

Consultation Response

Which? response to Ofgem's statutory consultation on the future of the Ban on Acquisition-only Tariffs (BAT)

Submission date: 10/06/2024

Summary

Which? does not agree with Ofgem's decision to remove the Ban on Acquisition-only Tariffs (BAT). We do not feel that Ofgem has made an adequate case to remove the BAT and that, at the very least, it should remain in place until March 2025 so that Ofgem has an opportunity to address our concerns about the consultation process and the use of inadequate analysis to justify its decision.

We are disappointed by the consultation process Ofgem has taken, with its full analysis on BAT removal only now becoming available during the statutory consultation phase. Ofgem's own impact assessment guidance states that it should normally seek to publish this analysis at earlier stages of proposal development and informal consultation, in addition to any statutory consultation.¹

We do not agree that the analysis and impact assessment supports Ofgem's conclusions that removing the BAT is in consumers' best interests. In our view, there are still strong grounds for an enduring BAT on the basis of reducing the loyalty penalty and in the interests of fairness and Ofgem should fully explore these benefits. We have particular concerns with Ofgem's analysis in the following areas:

- **Impact assessment.** It would have been more appropriate for Ofgem to have undertaken a proper cost benefit analysis rather than relying on the scenario-based modelling. Too many of the assumptions use the recent past as a guide, despite its exceptional nature. The approach also leaves out any assessment of costs to consumers from increased search and switching costs.
- **Loyalty penalty analysis.** The consultation mischaracterises how the BAT can reduce the loyalty penalty by only measuring its success against its ability to protect fully disengaged consumers. Much more attention should have been given to the relative benefits for consumers who switch internally with their supplier.
- **Competition effects.** The consultation has not considered that the BAT could have long-run pro-competitive effects by lowering barriers to entry and expansion. Further there has been no serious analysis of potential pro-competitive effects on non-price competition.

¹ Ofgem (2020), [Impact Assessment Guidance](#), para 85.

- **No consideration of consumer preferences.** In its assessment of fairness and trust, Ofgem has not taken into account consumer opinion at all. Which? surveyed 1,912 consumers responsible for their energy bills and found around 8 in 10 think acquisition-only pricing is unfair, even in circumstances where they are likely to benefit.² Polling from others, released since the consultation opened, also shows that the overwhelming majority of consumers think that acquisition-only pricing should not be allowed.

Given the deficiencies in both the process and analysis, we believe Ofgem should, at the very least, extend the BAT until March 2025. This would give time for a full analysis of potential impacts and a proper consultation with stakeholders on whether the BAT should be removed at all.

² Yonder, on behalf of Which?, surveyed 2,090 UK adults between 3rd to 4th June 2024, of whom 1,912 were responsible for their household's energy bills. More details are included in the full response below.

Full response

Which? welcomes the opportunity to respond to Ofgem's consultation on the future of the Ban on Acquisition-only Tariffs (BAT), but unfortunately we have serious concerns about the consultative process Ofgem has used, the analytical approach it has adopted, and hence its subsequent decision to remove the BAT from October 2024.

Process and consultation

The consultation process has been insufficient, and not in keeping with transparency of analysis and decision-making. Prior to the statutory consultation, Ofgem released just two brief documents: a call for evidence in October 2023 and a decision document in February 2024. Neither of these exceeded four pages of text, and in total presented six paragraphs of analysis. The February decision document did not even invite feedback. Instead, Ofgem has given stakeholders just a four week statutory consultation period to feedback on its full analysis, now running to 55-pages and with a decision apparently already made. The description that the consultation is only on whether to end the BAT at 6 or 12 months also appears to aim at reducing the actual feedback on Ofgem's decision to remove the BAT at all.

If the analysis was complete and sufficient to make a decision in February 2024, Ofgem should have consulted in full at that point, with a statutory consultation only following after considering stakeholder views. This would have been in line with Ofgem's own impact assessment guidance, which states that "we will normally seek to publish the IA both in the earlier stages of proposal development and informal consultation, and in addition to any statutory consultation."³

Ofgem should consider whether a longer period of stakeholder consultation may be needed in order to follow due process, even if this precludes it from its minded-to position of removing the BAT from October 2024.

Ofgem's analysis and impact assessment

We largely keep our comments to Ofgem's analysis of the loyalty penalty, fairness and non-price competition. We do not agree that Ofgem has demonstrated that the BAT is more likely than not to have an adverse effect on consumers, the loyalty penalty benefits are likely to be limited, nor that 'more effective' price competition is a complement to non-price competition.

On the impact assessment, we do not agree that Ofgem's scenario analysis can be used to adequately support claims that the benefits of removing the BAT are likely to outweigh the costs. The preference to use scenarios in place of actual estimates of £ harms or benefits and an analysis of which parties benefit or lose out, means the analysis is both unclear and lacks credibility. Ofgem has not followed the typical process laid out in its impact assessment guidance, which should begin with setting out the possible options

³ Ofgem (2020), [Impact Assessment Guidance](#), para 85.

(including in this case retention of the BAT) and then include a monetised cost-benefit analysis alongside other hard to monetise benefits or costs. In not taking this approach, Ofgem has also failed to estimate or monetise other consumer benefits that could accrue from the BAT, including any reductions in search and switching costs.

A further weakness of Ofgem's impact assessment analysis is that it justifies assumptions on the basis of data on supplier and consumer behaviour from the past two years during the height of the energy crisis. Using very recent pricing behaviour by suppliers is unlikely to be usefully predictive of the future given the unprecedented circumstances and that the Market Stabilisation Charge was only removed in April 2024. It would be more prudent for Ofgem to extend the BAT for a full year, and use the intervening period to conduct an actual impact assessment based on the prevailing market conditions, rather than relying on the assumptions-based scenario modelling which does not adequately evidence the costs and benefits of removing the BAT.

The BAT's impact on the loyalty penalty

The consultation largely mischaracterises how the BAT can most significantly reduce the loyalty penalty, only examining the likely relative impacts of removing the BAT for engaged and disengaged consumers. This leads Ofgem to the conclusion that absent the BAT, suppliers would be able to attract new customers with cheaper deals without necessarily increasing costs for disengaged consumers. We agree that there is likely to only be a small or modest impact on completely disengaged consumers, however this largely misses the point.

The more important distributional analysis is of the overall spread of costs and benefits among internal and external switchers, ie those who move to a better tariff with the same company and those who switch to a different provider. In the absence of the BAT, we would expect that prices for external switchers, who can access acquisition-only deals, would be cheaper. However, we would also expect that prices for internal switchers would be higher, as suppliers would no longer need to set their best prices for existing customers at a level to also attract new customers. There is very likely to be a tradeoff between higher prices for internal switchers and lower prices for acquisition customers if the BAT were removed.

This is still a form of loyalty penalty. We know that those who have previously engaged are much more likely to have switched internally than externally, especially prior to the start of the energy crisis. In July 2021, a quarter of previous regular switchers had switched tariff with their current supplier in the past year, compared to just 10% who had switched supplier.⁴ A similar pattern is observed with occasional switchers. This is not surprising given the relatively smaller search and switching costs associated with switching internally. **On this basis we would expect removal of the BAT to lead to higher prices for a relatively less engaged (and more numerous) group of consumers i.e. a loyalty penalty.**

⁴ Ofgem/BMG (Sep 2022), [Household CIMC Survey report Waves 1 & 2](#). 25% and 23% of regular and occasional switchers had switched internally, while 10% and 14% had switched supplier.

In summary, the expected price impacts for different types of consumers would likely be as presented in the table below.

	Customer type	Expected price impact of BAT
Default tariffs	Disengaged	Limited expected impact. Protection offered by default tariff cap regardless. Possible that some default tariffs are cheaper, especially among suppliers who already set their default tariffs below the cap.
Cheapest tariffs for existing customers	Internal switchers (Medium engaged)	Prices are cheaper as tariffs need to attract new customers as well as prevent losing customers. There may be an increase in internal switching as differentials between default tariffs and cheapest fix for existing customers increases.
Cheapest tariffs for new customers	External switchers (Most engaged)	Prices are more expensive due to constraints from potential internal switching. Although the largest price differentials <i>between suppliers</i> could be preserved if newer entrants are less constrained by an existing customer base.

An analysis of the potential benefits and costs among these groups should have been central to Ofgem's analysis of the loyalty penalty. Instead the analysis seems to only concentrate on the likely spread of benefits and costs among the most disengaged and most engaged. It is unclear from the presentation of Ofgem's scenario analysis whether the potential benefits for internal switchers have been assumed away or just not set out in detail. If it has been assumed away on the basis of pricing behaviour of firms over the duration of the energy crisis (ie because most tariffs have been priced at the default tariff cap), and while the MSC was also in place, then this does not seem at all appropriate to guide assumptions about suppliers' future pricing behaviour. We would welcome more explanation on this point, as it is not very clearly set out in the impact assessment or technical appendix.

Ofgem's use of Relative Risk Ratios for different types of switching behaviour also fails to analyse the expected spread of benefits or costs among internal and external switchers. The comparison group used is 'previous non-switchers,' and it is not surprising that people who have previously switched would be more likely than this group to do so in the future. However, we can't see from the analysis the important comparison between those who have switched with the same supplier and those who switch to a new supplier.

Without examining this question in detail, the impact assessment cannot make a credible assessment of the relationship between the BAT and the loyalty penalty impact.

Price competition over time

The impact assessment contains only a relatively brief discussion on the likely impacts of removing the BAT on competition, concluding that ‘it is reasonable to assume...removing the BAT would generate further price competition.’ We believe that this analysis is too simplistic and does not take into account the potential dynamic pro-competitive effects that the BAT could have via lower barriers to entry and expansion.

Suppliers with the largest existing customer bases will be most constrained on price by the BAT. These suppliers will need to set their prices to both retain existing customers and acquire new customers. The potential of existing customers moving to their best prices will likely mean they set acquisition prices higher than they would be in the absence of the BAT. Newer suppliers however can still price their acquisition tariffs relatively aggressively under the BAT, given they face a more limited constraint from existing customers switching to the best price. In the short-run this could preserve market-wide price differentials for switching customers, and in the long run improve competition by lowering barriers to entry and expansion.

Non-price competition

If the BAT prevents larger suppliers from pricing acquisition tariffs more aggressively, they may compete for switchers via non-price competition. This could include better customer service, but may also increasingly include innovative types and structures of tariffs as we approach marketwide half-hourly settlement. Customer service is a particular issue in the retail market presently, with too many consumers feeling let down by their suppliers. This is not a minor issue and **Ofgem should give proper consideration as to whether the BAT could facilitate more non-price competition and incentivise better customer service.**

Currently the analysis in the consultation cannot be used to draw any conclusions on the impact of the BAT on non-price competition either way. Ofgem states that its analysis “suggests service quality is more likely to be a complement to effective price competition rather than an alternative.” We do not agree that Ofgem has established this. The analysis looking at levels of service quality pre and post BAT is confounded by the exceptional circumstances during which the BAT was introduced and it cannot be credibly used to make conclusions on the relationship between price and non-price competition.

There is some evidence that suppliers have used non-price factors to compete while price differentials have been limited. Some larger suppliers already use customer service in their marketing, and we may already be seeing burgeoning use of innovative tariffs and products as a means of competition among the larger suppliers. Octopus Energy, OVO, British Gas and e.on are all among the most active suppliers in offering ranges of smart or time-of-use tariffs or reward schemes for customers with EVs, heat pumps, solar panels or who can otherwise shift their energy outside of peak hours. We can expect this type of competition to become more intense as consumer take-up of technologies which allow flexibility increases.

Again, we believe there is a strong case for Ofgem to, at the very least, extend the BAT for 12 months so it can properly gather data on how firms compete under the BAT.

Consumer benefits of the BAT not considered in the impact assessment

The overall gains or losses cannot be accurately modelled without any assessment of the time and effort consumers spend on switching supplier in order to access the best available offers. This is not trivial. There are clear search and switching costs to consumers associated with changing supplier. If the BAT suppresses switching between suppliers, but allows more customers to access best-priced deals via their existing supplier, then the reduction in time and effort needed from consumers should be considered as a benefit of the policy. The FCA explicitly considered customer time saving from fewer switches in its similar remedy on insurance pricing, and this amounted to an approximate £300m present-value benefit over 10 years.⁵

Fairness and consumer opinion

Since Ofgem published the consultation document, an evidence base has emerged showing that consumers find acquisition-only pricing unfair and would prefer it to be banned. Three suppliers have run nationally representative surveys to gauge public opinion, all finding that around 9 in 10 consumers agree that suppliers should offer their best deals to existing customers:

- So Energy, “found 87% agreed that existing customers should be offered the same tariffs as new ones. Only 6% disagreed with the statement. A further 79% wanted to see a replication in energy of the rules implemented by the FCA in 2022 for insurance providers.”
- Octopus Energy found “In a survey run by YouGov 9 out of 10 (89%) respondents agreed that energy suppliers should offer the exact same deals to both new and existing customers.”
- E.on found “We commissioned some research with YouGov to see what customers think...93% thought suppliers should not be able to restrict their best deals to new customers only. 82% of the customers YouGov surveyed said they would have less trust in their supplier if it only offered its best deals to new customers.”

While all three surveys are compelling, there is some risk that the extent to which consumers disagree with acquisition-only pricing could be influenced by respondents not considering that they themselves could be beneficiaries. We ran our own survey to add to the body of evidence on consumer preferences, giving respondents one of two hypothetical scenarios to understand the extent to which consumers find the practice fair or unfair:

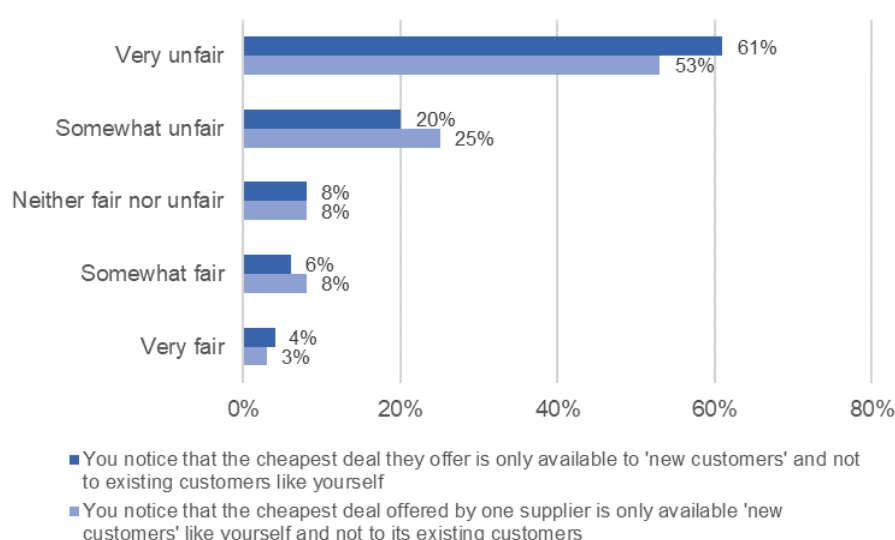
- In the first scenario we asked consumers to imagine they were looking at tariffs offered by their current supplier, and they notice the cheapest deal is only available to ‘new customers’ and not existing customers like them

⁵ FCA (2020), [General insurance pricing practices market study impact assessment](#) The FCA's range was £299.1-345.4m.

- In the second scenario we asked consumers to imagine they were looking at tariffs offered by different suppliers, and they notice the cheapest deal from one supplier is only available to 'new customers' like them, but not to its existing customers.

In both scenarios we find that around 8 in 10 consumers think that the situation would be either somewhat or very unfair. In the first scenario where consumers find acquisition-only deals with their own supplier, 20% of respondents said they would find this somewhat unfair, and 61% very unfair. In the second scenario, *where consumers see acquisition-only tariffs that they themselves could access as a new customer*, 25% of respondents said they would find this somewhat unfair, and 53% very unfair.⁶

How fair or unfair would consumers find acquisition-only pricing if looking at tariffs



All the consumer surveying, including our own, shows a very strong weight of public opinion against acquisition-only pricing. The vast majority of consumers think the practice is unfair, even where they could benefit from it, and think the practice should not be allowed. This may not be a strong enough reason in itself to retain the BAT, but it should at least be considered by Ofgem when weighing the pros and cons of BAT removal. It also puts additional onus on Ofgem to show that the benefits of removing the policy outweigh the costs, given that it goes so strongly against public sentiment. In our view the current impact assessment has not made that case, and we think the BAT should be extended unless Ofgem finds more compelling evidence of benefits.

⁶ Yonder, on behalf of Which?, surveyed 2,090 UK adults, of whom 1,912 were jointly or solely responsible for their household's energy bills. 953 of these were asked "Please imagine you were looking at the tariffs offered by your current energy supplier, either on their website or a price comparison website. You notice that the cheapest deal they offer is only available to 'new customers' and not to existing customers like yourself...How fair or unfair do you think this would be?" And 959 were asked "Q3. Please imagine you are comparing energy tariffs offered by different energy suppliers, either on their websites or a price comparison website. You notice that the cheapest deal offered by one supplier is only available to 'new customers' like yourself and not to its existing customers...How fair or unfair do you think this is?"

Decision to remove the BAT, and Ofgem's minded-to position

We do not agree with Ofgem's minded-to position to remove the BAT from October 2024. We do not think Ofgem has adequately evidenced that removing the BAT is in the best interests of consumers.

In our view, there are still strong grounds for an enduring BAT on the basis of reducing the loyalty penalty and in the interests of fairness, but at the very least Ofgem should extend the BAT for the full 12 months and conduct a proper impact assessment once there is more data on how the market is functioning while the BAT is in place but the MSC has expired. Too much of Ofgem's analysis has relied on using the exceptional circumstances of the last few years as a guide to the future, while the scenario modelling approach does not actually show any clear benefit to consumers given that its assumptions are so uncertain. Furthermore, the impact assessment makes no attempt to calculate any costs associated with higher levels of switching, makes no allowances for any potential long-run pro-competitive effects of the BAT, nor has any useful analysis of non-price competition. Furthermore, in its assessment of fairness and trust, Ofgem has not taken into account actual consumer opinion at all, while a body of evidence now suggests that consumers find acquisition-pricing unfair and would prefer the BAT to remain in place.

We have also raised concerns with Ofgem's approach to consultation. It is not reasonable that the first publication of the analysis and impact assessment of BAT removal was in a statutory consultation with a four week deadline. On this basis alone, there would be a case for at least extending to March 2025 so that proper stakeholder consultation on BAT removal (and Ofgem's analysis) can take place. We do not believe that it would be in keeping with good principles of consultation for Ofgem to extend to October 2024 on the basis of the short February 2024 decision letter and four week statutory consultation.

About Which?

Which? is the UK's consumer champion, here to make life simpler, fairer and safer for everyone. Our research gets to the heart of consumer issues, our advice is impartial, and our rigorous product tests lead to expert recommendations. We're the independent consumer voice that works with politicians and lawmakers, investigates, holds businesses to account and makes change happen. As an organisation we're not for profit and all for making consumers more powerful.

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