

Ofcom's switching proposals for mobile: compatibility with consumers' right to statutory cancellation period

1. The rationale behind cooling off periods

- 1.1. The concept of a cancellation or 'cooling off' period has long been recognised as an important consumer protection measure, worthy of being enshrined in law. During the 1980s, when a surge in doorstep selling occurred, the EU legislated to provide for this cancellation right. Several member states extended this protection to distance selling contracts more generally in the late 1980s and early 1990s. By the mid 1990s, all 15 member states had a 'cooling-off' period for distance selling, seven by law and eight by voluntary compliance schemes.
- 1.2. The benefit to consumers of a cooling off period was enshrined in *Directive 97/7/EC on the protection of consumers in respect of distance contracts*. The UK implemented this by means of the Distance Selling Regulations 2000 ('**DSRs**') which were in turn superseded by the CCRs underpinned by more recent European legislation.
- 1.3. The rationale behind cooling off periods has been widely recognised:

*'A hallmark of [...] consumer protection laws are cooling-off periods. This mechanism aims to protect consumers by constituting a right to withdraw from the contract within a certain time. Conventional legal wisdom appreciates the use of cooling-off periods and economic theory on the topic suggests that such a mechanism can lead to welfare gains, as long as it is implemented appropriately.'*¹

2. Consumers' cancellation period

- 2.1. Under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 ('**CCRs**'), consumers have a right to cancel contracts for goods or services with traders for a prescribed period of time after the contract is made.
- 2.2. For this right to apply, the following conditions must be met:
 - a) Is between a trader and consumer;
 - b) Is not an excluded contract; and
 - c) Is a distance or an off-premises contract.
- 2.3. **Cancellation rights.** The CCRs give a consumer the right to cancel the contract for services at any time during the cancellation period without:

¹ S. Hoepfner, 'The unintended consequence of doorstep consumer protection: surprise, reciprocation, and consistency', *The European Journal of Law and Economics* (2014) 38:247–276.

- a) Giving any reason; or
 - b) Incurring any liability other than the cost of service provided during the cancellation period.
- 2.4. **Cancellation period and start.** The cancellation period for most services is 14 days, starting from when the contract is entered into. Most retailers stipulate in their contract terms that the contract start date is the date on which they have received and processed the customer's order and confirmed the acceptance of the offer to the customer.
- 2.5. The contract between a mobile communications provider ('MCP') and a domestic customer for the supply of mobile communications services ('MCSs') bought by means of telesales or the internet would satisfy the criteria set out in paragraph 2.2. Accordingly, an MCP selling MCSs over the phone or on the internet would need to provide their customer with a 14-day cancellation period at the start of the contract. In response to the requirement for cooling off periods, mobile retailers offer a variety of cooling off options which go beyond the 14-day cooling off period:
- a) Vodafone offers customers, regardless of which medium was used to purchase the contract, the ability to cancel without reason during the first 30 days of a new contract;²
 - b) EE allows customers to cancel their contract within 14 days of its commencement and extends the right to customers who bought in store where they are experiencing coverage issues;³
 - c) O₂ provides a 'change of mind' policy allowing the customer to withdraw from the contract without penalty within 14 days of the contract's commencement. This applies to distance sales (online and by phone), as well as for in-store sales;⁴ and
 - d) Three allows customers to withdraw from contracts associated with online or telesales within the first 14 days, but this does not extend to in-store purchases.⁵
- 2.6. Crucially, the right to the cancellation period cannot be validly waived by the consumer. Suppliers can provide customers with services during the cancellation period provided:
- a) The customer has made an express request; and
 - b) in the case of an off-premises contract, the customer has made the request on a durable medium.

² <https://www.vodafone.co.uk/explore/network/network-satisfaction-guarantee/>

³ <http://ee.co.uk/help/accounts-billing-and-topping-up/cancel-or-return/cancelling-a-contract-within-14-days>

⁴ <http://www.o2.co.uk/help/phones-sims-and-devices/our-change-of-mind-policy>

⁵ <http://www.three.co.uk/terms-conditions/returns-and-exchange-policy>

3. Customer switching decisions must be properly informed with appropriate use of the statutory cooling off period

- 3.1. The current mobile porting regime in the UK does not accommodate a cooling off period for customers *per se*. Technically the customer once in receipt of the PAC code can have his number ported with one business day with no process delay specifically built in so that the port occurs after the customers cooling off period has expired. The existence of Retailers notice periods typically of 30 days has given customers a delay cushion whereby they are able to cool off their switching decision before any switching activity has taken place. Once having ported the number to a supplier it would need to be ported again in the event that a customer cools off after the port has taken place.
- 3.2. It is important that any change to the mobile switching regime is consistent with the important statutory cooling off right and respects the spirit of it.
- 3.3. Without the existence of notice periods customers will be able to progress and complete a switching decision very rapidly. A key principle that the revised mobile switching regime should embrace is that customers must be well-informed making good switching decisions. Put simply, the process should not seek to encourage customers to switch without being properly informed of the potential implications for them and the service they receive if they choose to withdraw from the switch during the statutory cooling off period. The problems likely to arise are predictable: inefficiently high use of switching (as customers 'bounce' back and forth between networks) and, more importantly, confusion on the part of consumers as to what the implications of switching are.

4. Experience in the energy sector

- 4.1. The energy industry has been wrestling for several years with the problem of finding an effective process which allows for fast and effective switching while ensuring it dovetails appropriately with the statutory cooling off period. Ofgem has carried out considerable research and consultative work to this end.⁶ Before the CCRs came into force, the typical practice within the energy industry was to delay triggering the switch until the cooling off period had expired, or the customer had expressly waived their right to exercise their termination rights during cooling off period provided for under the DSRs.
- 4.2. In consulting on its proposals for a faster switching process in 2016, Ofgem set out the following three options:

⁶ See, for example, 'CoS Options Analysis – cooling-off period - Ofgem discussion paper for COSEG', 2013, available at: <https://www.ofgem.gov.uk/ofgem-publications/75253/20130621cos-options-analysis-cooling-period.pdf> and 'Domestic consumer expectations and preferences for switching energy supplier and the cooling off period', 2016, available at: https://www.ofgem.gov.uk/system/files/docs/2016/12/cooling_off_report.pdf.

- *the consumer moves back to the old supplier with the supply continuing under a deemed contract,*
- *the consumer stays with the new supplier with the supply continuing under a deemed contract until they switch again, or*
- *the consumer can choose between these two options.'*

4.3. The current position is that Ofgem appears to be pressing ahead with their proposal to implement faster switching whereby customers can switch and they rely heavily on being able to switch again during the statutory cooling off period. Such a solution is not at all well-suited to the communications industry. Switching activity in the energy sector uses a common network of delivery as well as processes which allow the gaining and losing providers to coordinate their actions so that no loss of service is experienced by the customer. This is a very different situation to telecoms where the network is not common.

Facilitating fast switching without customer detriment

- 4.4. As part of its changes to the mobile switching regime, Ofcom has proposed to prevent switches being delayed during contractual notice periods. As the regime operates today, customers typically take advantage of the contractual notice period to reflect on their switching decision. During this time, customers are free to explore further whether they would be better off by remaining with their current provider. Some customers decide not to proceed with the switch by exercising their right to withdraw from the contract with their prospective provider during the 14-day cooling off period.
- 4.5. It is vital that customers are properly informed in advance that by switching and then changing their mind during the 14-day statutory cooling off period, the switch cannot simply be 'undone'. Instead, the customer will be required to make a further switch – either back to their previous supplier or to another provider. Doing will result in a second period of service interruption during the switch over as well as their being required to enter into a new contract for the service for a minimum contract period.
- 4.6. A switching regime that permits customers to switch providers on a whim, having conducted little or no research about their prospective provider or the service they offer, is unlikely to result in a good experience or outcome for the customer. It also increases the likelihood of further switching decisions that the customer regrets – thereby resulting in ongoing inefficiencies to both customers and providers. This situation also increases the risk of frustrated customers becoming disengaged with the switching process which may negatively impact their own welfare and their value as an economic player in society across the communications industry and in others where switching occurs. Such an outcome runs counter to Ofcom's stated intentions behind revising the mobile switching regime and is anathema to good switching outcomes and consumer welfare more generally.

- 4.7. The importance of well-informed customers making sensible switching choices that they are unlikely to regret cannot be overstated. Indeed, ‘informed choice’ finds expression in Recital 47 to the 2009 Directive which amended the Universal Service Directive where it says:
- ‘In order to take full advantage of the competitive environment, consumers should be able to make informed choices and to change providers when it is in their interests.’*
- 4.8. Moreover, Ofcom recognises the importance of informing customers in the consultation document itself:
- ‘[I]t would be effective and proportionate to meet our objectives to introduce [...] a requirement to provide transparency of switching processes to help ensure that consumers are better informed.’*
- 4.9. The importance of giving customers the opportunity to make a well-reasoned decision was emphasised by Ofcom in its Call for Evidence on Switching Principles in 2015 – where it said:
- ‘2.6. Customers should also have enough time to change their minds if they decide the switch is not in their interest.’⁷*
- 4.10. While it is true that including the ETC information with the PAC code will reduce the likelihood of bill shock in relation to those charges:
- a) The ETC is not the only possible harmful effect of switching. For example, the consumer may be losing benefits associated with a multi-service bundle, accrued contractual benefits and so on; and
 - b) Ofcom is wrong to assume that a single mode of communicating that information will be 100% effective in all cases – what is necessary is a range of different ways to ensure that consumers have the full range of information that they need to make an informed decision.
- 4.11. For these reasons, it is vital that consumers have access to the full information about the impact of switching. It is clear that a direct conversation between the existing provider and the consumer is the most effective and efficient way to convey this information, and Ofcom’s processes ought to include this as a step in the process.
- 4.12. Research conducted by Ofgem as to consumers’ preference for a switching regime which offered fast switches coupled with the protection of a cooling off period emphasised that the ability to make an informed decision in respect of the switch was particularly important. More specifically, the Ofgem report⁸ said:

⁷ See https://www.ofcom.org.uk/data/assets/pdf_file/0028/49564/switching_principles.pdf

⁸ See page 5 of ‘Domestic consumer expectations and preferences for switching energy supplier and the cooling off period’, 2016, available at: https://www.ofgem.gov.uk/system/files/docs/2016/12/cooling_off_report.pdf.

'Whilst respondents were generally positive about the concept of the cooling off period, they did not think it would make them more likely to consider switching energy supplier. This was partly because they felt they were unlikely to change their mind having made an informed decision.'

Ofgem noted that were able to make informed decisions by means of digital comparison tools such as price comparison sites and information from suppliers themselves.⁹

⁹ See paragraph 3.3 of Domestic consumer expectations and preferences for switching energy supplier and the cooling off period'.