Making communications markets work well for customers – a framework for assessing fairness

BT's Response to discussion paper published on 17 June 2019

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1   Ofcom's framework

1.1   We welcome Ofcom's discussion paper on its proposed framework for assessing fairness in the broadband, mobile, landline and pay-TV markets.

1.2   We take the issue of customer fairness seriously. We have signed up to Ofcom's six Fairness for Customer commitments because the principle of customer fairness is important to us and informs our decision making.

1.3   As well as adhering to our public commitments, it's worth noting that providers have a commercial interest in treating customers fairly. To the extent that fairness is important to customers, whether they are being treated fairly or not will be reflected in their satisfaction. Net Promoter Score (NPS) is a key metric with which we measure our own performance by asking our customers if they would recommend our products and services to others; a metric which can also be compared against competitors. Where we do not treat customers fairly this will affect our NPS and our ability to win and retain customers.

1.4   With this in mind, we are already taking proactive steps to address perceived unfairness. In response to recent concerns expressed by Citizens Advice (CAB), the Competition and Markets Authority (CMA) and Ofcom that loyal, fibre-ineligible and mobile handset customers may be unfairly treated, we are in the process of implementing a number of initiatives to limit the price differentials between new and existing, and copper and fibre, broadband customers. On mobile handsets we, along with other MNOs, have committed to price reductions for out-of-contract customers. When implementing its final fairness framework, Ofcom should take account of these and other initiatives, allowing the benefits to be realised over a reasonable timeframe, before considering whether any intervention is necessary.

1.5   While each individual company bears responsibility for building fairness into how it deals with its customers, it may be difficult for individual companies to act where the practices that are seen as unfair have become embedded in the competitive dynamic across the industry. We think that there is, therefore, a need for Ofcom to play a leading role in giving industry clarity on what its expectations are and on what 'good' looks like. Ofcom's fairness framework provides a vehicle for achieving this. Where Ofcom identifies best practice, it should highlight this to industry and encourage other providers to take action where necessary to drive similar outcomes.

Further clarity on the relationship between this proposed framework, Ofcom's Fairness for Customer commitments and consumer law is required

1.6   We welcome Ofcom's desire to facilitate a shared understanding of how it is likely to approach the assessment of fairness. This discussion paper is a helpful starting point. The proposed framework is at this stage rather theoretical, and although the paper acknowledges that this framework needs to link up with the Fairness for Customers

commitments that Ofcom launched in June, it is a little unclear as to whether this is the underpinning for those commitments or whether it builds on them.

1.7   It would be helpful if Ofcom could give greater clarity on its approach to assessment and intervention by providing practical examples of how this fairness framework would support decision making in practice. For example, Ofcom could set out how its framework would have driven the conclusions it has reached in its recent review of mobile handsets, and how it might apply in relation to its on-going review of broadband pricing. These illustrations would give providers an indication of what to expect should Ofcom seek to apply its framework to other instances of potential unfairness. Additionally, it could provide guidance on how providers can proactively make changes in similar scenarios before intervention is necessary.

1.8   It would also be helpful for Ofcom to clarify how its fairness framework is likely to relate to established consumer law principles. The legal test for fairness is not applicable where a contract term – including a price – is "core", i.e. it forms the main subject of the contract and it has been presented prominently and transparently so that the customer has the choice of whether to buy or not. Our understanding is that Ofcom's framework would test whether customers have indeed had sufficient opportunity to make that choice, i.e. whether there has been "procedural fairness". It would be useful if Ofcom could confirm this or otherwise.

We welcome Ofcom's bias against intervention and recognition of the importance of investment incentives

1.9   Ofcom makes clear in its discussion paper that it will continue to operate with a 'bias against intervention, seeking the least intrusive regulatory mechanisms to achieve its goals'.[1] It also recognises that the consequences of intervening must be fully considered prior to intervention.[2] We are very supportive of this.

1.10   As Ofcom recognises, determining what is fair and unfair in a highly competitive market is not straightforward; where Ofcom decides to intervene it may face difficult trade-offs. In the event that Ofcom intervenes to create more equal outcomes for disengaged customers it must recognise that there could be a dampening of overall customer engagement. As Ofcom recognises, the costs and benefits in making such a trade-off must be carefully considered whenever the framework is applied, and the outcomes of decisions measured subsequently, to inform future actions.

1.11   Where intervention is justified to promote distributive fairness, working closely with industry to identify solutions will help avoid intrusive regulatory interventions that could have unintended consequences for competition and the market. A principles-based approach, with specific actions designed and implemented by companies on the basis of their relationships with their customers, especially when combined with

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[1] Paragraph 3.24 of Ofcom's discussion paper
[2] Paragraph 3.47 of Ofcom's discussion paper

appropriate leadership from Ofcom for example in sharing best practice, could be a very powerful approach and one with fewer downside risks.

1.12 We also agree with and welcome Ofcom's recognition that incentives to invest are important in the communications markets. To meet the demands of full fibre and 5G, significant investment in fibre infrastructure is being made by BT and indeed across industry in the UK. Investors will worry about increased retail regulation in markets that are competitive, particularly if this risks affecting provider's ability to make a reasonable return.

1.13 For this reason, it would be helpful for Ofcom to explicitly recognise the important role that retail price levers play in ensuring an incentive to invest in new services. Price, and relative prices of alternative services, plays a key role in a customer's decision to switch. Where new services are allowed pricing flexibility to ensure a reasonable return can be made, similar flexibility should be afforded to legacy services in order to maintain incentives to upgrade.

1.14 For example in the broadband market, the smaller the price differentials between copper and fibre services, the greater the incentive for customers to migrate onto fibre services. The most effective way to encourage organic migration away from legacy services is to enable providers to reduce the differential between products. Efficient migration away from legacy services will also provide an additional incentive to invest as cost savings are realised from closing down legacy platforms. These issues must be borne in mind in any fairness assessment which looks at copper broadband pricing, for example.

Ofcom's approach to identifying behavioural biases should be empirically driven

1.15 In its discussion paper, Ofcom outlines that behavioural biases exhibited by some customers can be a barrier to engagement and to getting the best possible deal. Furthermore, exploitation of these biases could make customers worse off, particularly where the exploitation is unfair or impacts vulnerable customers.

1.16 We agree with Ofcom's view that exploited behavioural biases can lead to unfair outcomes for customers, and that identifying and intervening in instances of exploitation is important. However, this should be on the basis of empirical evidence, accurately diagnosing any pockets of concern that can be remedied and establishing whether intervention will be genuinely needed to improve customer outcomes. To achieve this successfully Ofcom must undertake a careful assessment of customers' *revealed* preferences in order to understand how customers make decisions and how firms respond.

1.17 Diagnosing any perceived irrational or unexplained customer behaviour as a 'bias' would not be a true reflection of why customers make decisions when engaging with the market. For example, low levels of switching should not be assumed to be an indicator of low levels of engagement. Satisfied and sophisticated customers may be

fully engaged but conclude the best option is to remain with their current provider for reasons of trust, brand loyalty or other positive factors.

1.18   While surveys have merit in some circumstances, we do not agree that they always provide an accurate or reliable data source for assessing the behaviour of customers in the market, and applying the correct survey methodology will be key. For instance, customer surveys that ask respondents a hypothetical question as to whether they would likely switch in response to a price change may be less informative than direct behavioural data on actual customer switching in response to a price change. To the extent biases exist and lead to poor switching choices these may be better revealed with behavioural data (e.g. especially if in practice customers have trouble calculating savings from switching).

1.19   Trials – including randomised control trials (RCTs) – are likely to provide useful information on customer behaviour for this reason. We would very strongly support the use of trials should Ofcom be considering possible interventions to improve customer engagement or otherwise aid customer decision-making. This is likely to be preferable where Ofcom is seeking to identify the most appropriate intervention for maximising customer engagement.

1.20   A trial approach is much more likely to be successful and insightful if it is industry-led (and industry-wide), capitalising on the marketing expertise and customer knowledge that operators have and reflecting their customer bases. But we see Ofcom's collaboration as important in ensuring success of such trials. For example, we recently adopted an RCT approach in collaboration with Ofcom when seeking to understand the type and volume of information required to engage with customers of standalone fixed voice services. We would be happy to work with Ofcom in future on trials where this would be helpful and appropriate.

We support the use of cross-sector insights on fairness to inform Ofcom's framework

1.21   We very much welcome the fact that Ofcom's thinking on the fairness framework has been informed by thinking in other sectors, such as financial services. Other sectors such as energy and water have also considered the same issues. Much can be learned from other sectors, not only in generating a useful conceptual and analytical framework for fairness issues (such as the 'procedural' and 'distributional' taxonomy that Ofcom takes from the FCA) but also in understanding what has worked well and not so well in terms of company behaviour and regulatory intervention. We would very much support Ofcom in linking its thinking in to thinking and experience in other sectors.

2   Vulnerable customers

A pragmatic approach to identifying and supporting vulnerable customers that recognises the complexities faced by providers is required

2.1   In its discussion paper, Ofcom outlines particular concern for the treatment of vulnerable customers in instances of both procedural and distributive unfairness. We recognise and agree with Ofcom's view that more should be done to ensure vulnerable customers can engage with the market, are not subject to unfair practices and get any extra help they need. We also accept and acknowledge that more can be done to ensure vulnerabilities experienced by our customers are identified and supported, and we are working to proactively address this, along with other industry players.

2.2   Inevitably, our approach to identifying and reacting to vulnerable customers relies largely on self-reporting. This continues to be the most effective way to identify vulnerable customers with their consent and ensures that outcomes are tailored to the customer's specific needs. But we recognise that this approach does not work for customers who may not identify with the term "vulnerable", be unaware of any 'vulnerabilities' they have or do not wish to reveal any vulnerabilities and so do not report this when engaging, or indeed do not engage at all. While we can often identify vulnerability when we see it close up in family members or friends, Ofcom must recognise the practical challenges faced by providers whose starting point is millions of customer records (usually containing just names, contact numbers and spend).

2.3   Throughout its discussion paper Ofcom refers generically to "vulnerable customers". There is no 'one size fits all' solution for identifying and supporting vulnerable customers, especially given the varied circumstances under which an individual can become vulnerable. Some factors that can lead to a high risk of vulnerability are static (e.g. a customer with learning difficulties) whereas others are transient (e.g. a customer who has lost their job or is dealing with bereavement). Similarly, the extra help needed by vulnerable customers varies greatly. Some may require practical support (e.g. priority fault repair), while others may find it more difficult to engage with the market or manage their account (e.g. a customer with mental health issues).

2.4   Vulnerability, therefore, covers a wide range of issues and requires a variety of supportive measures to provide for these customer's needs. A sophisticated approach to identifying and supporting vulnerable customers, which provides an appropriate outcomes-based solution for the customer's specific needs, is required and we suggest Ofcom moves beyond referring generically to "vulnerable customers".

2.5   An approach that characterises customers as vulnerable because they sit within a certain demographic or exhibit certain behaviours risks being too simplistic – particularly if only considering one factor in isolation. For example, low engagement or low usage data cannot necessarily be used to determine which customers are vulnerable as there is no evidence that truly vulnerable customers over-index in these particular areas. There is a risk that customers could be offended by erroneous prescriptions of vulnerability. Similarly, appropriate remedies for any unfairness will

vary from one form of vulnerability to another, and a broad-brush approach will not be effective.

2.6 Ofcom must ensure that when setting policy providers and customers have the right incentives for identifying vulnerabilities. Where vulnerability flags have a bearing on a customer's pricing then there is a risk that incentives to flag accurately are distorted; providers could be reluctant to flag while customers could be incentivised to exaggerate or falsify their circumstances. To avoid this, the outcome of flagging vulnerable customers should affect how customers are treated, and the services they receive, rather than the price they pay.

3   Business customers

Business customers differ significantly to residential customers and Ofcom's framework should reflect this

3.1   Whilst we are supportive of Ofcom's ambition to provide greater clarity on its fairness framework, we do not believe it has appropriately assessed how this should apply to business customers. We consider that a different approach is required for business customers which reflects the fact that they are generally better equipped to engage and manage their contractual arrangements than residential customers (except perhaps for the subset of micro businesses who display similar characteristics to residential consumers and opt for consumer-like products). In addition, we do not believe that business customers are subject to the same type of considerations around vulnerability and distributive fairness as residential customers.

3.2   In our experience, business customers differ significantly to residential customers, both in how they engage with providers and with the market. There are also considerable differences between business customers themselves, for example in terms of their product preferences and procurement strategy. Larger businesses are likely to be able to access the resources and expertise required to deal with contracts, provision of services and have dedicated teams who know when to review their telecoms services etc. The more bespoke nature of the relationship means that they are able to discuss with the provider services that best suit their needs, as well as being able to better deal with any problems. We would also highlight that even small business customers are able to negotiate tariffs and obtain deals that reflect their specific needs. It is not currently evident how the flexibility and/or bespoke nature of deals afforded to business customers will be assessed within a fairness framework. We also consider that Ofcom's guidance on applying the framework should explicitly recognise bespoke deals as an area where Ofcom is less likely to consider such practices unfair.

3.3   Given the competitive nature of the business market, often characterised by a high degree of negotiation, it is vital that any intervention is only considered in relation to areas where research and evidence has specifically identified business customer harm. Ofcom should not seek to infer similarities with residential consumers and apply remedies designed for residential consumers across to business customers. We would be happy to help Ofcom consider the specifics of the business customer market.

Annex

The following provides cross references to the relevant parts of the main document, as well as specific answers to Ofcom's questions.

Q1. Do you think our characterisation of what might constitute fair and unfair practices is appropriate?

In principle, we agree that Ofcom's characterisation of fair and unfair practices is appropriate for residential customers. However, it would be helpful if Ofcom could give greater clarity on its approach to assessment and intervention by providing practical examples of how this fairness framework would operate in practice (for example mobile handset pricing and broadband pricing).

Q2. 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.

We agree that the factors and questions that Ofcom will take into account when assessing fairness are a good starting point for Ofcom's framework.

Q3. What additional information or guidance, if any, would you like to see included in our fairness framework.

While we agree with the principle of Ofcom's proposed framework and high level objectives, we are not clear on how this proposed framework builds on or underpins Ofcom's six Fairness for Customer commitments. Ofcom should set out its framework in more detail, using real or hypothetical examples, to allow providers to see clearly how Ofcom will implement its framework.

We believe that a different approach is required for business customers than for residential customers in a manner that recognises their differing circumstances. It is not currently evident how the flexibility and/or bespoke nature of deals afforded to business customers will be assessed within a fairness framework. In addition, given the competitive nature of the business market, it is vital that any intervention is only considered in relation to areas where research and evidence has specifically identified business customer harm.

A more practicable approach to identifying and responding to vulnerable customers is required; one that recognises the challenges for communications providers of identifying individual customers as vulnerable, realises that incentives must be right for both customers and providers in getting to that identification, and that there is no "one size fits all" approach.

Ofcom should set out a framework for determining the presence of behavioural biases in residential customers. The identification of a bias, and subsequent intervention, should be empirically driven using trials or market studies that focus on direct behavioural data as the basis for intervention.