
Making communications markets work well for customers

A framework for assessing fairness in broadband,
mobile, home phone and pay-TV



DISCUSSION PAPER:

Publication date: 17 June 2019

Closing date for responses: 12 August 2019

Contents

Section

1. Overview	1
2. Background	3
3. Fairness framework	5
4. Discussion questions	18
5. Next steps	19

Annex

A1. Responding to this discussion paper	20
A2. Consultation coversheet	22

1. Overview

Ofcom strongly believes that customers should get a fair deal for their communications services. We want communications providers to do more to put fairness at the heart of their businesses to achieve this. We think this is important to ensure that customers continue to trust that communications markets will deliver for them. To help providers, we have developed this discussion paper to explain how Ofcom is likely to assess fairness issues and the kinds of concerns that might prompt intervention.

This paper is part of the wide range of work Ofcom is doing under its Fairness for Customers programme. This includes our recently published Fairness for Customers commitments, which are designed to raise standards in how companies treat their customers and new rules to make sure people get the right information, at the right time to find the best deal for them.¹

What we are proposing – in brief

We have set out the types of questions and factors we would consider in assessing whether customers are being treated fairly. Our duties are underpinned by securing fair outcomes for customers and we act where necessary to protect people from harmful practices. This paper sets out our proposed approach to identifying whether people are being treated fairly or whether there are unfair practices we need to address. We set out five key questions for this purpose, including: (i) How do providers treat customers throughout the customer journey? (ii) Who is being harmed? (iii) What is the extent of the harm? (iv) How important is the service? and (v) Does the service depend on risky new investment?

We recognise that these kinds of assessments can be complex and invite comments on our proposed approach. We view this discussion paper as part of a wider debate about securing fair outcomes for customers. Assessing whether a certain practice is fair or unfair is not always straightforward, particularly where some people benefit while others lose out. This can make it challenging to determine whether and how best to deliver fairer outcomes. This paper is designed to create a shared understanding of how Ofcom is likely to approach considering whether certain practices are fair for customers in broadband, mobile, home phone and pay-TV markets.

- 1.1 Ofcom's purpose is to make communications work for everyone. To achieve this people should be treated fairly and get a fair deal for their communication services. Our duties under the Communications Act 2003 and relevant European legislation are underpinned by the idea of securing fair outcomes for customers. We have powers to regulate if competition isn't working to the benefit of customers and, more generally, to protect customers from harm.

¹ Ofcom's Fairness for Customers commitments can be found here: <https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2019/broadband-and-phone-firms-put-fairness-first> and more detail on the new rules for giving information to customers can be found here: <https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2019/firms-must-tell-customers-about-best-deals>

- 1.2 The way we use our powers has fairness at its heart. We have used them to improve outcomes for customers and have a long track record of protecting customers from harmful or unfair practices.² Our 2019-20 Annual Plan sets out the scale of our ambition to positively promote fair outcomes for customers in the future and comes at an important time when more and more communication services are playing an essential role in our everyday lives.³
- 1.3 In this paper, we set out the different kinds of issues which are more likely to concern us. The primary focus is on the relationship between providers and customers - or different groups of customers - rather than fairness between different providers.⁴ As noted above, we explain the questions we might ask when we receive complaints, or where our own market monitoring raises concerns about the fairness of outcomes for customers. We also consider the types of remedies we may look at where we find that there is a case for regulatory intervention.

² For example, in recent years we have intervened to ensure people are automatically compensated when things go wrong with their fixed line services, to cap prices for Directory Enquiry services and to ensure customers who only take a landline telephone service are protected from high prices.

³ Ofcom's Annual Plan: Our Programme of Work for 2019/20, Ofcom, March 2019,

https://www.ofcom.org.uk/data/assets/pdf_file/0020/141914/statement-ofcom-annual-plan-2019-20.pdf

⁴ We have an established approach to dealing with fairness between providers and the contents of this discussion paper has no bearing on that approach.

2. Background

- 2.1 Ofcom’s principal duty is to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition.⁵
- 2.2 To achieve this, we focus on three goals:
- a) to promote competition and ensure markets work effectively for customers;
 - b) to secure standards and improve quality for customers; and
 - c) to protect customers from harm, especially vulnerable groups.
- 2.3 As set out in our strategic review of digital communications, we believe that competition can deliver significant customer benefits by driving innovation and take-up of new technology, improving service quality and delivering affordable prices.⁶ Where this works effectively, the promotion of competition can help ensure fair outcomes for customers.
- 2.4 However, we recognise that competition alone cannot achieve this in all circumstances. Sometimes markets which appear competitive, for example where no provider has significant market power, nevertheless fail to deliver fair outcomes for all customers. In such circumstances, there may still be a case for intervention to help secure fairer outcomes and, importantly, maintain customers’ trust that markets will work for them.
- 2.5 In some markets (for example, broadband), the extent to which customers pay different prices for an equivalent, or substantially similar, service has increased over time as providers have increased the difference between promoted and non-discounted prices.⁷ While some customers may be made better off by such practices, others may end up paying more and this can lead to concerns about fairness between customers.
- 2.6 There is now also greater awareness that customers can exhibit behavioural biases that may limit their ability to choose a deal that is right for their needs.⁸ Suppliers may be able

⁵ Section 3(1), Communications Act 2003, <https://www.legislation.gov.uk/ukpga/2003/21/section/3>

⁶ Making Communications Work for Everyone, Ofcom, February 2016, paragraph 1.26
https://www.ofcom.org.uk/data/assets/pdf_file/0016/50416/dcr-statement.pdf

⁷ We have an on-going review of pricing practices in the fixed broadband market to determine whether and to what extent customers are harmed by such practices. The terms of reference for this are available at the following link: Helping Consumers Get Better Deals: Consultation on end-of-contract and annual best tariff notifications, and proposed scope for a review of pricing practices in fixed broadband, Ofcom, December 2019
https://www.ofcom.org.uk/data/assets/pdf_file/0022/130378/Consultation-helping-consumers-get-better-deals.pdf

⁸ The growth in interest in behavioural economics in the decade to 2010 is described in: Office of Fair Trading, *What does behavioural economics mean for competition policy?*, OFT 1224 Spring 2010, (in particular, p 5)
http://webarchive.nationalarchives.gov.uk/20140402182927/http://www.of.gov.uk/shared_of/economic_research/of1224.pdf. The increasing role for behavioural economics in recent years is described in Fletcher, Amelia “*The Role of Demand-Side Remedies in Driving Effective Competition A Review for Which?*”, University of East Anglia Centre for Competition Policy, November 2016 https://www.regulation.org.uk/library/2016-CCP-Demand_Side_Remedies.pdf. For a recent application of behavioural economics in the telecommunications sector, see Ofcom, “*Automatic Compensation: Protecting consumers from service quality problems*”, November 2017
https://www.ofcom.org.uk/data/assets/pdf_file/0026/107693/Statement-automatic-compensation.pdf

to exploit these biases in ways which make customers worse off and which may be unfair, particularly where vulnerable customers are affected.⁹ Moreover, the growth in online shopping and the associated data on customers' habits and preferences has created additional opportunities for firms to exploit behavioural biases. Although we have not seen evidence to suggest that this is currently happening in communications markets, in future, technological change such as developments in big data and algorithms could give providers the ability to personalise prices in a much more sophisticated way.

- 2.7 These developments have contributed to concerns about fairness in various sectors which have been reflected in a number of recent publications. The Government's Consumer Green Paper, published in 2018, raised concerns about the gap between the best and worst deals received by customers and suggested that the emergence of the practice of charging higher prices to disengaged customers was a new challenge for regulators.¹⁰ In September 2018, Citizens Advice made a super-complaint to the Competition and Markets Authority (CMA) calling for action on that same issue.¹¹ Use of this pricing practice was identified in broadband and mobile markets, as well as in the mortgage, insurance and cash savings markets. Also in 2018, the Financial Conduct Authority (FCA) published two papers setting out a framework for considering the fairness of price discrimination: a short research note in July and a longer discussion paper in October.¹² In the CMA's response to the super-complaint in December, it noted that "better and fairer" outcomes were required for customers and drew on the fairness framework published by the FCA.¹³

⁹ A study for the OFT, "*The impact of price frames on consumer decision making*" (OFT 1226, May 2010) found that several commonly-used pricing practices induce customers to make mistakes (purchases that are not right for them). The research suggested that customers were particularly susceptible to "drip pricing". Drip pricing is where the customer is drawn in by a low price before finding there are various add-on charges (such as handling, delivery etc). Drip pricing "with shrouding" is where the add-ons are hidden, e.g. in the small print, and therefore less likely to be noticed by customers
https://webarchive.nationalarchives.gov.uk/20140402165040/http://oft.gov.uk/shared_oft/economic_research/OFT1226.pdf

¹⁰ Modernising Consumer Markets, Department for Business, Energy and Industrial Strategy, April 2018
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/699937/modernising-consumer-markets-green-paper.pdf

¹¹ Excessive Prices for Disengaged Consumers, Citizens Advice, September 2018
[https://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Super-complaint%20-%20Excessive%20prices%20for%20disengaged%20consumers%20\(1\).pdf](https://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Super-complaint%20-%20Excessive%20prices%20for%20disengaged%20consumers%20(1).pdf)

¹² "*Price discrimination in financial services: How should we deal with questions of fairness?*" FCA Research Note, July 2018, page 3, https://www.fca.org.uk/publication/research/price_discrimination_in_financial_services.pdf and "*Fair Pricing in Financial Services*", FCA Discussion Paper DP 18/9, October 2018, <https://www.fca.org.uk/publication/discussion/dp18-09.pdf>

¹³ Tackling the Loyalty Penalty, Competition & Markets Authority, December 2018,
https://assets.publishing.service.gov.uk/media/5c194665e5274a4685bfba/response_to_super_complaint_pdf.pdf

3. Fairness framework

Approach

- 3.1 There are various ways customers might experience unfairness. It could be procedural unfairness, which is about a firm's conduct in how it treats customers. Or, it could be distributive unfairness, which is concerned with the fairness of some customers paying more than others for the same service or, more generally, receiving an inferior service or a poorer quality product.¹⁴ The type of intervention appropriate to address the unfairness will vary depending on its character and who is harmed by it.
- 3.2 We have powers to impose obligations on all providers, in the form of rules called General Conditions. These represent a direct way of addressing unfair market outcomes. They can be used to secure standards, improve quality or protect customers from harm. They are usually used in circumstances where we have determined that promoting competition alone is insufficient to protect customers from harm.
- 3.3 The following parts of this paper set out the approach we may take in identifying and assessing fairness, to determine whether, and what kind of, intervention is necessary to deliver fairer outcomes for customers. We noted above that the FCA is in the process of developing a similar framework.¹⁵ While the FCA framework focuses on concerns about unfair pricing, our paper also deals with other aspects of the service customers receive, including quality (such as time-to-repair) and appropriate compensation if things go wrong.
- 3.4 We also recognise that there are differences between regulated sectors which will need to be reflected in approaches to achieving fairer outcomes for customers. For example, communications markets are distinguished by rapid technological change that may extend to the underlying networks through which services are delivered. There is also more scope for network competition than in other regulated sectors. However, competition between networks requires significant investment which, in the communications sector, may be both costly and relatively risky because of technological change and product innovation.
- 3.5 In addition, communications markets are characterised by a wide range of products and prices, reflecting individual preferences as well as the technical sophistication of modern telecoms networks. This combination of features requires an approach which is tailored to the communications sector in order to achieve fair outcomes for customers while creating the right incentives for firms to invest in infrastructure and technology.
- 3.6 Nonetheless, there are many useful points in the FCA's approach. In particular, we agree that:

¹⁴ "Price discrimination in financial services: How should we deal with questions of fairness?" FCA Research Note, July 2018, page 4, https://www.fca.org.uk/publication/research/price_discrimination_in_financial_services.pdf

¹⁵ We are aware that work on the FCA's framework is ongoing and it is currently being updated in light of consultation responses.

- a) Price discrimination may be beneficial and may be perceived as fair or unfair, depending on the circumstances. It must be assessed on a case-by-case basis.
 - b) It is useful to distinguish between procedural fairness and distributive fairness.
- 3.7 Price discrimination – charging different customers prices which do not reflect differences in the cost of supply – may be beneficial where it leads to higher output or brings customers into the market who would not otherwise have been able to afford the service.¹⁶ Quantity discounts or discounts for low income customers (such as social tariffs for telecommunications services) may fall into this category.
- 3.8 We think it is helpful to consider the distinction between procedural fairness and distributive fairness. As we explain below, the appropriateness of intervention to address unfairness, and the type of intervention which might be appropriate in a given case, will depend on whether the issue is caused by firms’ behaviour (procedural fairness) or arises from differences in outcomes between customers (distributive fairness).

Procedural fairness

- 3.9 As noted above, the term “procedural fairness” refers to the fairness of the way firms treat customers in the market. One reason for the focus on greater procedural fairness is that it will often allow markets to work more efficiently, for example by giving customers more and better information and reducing barriers to engagement and switching. The impact of the behavioural biases referred to above may also be reduced by greater procedural fairness.
- 3.10 Increasing procedural fairness will often, therefore, be pro-competitive and make customers as a whole better off.¹⁷ Measures that increase this sort of fairness will often be consistent with Ofcom’s duty to further the interests of citizens and consumers.
- 3.11 Procedural fairness does not necessarily mean that all providers charge the same prices or act in the same way. In many markets, providers do not all charge the same prices as each other, even for an equivalent service. Price differentials between operators, where they are transparent, can provide an incentive for customers to search for a better deal and can therefore be consistent with a market which is effectively competitive and with procedural fairness. Abolishing, or overly restricting, price differentials between providers could, in some circumstances, lead to a loss of competitive intensity.¹⁸

¹⁶ Note that, if there are differences in the cost of supplying different customers, then charging all customers the same price is a form of price discrimination. For example, charging geographically uniform prices will involve price discrimination if costs differ between areas, as is often the case, but is widely regarded as fair.

¹⁷ Business customers, as well as residential customers, may be confronted by procedural unfairness although, for a number of reasons, firms’ decisions are less likely to be subject to behavioural biases. See OFT (2010) op cit section 3.2, http://webarchive.nationalarchives.gov.uk/20140402182927/http://www.oft.gov.uk/shared_ofteconomic_research/oft1224.pdf

¹⁸ Customers need an incentive to engage in the market because search always involves, at least, an investment of their time and effort. This means that eliminating the highest prices in the market reduces the “reward” for searching for a lower price and leads to a reduction in search activity. With less search, the intensity of competition is reduced. This effect is described in Armstrong, M., Vickers, J., & Zhou, J. (2009). “Consumer protection and the incentive to become informed”. *Journal of the European Economic Association*, 7(2–3), 399–410.

- 3.12 Similarly, price discrimination between different customers (of the same provider) can be consistent with procedural fairness where it is transparent and where it enables greater numbers of customers to buy services that meet their needs at prices they can afford. Procedural fairness does not mean that there can never be price differentiation or discrimination between customers.
- 3.13 However, discrimination may be unfair. For example, where there is a lack of transparency, for example because providers hide some tariffs from customers, or where behavioural biases are exploited. A key concern is that discrimination or other practices that are perceived as unfair may lead, over time, to a breakdown in customer trust. Moreover, that loss of trust may not be confined to the firms that behave unfairly but may affect the market as a whole, leading to reduced levels of customer engagement.¹⁹ Whilst the concern has been raised in particular in relation to personalised pricing in online markets, the idea that “customer trust is vital for markets to function effectively” applies generally.²⁰ Conversely, loss of trust in markets can lead to pressure for greater regulatory or government control of market outcomes.
- 3.14 Recently, explicit attempts have been made to draw the attention of firms’ management to the importance of fairness. One such proposal from an economics consultancy aims to help firms avoid business models which rely on exploiting behavioural biases or restrictions which discourage customer choice.²¹
- 3.15 Our own Fairness for Customers commitments are also designed to inspire providers to raise standards in relation to customer fairness. By signing up, providers can demonstrate, to customers and the public, their commitment to embedding customer fairness in their business. The six individual commitments set out what people should expect from their phone, broadband and pay TV providers. They cover both procedural and distributive fairness and are as follows:
- **Commitment 1:** Customers get a fair deal, which is right for their needs. Providers offer customers packages that fit their needs and have a fair approach to pricing. Prices are clear and easy to understand;
 - **Commitment 2:** Customers get the support they need when their circumstances make them vulnerable. Providers understand and identify the characteristics, circumstances and needs of vulnerable customers - such as vulnerability due to a disability, age,

¹⁹ See OECD (2018) Personalised pricing in the digital era – Note by the United Kingdom [https://one.oecd.org/document/DAF/COMP/WD\(2018\)127/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)127/en/pdf)

²⁰ OECD op cit p9. Complex pricing and hidden discrimination are widely practised. For example, the CMA noted that “the complexity of tariff offers in the mobile market can often make it difficult for customers to compare deals accurately and find the most suitable offers for them”: *“Tackling the Loyalty Penalty, response to a super-complaint made by Citizens Advice on 28 September 2018”*, paragraph 6.62. The CMA also describes a range of harmful business practices which make it hard for customers to get a good deal, *ibid* Section 7. https://assets.publishing.service.gov.uk/media/5c194665e5274a4685bfba/response_to_super_complaint_pdf.pdf

²¹ *Fair ground: a practical framework for assessing fairness*, OXERA Agenda, March 2019, <https://www.oxera.com/agenda/fair-ground-a-practical-framework-for-assessing-fairness/>. According to OXERA, “The current focus on fair pricing is the culmination of many years’ progress in understanding consumer outcomes. Increasingly, the responsibility for those outcomes is being placed on firms.” The framework is intended to be “applicable across products, markets and sectors”.

mental illness or having recently been bereaved - and act to give them fair treatment and equal access to services too;

- **Commitment 3:** Customers are supported to make well-informed decisions with clear information about their options before, during, and at the end of their contract. Providers design and send communications in a way that reflects an understanding of how customers generally react to information so that they can understand and engage with the market;
- **Commitment 4:** Customers' services work as promised, reliably over time. If things go wrong providers give a prompt response to fix problems and take appropriate action to help their customers, which may include providing compensation where relevant. If providers can't fix problems with core services they have promised to deliver within a reasonable period, customers can walk away from their contract with no penalty;
- **Commitment 5:** Customers can sign up to, change and leave their services quickly and smoothly. Providers ensure that customers who are leaving do not face additional barriers or hassle compared to those who are signing up to new services;
- **Commitment 6:** Customers can be confident that fair treatment is a central part of their provider's culture. Companies can demonstrate that they have the right procedures in place to ensure customers are treated well. They keep these effective and up-to-date.²²

Distributive fairness

- 3.16 In other cases, the greater impact may be on distributive fairness, with some customers gaining and others losing out, for example, as a result of practices that exploit the behavioural biases or vulnerability of some customers. Where this kind of outcome occurs, regulators are required to make judgments in which the benefits to one group of customers have to be weighed against costs to another group.
- 3.17 Making the sorts of judgements described is somewhat restricted within the framework of traditional economic analysis. Nonetheless, we can build on this framework to identify the circumstances in which distributive fairness concerns are most likely to arise and in which interventions to address them are most likely to be justified.
- 3.18 The starting point in this framework is that a practice or intervention is beneficial if at least one person is made better off and no-one is made worse off.²³ This, however, is quite a restrictive standard for evaluating policy interventions because nearly all changes involve both losers as well as gainers.
- 3.19 In most cases therefore, assessing the case for intervention will require us to offset benefits to some against costs to others. An approach that is often used in cost-benefit analyses is to ask whether the gainers from an intervention could compensate the losers so

²² <https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2019/broadband-and-phone-firms-put-fairness-first>

²³ This is known as the "Pareto principle".

that all would be at least as well off as before (although it is not usually the case that such compensation actually occurs). However, even this approach on its own does not provide a basis for weighing gains to one group of customers more highly than another.

- 3.20 To move beyond these limitations requires some additional assumptions. For example, redistribution in favour of financially disadvantaged customers might be considered to be of overall benefit if one were prepared to assume that such a customer would enjoy a greater increase in welfare from an extra £1 than another customer who was relatively wealthier.²⁴
- 3.21 In addition, customers may have preferences which are to some extent altruistic. This is the case where one customer's welfare depends on the welfare of others and where people generally exhibit some preference for equality and fairness, particularly towards those in vulnerable circumstances.²⁵ Where this is so, it may be possible to increase overall welfare by modifying market outcomes in a way which people perceive to be fairer, for example, by providing additional protection for vulnerable customers.
- 3.22 Concern for the vulnerable in our society is reflected in Ofcom's duties. This means that distributive fairness is likely to be a concern to us where vulnerable customers are affected. Section 3(4) of the Act sets out a number of things we must take into account in performing our duties, where they are relevant, including the vulnerability of those whose circumstances appear to us to put them in need of special protection and the needs of persons with disabilities, of the elderly and of those on low incomes.²⁶

When are we likely to apply the fairness framework?

- 3.23 Ofcom's Fairness for Customers commitments show what we expect to see when providers are treating their customers fairly. As part of any assessment of fairness, and of whether and how we should address any unfairness, we are likely to consider how far providers are living up to the six individual commitments set out above. The approach we take will be applied flexibly, considering fairness in the round. It is not intended to be a static approach and it would be adapted as new issues arise.

²⁴ Whilst this might seem obvious, it runs up against the difficulty of measuring an individual's welfare and comparing it to that of a different individual. Although, for a given individual, it is reasonable to assume that each extra £1 of income gives less additional satisfaction than the previous £1 increase in income, the difficulty here is with inter-personal comparisons. Nonetheless, Layard et al. (2008) suggest that, if income doubles, the additional satisfaction that would be derived from an additional £1 declines to somewhat less than 50% of its original value, [http://darp.lse.ac.uk/papersdb/Layard_etal_\(JPubEcon08\).pdf](http://darp.lse.ac.uk/papersdb/Layard_etal_(JPubEcon08).pdf), and the HMT Green Book suggests that this estimate can be used to calculate welfare weights for use in cost-benefit analyses https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/685903/The_Green_Book.pdf, Annex 3, pp 78-79.

²⁵ There is some evidence for this from laboratory experiments and the extent of charitable giving amongst other things. The evidence suggests that at least some people have preferences which are to some extent altruistic, but there is a marked difference between experimental results and real-world behaviour. See, for example, DellaVigna, Stefano: "Psychology and economics: evidence from the field", *Journal of Economic Literature* Vol, XLVII pp 315-372, June 2009.

²⁶ Section 3(4), Communications Act 2003, <https://www.legislation.gov.uk/ukpga/2003/21/section/3>

- 3.24 We will operate within our existing regulatory principles as well as our statutory duties.²⁷ This means that we will continue to operate with a bias against intervention, seeking the least intrusive regulatory mechanisms to achieve our policy objectives, including those relating to fairness, and ensuring that these are evidence-based, proportionate, consistent, accountable and transparent.
- 3.25 Nevertheless, we are more likely to use the framework set out in this document where, for example, we receive complaints, or where our own market monitoring raises concerns about the fairness of outcomes for customers in communications markets. We are most likely to be concerned in cases or circumstances where discrimination adversely affects vulnerable customers (taking account of section 3(4) of the Act), for example because they have difficulty engaging in the market to access, assess and act on price information.²⁸ In cases where we choose to investigate whether an issue of fairness exists due to observed distributional unfairness, we may also look first into whether any procedural unfairness exists and can be remedied. That may go some way to addressing the distributional outcome.

Applying the framework

- 3.26 We recognise that not all disengaged customers are vulnerable, and that disengagement may sometimes represent a deliberate choice. We will take this into account where we apply the framework. Provided there is no procedural unfairness and firms' practices do not exploit behavioural biases or encourage disengagement, so that customers can easily access the information they need in order to engage in the market and act on it, we will usually be less concerned about purely distributive fairness between non-vulnerable customers. We are then more likely to be tolerant of any resulting price differentials or other differences between such customers in the market outcomes they experience.
- 3.27 Individual practices will be judged on a case-by-case basis but, in the light of the above, the following would be more likely to be regarded as unfair under our framework:
- a) exploiting market power over certain customer groups;
 - b) attempting to mislead or hide relevant information;
 - c) exploiting characteristics or behavioural biases which impair some customers' ability to make well-informed decisions or which mean they make decisions which are not in their best interests;
 - d) exploiting characteristics such as a lack of competition in some geographic locations which put some customers at a disadvantage relative to other customers; and

²⁷ See figure 2.2, Ofcom's 2005/06 Annual Plan, Ofcom, March 2005, https://www.ofcom.org.uk/_data/assets/pdf_file/0020/42770/ch2.pdf

²⁸ The FCA identified six key evidential questions to assess the scale of any distributive fairness concerns: FCA Research Note, July 2018, op cit Figure 3. As explained in the next section, our approach builds on this and adopts some of its key features.

e) exploiting market failures or behavioural biases to provide a service quality which does not meet reasonable expectations.²⁹

3.28 The following would be less likely to be regarded as unfair:

- a) discounts which expand the market to include new customer groups (and do not anti-competitively foreclose rivals); and
- b) in a competitive market, with transparent prices and no barriers to engagement, and where behavioural biases are not being exploited, charging more to customers who are not vulnerable but who choose not to engage.

Questions to consider in any fairness assessment

3.29 In the following section, we set out the types of questions we are likely to consider when we apply our framework, in order to identify whether unfairness of the types described is present in a market. We also set out the types of factors which, if present, might make us more likely to intervene.

3.30 In broad terms, we would want to understand how providers are treating their customers; who is being harmed; and the extent of the harm. Along with the answers to these questions, we would want to understand how important the service in question is and whether it is a newly introduced service, resulting from considerable investment, or is well-established. These questions are set out in Figure 1.

3.31 The sorts of questions and factors we outline are not exhaustive and nor are they a checklist. In any particular case, we would be likely to consider the relevant questions in the round, with no one factor likely to be determinative on its own. We would be more likely to intervene where a number of factors suggest unfairness, even if each on its own were not at a high level of concern.

²⁹ According to the OFT (2010), “arguably, behavioural biases can be viewed simply as a fourth type of market failure”: OFT1224, op cit page 10

Figure 1: Questions to assess concerns about fairness

	 We are likely to be more concerned where:
How do providers treat customers throughout the customer journey?	Information is not clear, easy to understand and timely; Behavioural biases are exploited; Customers are not supported in making well-informed decisions; Problems are not fixed promptly.
Who is being harmed?	Vulnerable customers are being harmed; The practice has relatively small offsetting benefits, such as market expansion through low price offers.
What is the extent of the harm?	Many customers are affected; The harm to each customer is significant.
How important is the service?	The service is seen by customers as highly important or essential, rather than 'nice-to-have'; The service is important to vulnerable customers.
Does the service depend on risky new investment?	The service is a legacy service with predictable demand and costs and little need for new investment, rather than being a new service with uncertain costs and demand and requiring significant investment.

How do providers treat customers throughout the customer journey?

- 3.32 Where we observe poor outcomes for customers in communications markets, we will consider whether they are the result of, or are exacerbated by, providers not treating customers fairly. Customers' interests are likely to be best served where providers act in a way that is procedurally fair.
- 3.33 Opportunities to treat customers fairly, or otherwise, arise at all stages of the customer journey e.g. when customers are making an initial purchasing decision; during the contractual relationship; when customers have an opportunity to re-contract; and when customers come to the end of their contract.
- 3.34 As set out in our Fairness for Customers commitments, the type of behaviour we would expect to observe from providers that are treating customers fairly include:
- a) Giving customers clear, easy to understand and timely information before, during and at the end of their contract.
 - b) Supporting customers in making well-informed decisions; and

- c) Responding promptly to fix problems when things go wrong.
- 3.35 The need for clear and easy to understand information before making a purchasing decision is highlighted in Ofcom’s General Conditions. However, our work on end-of-contract notifications has highlighted that the need for clear information can be equally important when customers come to the end of their contract and can make a new purchasing decision, either by switching to another provider or by re-contracting with their existing provider.³⁰
- 3.36 For customers to make well-informed decisions they need to be able to access, assess and act on the information that is made available to them. However, we know that behavioural biases can affect the customer decision making process and these biases can be exacerbated and exploited by providers.
- 3.37 In some cases, the presence of behavioural biases can lead providers to compete in ways that are not in customers’ interests, for example, by offering products that appeal to the customer because they target biases or by making the switching process difficult.³¹ Where choices are affected by bias, poor customer outcomes can occur, such as paying too much for a given product; not finding the cheapest or most suitable product; or purchasing a product that does not match the customers’ needs.³²
- 3.38 The expectation that providers treat customers fairly extends beyond the point of purchasing a particular service. In their ongoing relationships with customers, providers should also treat them fairly. That ongoing fair treatment includes, for example, ensuring that services work as promised and providers respond promptly when things go wrong. The recently launched Automatic Compensation Scheme for broadband and landline services recognised that where customers experience service quality failures, fair treatment requires providers to promptly fix any problems and to automatically compensate where that does not happen.³³

³⁰ Ofcom (2019) “Helping consumers get better deals: Statement on end-of-contract notifications and annual best tariff information”, https://www.ofcom.org.uk/data/assets/pdf_file/0018/148140/statement-helping-consumers-get-better-deals.pdf

³¹ For example, our mobile switching work reported that when customers contacted their existing provider about porting their number to a new provider they often found it difficult and time consuming, with customers being subjected to unwanted persuasion to remain with their provider. This deterred some customers from switching and was one of the drivers for the auto-switch reforms that come into effect on 1 July 2019. Ofcom (2017) “Consumer switching: Decision on reforming the switching of mobile communication services”, https://www.ofcom.org.uk/data/assets/pdf_file/0023/108941/Consumer-switching-statement.pdf

³² OFT, “The impact of price frames on consumer decision making” (OFT 1226, May 2010), op cit; Huck, S., Zhou, J., London Economics, Duke, C. (2011) “Consumer behavioural biases in competition: a survey” Final report, p.10, <https://london-economics.co.uk/wp-content/uploads/2012/06/Consumer-behavioural-biases-in-competition-OFT1.pdf>

³³ Ofcom (2017) “Statement: Automatic Compensation”, <https://www.ofcom.org.uk/consultations-and-statements/category-1/automatic-compensation>

Who is being harmed?

- 3.39 In the case that providers are found to be behaving in a way that does not treat customers fairly, the likelihood of intervening and the nature of any intervention will also depend on who is being harmed.
- 3.40 For example, price discrimination may mean that some customers pay more than they would if prices were uniform but, on the other hand, some customers may pay lower prices, and this may include some who would not have participated in the market if they had had to pay a higher price (or might have instead taken an inferior alternative). This means that we might be concerned about who pays more and who pays less in any particular case.³⁴
- 3.41 In communications markets, we are likely to be most concerned when poor outcomes are experienced by customers in vulnerable circumstances.³⁵ On the other hand, it is likely that we would be less concerned where customers paying higher prices have actively chosen to do so, for example, where they are aware that better deals are available but have decided that the amount they would save does not justify the effort of shopping around.

What is the extent of the harm?

- 3.42 As with any potential intervention, the extent of any identified harm is an important consideration. We are likely to be more concerned where a large number of customers are affected and/or if the harm suffered is substantial.

How important is the service?

- 3.43 We will have regard to the importance to customers of the service in question and would be more likely to be concerned where customers view a particular service as being essential to their daily lives. In communications markets, what is considered to be essential evolves over time as new technology is introduced and new services are made available to customers. For example, the recent growth in services such as online banking, shopping and streaming has led to a sharp increase in the number of customers who now consider internet access to be essential, as noted in our 2018 Access and Inclusion Report.³⁶

³⁴ We recognise that price discrimination is likely to benefit providers through higher profits. However, when we assess the impact of policy interventions we usually place most emphasis on costs and benefits to customers. This is because concern for consumer welfare relates more closely to Ofcom's principal statutory duty. However, Ofcom has a range of further duties, such as the desirability of encouraging investment and innovation, and it is usually in customers' interests for regulation to be consistent with providing incentives for investment and innovation, for example, by allowing providers a reasonable return on their investments.

³⁵ While not an exhaustive list of the ways in which a customer may be vulnerable, Condition C5 in Ofcom's General Conditions lists characteristics which we expect providers to take into account when giving consideration to vulnerable customers. These are "age, physical or learning disability, physical or mental illness, low literacy, communications difficulties or changes in circumstances, such as bereavement". See General Conditions of Entitlement: Unofficial Consolidated Version, https://www.ofcom.org.uk/data/assets/pdf_file/0021/112692/Consolidated-General-Conditions.pdf

³⁶ Ofcom (2019) "Access and Inclusion in 2018", https://www.ofcom.org.uk/data/assets/pdf_file/0018/132912/Access-and-Inclusion-report-2018.pdf

Research by TouchPoints in 2018 found that 60% of adults in Great Britain agreed that the internet was an essential part of their life, up from 54% in 2012.³⁷ We will continue to monitor such developments and would be more concerned when fairness concerns relate to services that customers rely most upon, or which many people consider to be essential.

- 3.44 We also have to keep in mind that within rapidly evolving communications markets, the pace of progress is not the same for all customers and there is a growing digital gap between different groups of customers or “demographics”.³⁸ Therefore, while some services such as landline only services might no longer be important for the bulk of customers, they may remain essential for others. The characteristics (for example, age or income level) of those customers who use the services under investigation and the importance of those services to such customers will be relevant considerations in our assessment.

Does the service depend on risky new investment?

- 3.45 Incentives to invest are important in many communications markets because the technologies used often require significant costs to be sunk and because innovation is rapid. For example, the move to full-fibre local access networks to allow customers to benefit from ultra-fast internet access will require investment costing billions of pounds. In these circumstances, it is important for fairness to be built in at an early stage, recognising both that customers have a right to expect that new services will be marketed and provided fairly and also that investment in new services will only occur if the firm expects to receive a reasonable return on its investment. Regulatory interventions will need to take this into account.
- 3.46 This calls for a case-by-case approach to this criterion, as with the others. Where concerns about fairness arise, the benefits and costs of alternative interventions to address them may depend on whether the service is an established one or whether it is new and innovative. In the former case, demand and costs are likely to be relatively predictable and levels of customer engagement may also be relatively low. In the case of a new service where demand and costs may be uncertain and especially where significant up-front investment is needed, we may need to be more cautious that any proposals for regulation take into account the need for a reasonable expected return on that investment.

³⁷ TouchPoints 2018, GB adults 15+; Ofcom (2019) “UK Communications Market Report 2018”, p.14, https://www.ofcom.org.uk/_data/assets/pdf_file/0022/117256/CMR-2018-narrative-report.pdf

³⁸ Ofcom (2019) “UK Communications Market Report 2018”, p.26, https://www.ofcom.org.uk/_data/assets/pdf_file/0022/117256/CMR-2018-narrative-report.pdf

How might we respond to a fairness concern?

Considering the consequences of intervening

- 3.47 Our regulatory principles mean that we consider carefully the consequences of our actions before intervening in markets. Some of the factors we would take into account are set out below:
- a) Regulation may be unnecessary because the problem would be self-correcting over time. For example, in competitive markets, firms which have a reputation for treating their customers fairly may gain an advantage over others;
 - b) The costs of regulation may be higher than the benefits, for example because the remedy is complex to implement. More generally, a simple remedy that is straightforward to implement may be preferable to a more complex one;
 - c) Customers may not always respond in the expected way, meaning that a remedy may be ineffective. This is an issue where research, testing and/or trials can be very important;³⁹
 - d) Some remedies can distort markets. For example, reducing price differentials by means of price caps might have the effect of making customers less engaged and weaken competition. Price caps may also reduce incentives for investment if set too tightly;
 - e) Providers may respond in ways which reduce the benefits of any intervention. For example, measures to restrict or prevent price discrimination may mean that prices for some customers rise, so that they pay more or even stop using the service;
 - f) In some circumstances, a move to reduce prices for some customers may be offset, at least in part, by increases in prices paid by others due to the “waterbed effect” (so-called because pushing down on prices in one place causes a rise in prices elsewhere). For example, low introductory prices are sometimes used to attract new customers in the hope of making high profits later, by charging them more after the end of their initial contract term. Cutting out-of-contract prices would then reduce the incentive to offer introductory discounts, and prices for new customers would be likely to rise as a result, giving rise to a waterbed effect. If waterbed effects are significant, it may be particularly important for distributive fairness reasons to identify who is likely to gain and lose as well as to assess the implications for customers in aggregate.

Remedies

- 3.48 Where we find fairness concerns, we would expect to consider appropriate forms of remedy and our power to impose them. Where we identify appropriate and proportionate

³⁹ See UKCN (2016), “*Helping people get a better deal: Learning lessons about consumer facing remedies*”, Prepared by the Financial Conduct Authority and the Competition and Markets Authority, on behalf of the UK Competition Network: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744521/UKCN_consumer_remedies_project_-_lessons_learned_report.pdf

remedies and we have the necessary powers, we would take action. If we think that further powers would be appropriate to protect customers, we would seek them.

- 3.49 The types of remedies and approaches we are likely to consider include:
- a) making or modifying regulatory conditions;
 - b) enforcing existing regulatory obligations (e.g. under the General Conditions);
 - c) working with providers on a voluntary basis;
 - d) collaborating with or assisting other regulators, such as the CMA, in exercising our concurrent powers; or
 - e) working with Government to consider new approaches to regulation, including changes to legislation.

4. Discussion questions

Question 1: Do you think our characterisation of what might constitute fair and unfair practices is appropriate?

Question 2: Do you agree with the questions set out in our fairness framework? Are there any other questions that should be included? Please set these out in your response.

Question 3: What additional information or guidance, if any, would you like to see included in our fairness framework?

5. Next steps

- 5.1 This paper sets out our initial thinking on the types of questions we might ask and the considerations that are likely to be relevant when an issue of fairness arises. Establishing what constitutes fair and unfair conduct, and what type of regulatory response, if any, might be appropriate may not always be straightforward. We therefore welcome views on the approach we have set out above and to our questions for discussion, so that we can take these into account when finalising our framework. The closing date for responses is 12 August 2019.
- 5.2 Our commitment to ensuring that customers in the markets we regulate are treated fairly is an ongoing one. Setting out our proposals for a structured approach to the issue of fairness is an important step to embedding customer fairness in communications markets and we will therefore carefully reflect on the responses we receive to this consultation. We also expect to engage with providers and consumer organisations over the coming months. The responses we receive will feed into a final fairness framework which we expect to publish before the end of the financial year.

A1. Responding to this discussion paper

How to respond

- A1.1 Ofcom would like to receive views and comments on the issues raised in this document, by 5pm on 12 August 2019.
- A1.2 You can download a response form from <https://www.ofcom.org.uk/consultations-and-statements/category-2/making-communications-markets-work-well-for-customers>. You can return this by email or post to the address provided in the response form.
- A1.3 If your response is a large file, or has supporting charts, tables or other data, please email it to fairness.framework@ofcom.org.uk, as an attachment in Microsoft Word format, together with the cover sheet (see Annex A2).
- A1.4 Responses may alternatively be posted to the address below, marked with the title of the consultation:
- Fairness Framework
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- A1.5 We welcome responses in formats other than print, for example an audio recording or a British Sign Language video. To respond in BSL:
- Send us a recording of you signing your response. This should be no longer than 5 minutes. Suitable file formats are DVDs, wmv or QuickTime files. Or
 - Upload a video of you signing your response directly to YouTube (or another hosting site) and send us the link.
- A1.6 We will publish a transcript of any audio or video responses we receive (unless your response is confidential)
- A1.7 We do not need a paper copy of your response as well as an electronic version. We will acknowledge receipt if your response is submitted via the online web form, but not otherwise.
- A1.8 You do not have to answer all the questions in the discussion paper if you do not have a view; a short response on just one point is fine. We also welcome joint responses.
- A1.9 It would be helpful if your response could include direct answers to the questions asked in the discussion paper. The questions are listed at Section 4. It would also help if you could explain why you hold your views, and what you think the effect of Ofcom's proposals would be.

A1.10 If you want to discuss the issues and questions raised in this discussion paper, please contact Rebecca Bamford on 020 7981 3703, or by email to fairness.framework@ofcom.org.uk.

Confidentiality

- A1.11 Consultations are more effective if we publish the responses before the response period closes. In particular, this can help people and organisations with limited resources or familiarity with the issues to respond in a more informed way. So, in the interests of transparency and good regulatory practice, and because we believe it is important that everyone who is interested in an issue can see other respondents' views, we usually publish all responses on [the Ofcom website](#) as soon as we receive them.
- A1.12 If you think your response should be kept confidential, please specify which part(s) this applies to, and explain why. Please send any confidential sections as a separate annex. If you want your name, address, other contact details or job title to remain confidential, please provide them only in the cover sheet, so that we don't have to edit your response.
- A1.13 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and try to respect it. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.14 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's intellectual property rights are explained further in our [Terms of Use](#).

A2. Consultation coversheet

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing

Name/contact details/job title

Whole response

Organisation

Part of the response

If there is no separate annex, which parts? _____

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)