than merely comment upon the questions used in the BDRC questionnaire, I believe it is useful to outline what I believe to be a series of questions that would enable a more rounded review of the experience of the switching process to be obtained.

First, an entirely open question: "You switched x months ago. Please describe the experience to us. Please think about from when you initially considered switching to when your new services were up and running".

Second, a bit more leading: "And, apart from any you have already mentioned, did you encounter any difficulties or problems over the switching process?"

These two questions would provide a spontaneous account of the process and an indication of the issues respondents recall facing. Is there a legacy from the previous experience?

Third, the general question – overall ease / difficulty (as QG13 in BDRC questionnaire).

Fourth, a detailed review of individual elements of the process (similar to QC2a in BDRC questionnaire). I can see the logic of using major and minor as categories for differentiating the extent of the difficulty faced as they represent concepts that are simple to grasp for the respondent.

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<sup>1</sup> There also seems, in the consultation, an equivalence of difficulty with deterrent which does not, in my opinion, necessarily follow.

However, they are not so simple to interpret and given the overall purpose of the survey – is the switching process unnecessarily difficult and does it represent a deterrent to switch? – then some more detailed options could have been used. For example, (and using the same bucket approach used by BDRC):

- Something that made the process unreasonably difficult
- A difficulty but one of those things
- A minor irritation
- No problem – it went smoothly

I note in paragraph 2.31 the consultation states:

“The switching process itself, however, should not be something that prevents or hinders an informed consumer changing provider. Neither should it create unnecessary difficulties for those that switch, such that they would be put off from doing so again”

A question that asks how likely the respondent would be to switch again in the future would seem an obvious way to understand whether the process had put people off doing so again. Accordingly, it would be appropriate to conclude with a question about the impact of perceived difficulties on whether they were such to put people off switching again in future. For example:

“Thinking about your experience switching, which of the following statements best describes your attitude to switching again in the future, perhaps when your current contract ends?

- Something I will happily do again
- Something I will reluctantly do again
- Something I will try to avoid doing
- Something I will not do again”

And “Why do you say that?”

I believe that this series of questions, along with the other questions in the BDRC survey, would provide a more reliable account of the impact of the switching process on people and on their attitude to do it again in the future.

## **Analysis – the use of the survey results**

### *Overall research conclusions*

The key reference to the research in the summary of the Triple Play consultation is contained in paragraph 1.3 of the summary. It states:

“When asked whether the switching process was easy, 81% of cross-platform switchers initially said that it was. However, when prompted, 79% said that they had encountered

some kind of difficulty, and 58% said they experienced at least one process-related difficulty.”

First, I believe this description is inaccurate and mis-reports the research process. It suggests that respondents were first (‘initially’) asked whether they thought switching was easy or not (still a prompted question since it included four suggested responses – two easy and two difficult) and subsequently prompted with potential difficulties. In fact, the question that identified the level of ease or difficulty (QG13) was asked *after* respondents had been prompted about possible difficulties and asked to consider them.

This is an important difference and its implications are considered in footnote 19 on page 20 of the Mobile Switching consultation. I recognise that the consultations are different but I believe this issue regarding questionnaire design and its impact upon the results is identical to both consultations. Footnote 19 notes that the figure of 78% (who believed the mobile switching process to be easy in the BDRC survey) is lower than the figure of 92% recorded on the Mobile Switching Tracker. It comments that this is likely to be as a result of the fact that respondents have been “probed on switching experience”, i.e. prompted about potential difficulties before being asked the ‘ease of switching question’.

I agree with this assessment; the figure of 78% is clearly an understatement since respondents will have been encouraged to consider difficulties before answering it.

I believe that it is appropriate to use the Mobile Switching consultation as a parallel and, as such, I believe that it is reasonable to expect that if a similar question in the Triple Play survey had been asked in the absence of prior prompting with potential difficulties that fewer than 10% of switchers would have rated the switching process as difficult and a tiny proportion – perhaps 1% or 2% - would have rated it as ‘very difficult’.

Therefore, I believe that paragraph 1.3 of the Triple Play consultation understates the true percentage of people who found the switching process easy overall.

*Ofcom’s decision to base its assessment of switching problems on the totals of respondents who identified ‘major’ and ‘minor’ difficulties*

There are three possible ways of estimating the perceived ease or difficulty with switching within the existing data (this does not include my preferred method of actually asking open questions in the first instance since such questions were not asked):

- 17% of people mentioned some difficulty when asked the ‘overall’ question and, within this figure, 3% found the process very difficult.
- 42% of respondents said they had experienced at least one ‘major’ difficulty.
- 79% of Switchers said they experienced at least one major or minor difficulty.

In the consultation, Ofcom chooses the last of these approaches, stating at footnote 45:

“On the basis that the process itself should not make switching difficult, we take account of evidence of both categories of difficulty [i.e. ‘Major’ and ‘Minor’ difficulties]. We use them to help us consider whether there are issues where we might intervene, and then go on, among other things, to make an assessment of the costs and benefits of possible intervention.”

Thus, of the three possible measures within the available data, the consultation considers the one that indicates the highest level of difficulty, by a large margin. This figure of 79% is nearly five times as large as the 17% of switchers who subsequently (after they had been prompted with difficulties) expressed a degree of difficulty overall; thus, nearly five times as many people mention a difficulty when prompted than believe the process to be difficult overall. In addition, this figure of 17% is itself inflated by the interviewing process and, if placed earlier in the questionnaire would, most likely, be significantly lower.

There is no inherently right or wrong way to use research data. However, there are ways that are more or less reasonable.

Chart 66 of the BDRC slidepack presents an analysis of the relationship between answers to the ‘overall’ question and mentions of difficulties when prompted. The results are shown in the following table:

	All switchers	All switchers who had at least one major difficulty	All switchers who had minor difficulties only	All switchers who had no difficulties
	1132	459	401	272
Very easy	33%	18%	30%	62%
Fairly easy	49%	49%	60%	35%
Fairly difficult	12%	24%	6%	0%
Very difficult	3%	8%	0%	0%
Don’t know	2%	2%	2%	3%
Net easy	83%	67%	91%	97%

Looking at the table:

- Of those switchers who mentioned at least one major difficulty, 67% said that their overall switching experience was very easy or fairly easy and 8% said it was very difficult.
- Of those who only mentioned a minor difficulty or difficulties (i.e. no major difficulties), 91% said that their overall switching experience was very easy or fairly easy and 6% described it as fairly difficult and 0% described it as very difficult. 2% said “don’t know”.

I have already noted that this question was asked after respondents had been exposed to a list of possible difficulties. Therefore, it is likely that even this 6% described in the final bullet point is likely to be an over-estimate of the level of difficulty experienced by this particular sub-group of the sample. This would suggest to me that the existence of a minor difficulty or minor

difficulties in cases here there has been no major difficulty leads to virtually no difficulty overall and, as such, most likely presents virtually no deterrent to switching. On the basis of these data, I believe that it was not appropriate to combine major and minor difficulties.

#### *Ofcom's approach to this issue differed from that used in the Mobile Switching consultation*

I note that Ofcom's approach to the issue of combining 'Major' and 'Minor' difficulties differs from its approach in the Mobile Switching consultation.

Footnote 20 of the Mobile Switching consultation states:

"To counter any concerns that issues may have been identified solely because they were prompted, we have taken the conservative approach of focusing principally on issues reported as 'major'".

The Triple Play consultation used a survey of the same overall design which prompted with possible difficulties and invited respondents to describe them as major or minor difficulties (or not at all). However, there is a significant difference in the way that the survey data are used in this report. Although I believe it is still likely to overstate difficulties and to cite issues which probably do not introduce a deterrent to switch this is a more reasonable than the approach taken in the Triple Play consultation.

#### **Non-switchers**

Paragraph 3.32 states:

"Concerns about loss of service are also an issue for non-switchers and may affect whether or not they decide to switch. For instance, in the quantitative BDRC research almost half (47%) of consumers who decided not to switch cited worries about being without broadband during the switch as a factor in their decision".

This does seem a valid concern but, to place it in its overall context, when respondents were asked for the main reason they decided not to switch, this reason was given by just 2% of the sample and was the 11<sup>th</sup> most common response. As with other conclusions in the consultation, I fear that too much weight has been placed on prompted responses. This is particularly true in the case of responses to a question where respondents, on average, specified seven different major factors. While I suspect that potential loss of broadband is something that seems a plausible concern when people are encouraged to think about it, I believe that paragraph 3.32 has overstated its importance and is arguably an example of a factor that may appear to be a potential difficulty when prompted but not a deterrent in peoples' minds in real life.

Paragraph 3.18 states "We also found that 79% of consumers who had considered switching but decided against it were put off by process-related worries". This figure of 79% was generated by including any respondent who had mentioned any one of six different process-related factors as a major or minor difficulty. The follow-up question showed the respondent all the factors that they had mentioned and asked "And which, if any, of these was the main factor that made you

decide to stay with your current [PROVIDER]?" The six process-related factors contributed just 6% of the main factors, when combined. Again, this suggests to me that it is the form of questioning and reporting that has generated large proportions rather than factors like these representing a substantive deterrent to switching.

As with my discussion of the switchers questions, I believe that a simple, initial open question would have been most valuable, particularly since the non-switching samples are based on decisions made in the last 12 months where memory issues are, presumably, not so important. I believe that a simple question could have been used:

"Why did you decide to stay with your existing provider? Please write in all your reasons"

Followed by a perhaps more leading question:

"Apart from anything you may have already mentioned, was there anything about the switching process that made you decide to stay with your existing provider?"

I believe that the addition of these questions would have provided more rounded and realistic views of non-switchers.

## Appendix: My experience

I am an independent market research consultant. I am a former Director of GfK NOP with over 30 years' experience in market research, including consumer surveys.

I was employed by MaS Research as a market researcher from 1983 until 1988 when I left MaS to join NOP (which became GfK NOP in 2005) where I stayed until September 2012. Among my responsibilities at GfK NOP, I was the Director responsible for the conduct of research projects for legal purposes and have conducted over one hundred such projects, including seven multi-national projects. I have provided an expert witness report on approximately twenty-five occasions and given evidence in court on thirteen occasions.

In addition to conducting surveys I have, on several occasions, been commissioned to review surveys conducted by other agencies and consultants and, where necessary, I have provided reports reviewing that survey evidence.

For the last 6 years, I have acted as a tutor on expert survey evidence for the LL.M course in Intellectual Property Litigation at Nottingham Law School.

I set out below a list of cases in which I have been cross examined on my evidence in court, in each case instructed by the claimant, with the exception of *Sky v Microsoft* where I was instructed by the Defendant.

- *Guccio Gucci v Paolo Gucci* [1991] FSR 81
- *Chocosuisse Union Des Fabricants Suisses De Chocolat v Cadbury Ltd* [1997] EWHC 360 (Pat)
- *Premier Brands UK Ltd. v Typhoon Europe Ltd & Anor* [2000] EWHC 1557 (Ch)
- *Glaxo Group Ltd & others v. Dowelhurst Ltd & Anor* [2000] EWHC 134 Ch
- *Associated Newspapers Ltd. & Anor v Express Newspapers* [2003] EWHC 1322 (Ch)
- *Bouverie No. 1 Ltd v De Vere Hotels & Leisure Ltd* [2006] EWHC 2242 (Ch)
- *Numatic International Ltd v Qualtex UK Ltd* [2010] EWHC 1237 (Ch)
- *Fage UK Ltd & Anor v Chobani UK Ltd & Anor* [2012] EWHC 3755 (Ch)
- *British Sky Broadcasting Group Plc v Microsoft Corp* [2013] EWHC 1826 (Ch)
- *Nestle v Cadbury* [2013] ETMR 25
- *Mattel v Zynga* [2013] EWHC 3348 (Ch)
- *ASSOS v ASOS* [2013] EWHC 3490 (Ch)
- *Enterprise v Europcar* [2014]

In addition, I am aware of eight further cases where my involvement is in the public domain by virtue of the fact that my witness evidence has been relied upon at trial:

- *United Biscuits (UK) Ltd. v. Burtons Biscuits Ltd* [1992] FSR 14
- *Healing Herbs Limited v. Bach Flower Remedies Limited* [1998] EWHC Patents 318
- *West (t/a Eastenders) v Fuller Smith & Turner Plc* [2003] EWCA Civ 48
- *esure Insurance Ltd v Direct Line Insurance Plc* [2008] EWCA Civ 842
- *Interflora Inc & Anor v Marks and Spencer Plc & Anor* [2012] EWHC 1722 (Ch) and *Marks and Spencer Plc v Interflora Inc & Anor* [2012] EWCA Civ 1501
- *Zee Entertainment Enterprises Limited, and others v. zeebox Limited* [2013] EWHC 1644 (Ch)
- *Zee Entertainment Enterprises Limited, and others v. zeebox Limited* [2014] EWCA Civ 82



- *Roederer v J Garcia Carrion S.A. & Ors [2015] EWHC 2760 (Ch)*