
Making communications markets work well for customers

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

[Making communications markets work well for customers](#) – Welsh translation



POLICY STATEMENT

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1. Overview

Ensuring fairness for customers is a continuing priority for Ofcom and we have a programme of work to encourage providers to put fairness at the heart of their businesses. We want people to be treated fairly by their provider and to get a good deal. Our fairness framework explains how we are likely to assess fairness concerns when they arise and the kinds of problems that might prompt action from us.

What we have decided

Our fairness framework sets out the types of questions and factors we would be likely to consider in assessing whether customers are being treated fairly. Our duties are underpinned by securing fair outcomes for customers and we take action where necessary to protect people from harmful practices. We set out our likely approach to assessing whether provider practices and the outcomes they generate are unfair, and whether we should intervene to protect customers.

Our fairness framework extends to all aspects of the customer experience, including prices. It is not always immediately clear if a provider's pricing practices are fair or unfair. This can be the case with price discrimination, where different customers pay different prices for the same service. We may welcome this practice where it involves applying discounts to the prices paid by certain groups of customers, such as those on low incomes; or where it promotes switching, thus encouraging healthy competition. But we may be more concerned where different prices are not applied transparently, where behavioural biases are exploited or where price discrimination adversely affects vulnerable customers. We think there are benefits in having an explicit framework for assessing these concerns. However, pricing is not the only aspect of the customer experience where issues of fairness arise and where guidance on our likely approach would be beneficial.

The framework provides us with a tool to assess fairness concerns in the round. We expect to use our fairness framework to assess individual practices and whether they might be considered unfair, on a case-by-case basis. In deciding whether to take formal action against practices we consider are unfair to customers, we will continue to apply our existing regulatory principles and act in line with our statutory duties.

- 1.1 In June 2019, we set out a draft fairness framework and sought views on our proposed approach. In finalising the framework, we have taken careful account of the issues that were raised by stakeholders in response to our discussion paper.
- 1.2 We also took account of the approach that other regulators are taking to address fairness concerns in their sectors. We think it is valuable, where appropriate, to have consistency in the assessment of fairness, while recognising the need for some flexibility to accommodate differences between sectors. In the sectors we regulate, it is important to take account of significant technological change and the scope for network competition, which may sometimes require substantial investment. Encouraging such investment is important because of the benefits it can deliver to customers, which may include improved service

quality and lower prices, as well as access to innovative services. We explicitly recognise this in our framework.

- 1.3 This document summarises the comments that were made on our draft fairness framework, gives our response to those comments and sets out a final framework. The types of questions we are likely to consider when we apply our framework are set out in Figure 1. We also set out the types of factors which, if present, might make us more likely to intervene.

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 and/or other barriers to engagement are exploited in ways that adversely affect customers; Customers are not supported in making well-informed decisions; Problems are not fixed promptly; Accessing complaints processes and independent dispute resolution services is difficult.
Who is being harmed, if anyone?	Vulnerable customers are being harmed; The practice has no offsetting benefits, such as market expansion through low price offers.
What is the extent of the harm, if any?	The harm to each affected customer is significant; Many customers are affected; The practice has persisted and is expected to persist for a long time.
How important is the service?	The service is seen by customers as highly important or essential, rather than 'nice-to-have'.
Does the service depend on risky new investment?	The service is a legacy service with predictable demand and costs (i.e. limited risk) and/or little need for new investment.

Source: Ofcom

- 1.4 Following the publication of this document, we will use the framework as a tool to help us assess fairness concerns that are raised through complaints or through our market monitoring. We will use it to help us decide whether intervention is needed and, if so, what form it should take.

- 1.5 Alongside the use of our fairness framework, we will monitor and report on the ability of customers to get a fair deal for their communications services following our work on end-of-contract notifications (ECNs), mobile handsets and broadband pricing. We will also continue to ensure that companies treat their customers fairly by monitoring the progress providers have made against our fairness for customers commitments¹ and through our policy work more generally.

¹ Ofcom, 3 June 2019, [Britain's biggest broadband and phone firms to put fairness first](#)

2. Introduction and background

Our fairness framework sets out how Ofcom is likely to assess fairness concerns

- 2.1 This document sets out our fairness framework. The framework has been developed to explain how we are likely to assess fairness issues and the kinds of concerns that might prompt us to intervene. It is intended to serve as a guide to providers and others about how we think about the multi-faceted issue of fairness where it arises in communications markets.
- 2.2 Our fairness framework is part of our wider programme of work to ensure fairness for customers. This involves working with providers to ensure that they treat their customers fairly as well as targeted interventions to help customers get better deals. We think the fair treatment of customers is important in order to maintain customers' trust that markets will work for them. Promoting fairness for customers was one of our priorities in 2019/20² and this will continue in 2020/21.³ We expect customers to benefit from the work we have done, including:
- The introduction of a new voluntary compensation scheme in April 2019 that ensures broadband and landline customers automatically get money back from providers signed up to the scheme when they experience missed appointments or face delays getting their connections installed or fixed.⁴
 - The launch of a set of fairness for customers commitments in June 2019 to which all of the UK's biggest telecoms providers have signed up.⁵ These are designed to embed a culture of fairness within the industry. We intend to publish a report to monitor the progress of providers against the commitments in the autumn of 2020.
 - The introduction of ECNs and annual best tariff advice which will come into effect in February 2020.⁶ ECNs will tell customers about any changes to their price at the end of their minimum contract period, the best tariffs available to them and any discounts available to new customers from their provider. Out-of-contract customers will receive advice about their contract status and their provider's best tariffs at least annually.
 - Measures to help customers get better deals for bundled mobile contracts, including price cuts by a number of operators for out-of-contract customers, coming into effect by February 2020.⁷

² Ofcom, 25 March 2019, [Ofcom's Annual Plan: Our programme of work for 2019/20](#)

³ Ofcom, 7 January 2020, [Ofcom's proposed Plan of Work 2020/21](#)

⁴ Ofcom, 1 April 2019, [Automatic compensation: What you need to know](#)

⁵ Ofcom, 3 June 2019, [Britain's biggest broadband and phone firms to put fairness first](#)

⁶ Ofcom, 15 May 2019, [Helping consumers get better deals: Statement on end-of-contract notifications and annual best tariff information](#)

⁷ Ofcom, 22 July 2019, [Helping consumers to get better deals in communications markets: mobile handsets](#)

- Proposals to help customers get better deals in the broadband market, including targeted commitments from major providers to reduce prices for those who are out of contract and protect vulnerable customers.⁸
- A consultation on proposals to improve the fair treatment of customers by, for example, ensuring customers with disabilities receive correspondence on their communications services in an accessible format, banning the sale of ‘locked’ devices and making switching easier and more reliable for broadband and mobile customers.⁹
- We also previously strengthened our rules to require that providers have policies and procedures in place to ensure the fair and appropriate treatment of vulnerable customers. Last year we consulted on a new guide for firms that proposes measures they can take to help identify vulnerable customers and ensure they are being treated fairly.¹⁰

Fairness concerns can arise even in competitive markets

- 2.3 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.¹¹ As set out in our discussion paper, we recognise the importance of promoting competition as a way of delivering benefits to customers. However, we also recognise that sometimes markets which appear competitive, for example where no provider has significant market power, nevertheless fail to deliver fair outcomes for all customers.
- 2.4 One of the reasons for this is that customer participation in markets can be affected by behavioural biases which affect a person’s ability to choose the best deal for them. These biases can be exploited by providers in ways that do not benefit customers so that, for example, they pay more or choose an inferior or over-specified product. The ability of providers to exploit customers is likely to increase as data capture and data analytics advance, creating the potential for increased price discrimination.¹²
- 2.5 In these circumstances, there may be a case for intervention to help secure fairer outcomes for customers.
- 2.6 Regulators are increasingly being asked to assess these kinds of issues. The Government published a Consumer Green Paper¹³ in April 2018 that raised concerns about the gap between the best and worst deals received by customers and pointed to the practice of

⁸ Ofcom, 25 September 2019, [Helping consumers get better deals: A review of pricing practices in fixed broadband](#)

⁹ Ofcom, 17 December 2019, [Fair treatment and easier switching for broadband and mobile customers: Proposals to implement the new European Electronic Communications Code](#)

¹⁰ Ofcom, 25 September 2019, [Treating vulnerable consumers fairly: A proposed guide for phone, broadband and pay-TV providers](#)

¹¹ Communications Act 2003, [Section 3\(1\)](#)

¹² Developments in big data and algorithms could give providers the ability to personalise prices in a much more sophisticated way

¹³ Department for Business, Energy & Industrial Strategy, April 2018, [Modernising consumer markets: consumer green paper](#)

charging higher prices to disengaged customers as a new challenge for regulators.¹⁴ In September 2018, Citizens Advice made a super-complaint to the Competition and Markets Authority (CMA) calling for action on that same issue.¹⁵ In the CMA’s response to the super-complaint in December, it noted that “better and fairer” outcomes were required for customers.¹⁶

2.7 Ofcom has a long track record of pursuing measures to protect customers where they are not being treated fairly. Some examples of this are set out above in paragraph 2.2. In this document, we set out a principles-based approach to assessing whether there is a fairness concern.

Our fairness framework is complementary to our existing regulatory tools and guidance

2.8 The framework is intended to provide more clarity about how we are likely to approach fairness concerns. We will use it as a tool to assist us in determining where best to focus our resources to ensure that customers are treated fairly. Where, either through our monitoring or through the complaints we receive, we are alerted to a potential fairness concern, we are likely to use the fairness framework to determine whether a more in-depth review is warranted.

2.9 It should not be seen as a substitute for existing guidance, such as our enforcement guidelines and nor is it a substitute for existing legal requirements with which providers have to comply. Rather, it is complementary to Ofcom’s existing regulatory tools and guidance.

2.10 Where we think it is necessary to undertake a review of a fairness concern, we will continue to operate in line with our regulatory principles, including operating with a bias against intervention.¹⁷ We will also continue to seek the least intrusive regulatory mechanisms to achieve our policy objectives and to ensure that these are evidence-based, proportionate, consistent, accountable and transparent. We are likely to use the fairness framework to help identify interventions that meet those requirements.

¹⁴ Department for Business, Energy & Industrial Strategy, April 2018, [Modernising consumer markets: consumer green paper](#), paragraph 40. The Government’s Statement of Strategic Priorities, published in October 2019, also included as priorities tackling harmful industry practices and improving the support available to vulnerable consumers and ensuring that all consumers get better outcomes. We have had regard to this statement in finalising the framework. DCMS, October 2019, [Statement of Strategic Priorities for telecommunications, the management of radio spectrum, and postal services](#)

¹⁵ Citizens Advice, 28 September 2018, [Excessive prices for disengaged consumers a super-complaint to the competition and markets authority](#)

¹⁶ CMA, 19 December 2018, [Tackling the loyalty penalty: Response to a super-complaint made by Citizens Advice on 28 September 2018](#), page 5

¹⁷ Ofcom, [Ofcom’s Annual Plan 2005/06: Consultation Document](#), paragraph 2.4

Our approach is consistent with other regulators but tailored to communications markets

- 2.11 In our draft fairness framework, we noted that our approach was similar to the Financial Conduct Authority's (FCA's) fairness framework.¹⁸ We think there is value in having a broadly consistent approach across regulators because fairness concerns may arise in many sectors and, of course, customers participate in many markets across different sectors. If a customer is disengaged or vulnerable, they may have difficulty finding the best deals for them in several markets, and firms in different markets may engage in similar practices to exploit this.
- 2.12 However, we also noted that it is important not to lose sight of the differences between regulated sectors. A distinguishing feature of communications markets is the presence of significant ongoing technological change that may extend to the underlying networks used to deliver services. The introduction of new technology or a new service is likely to require significant investment before it is clear how much demand there is for it. If this investment is to take place, providers need to have the right incentives for the degree of risk involved. We think it is important for our framework to reflect this feature of communications markets.

This document

- 2.13 In June 2019, we issued a discussion paper that outlined our proposed approach to assessing fairness concerns. We received around 20 responses to the discussion paper during the consultation period. This document summarises the main points that were raised in responses and our conclusions on those points. We close this document by setting out our final fairness framework, which includes the key elements of our approach and the questions we would be likely to use to assess our concerns.

¹⁸ FCA, July 2019, [Fair Pricing in Financial Services: summary of responses and next steps: Feedback Statement](#)

3. Summary of responses

Scope of the framework

Services in scope

Our proposal

3.1 In our discussion paper, we noted that the fairness framework would be applied to assess fairness in broadband, mobile, home phone and pay-TV services.¹⁹ We also noted that the application of the framework was not intended to be static and it could be adapted as new matters arose.²⁰

Discussion paper responses

3.2 The Communications Consumer Panel (CCP) encouraged us to expand the scope of the framework to cover the whole of the communications sector, including postal services. In their view, this would allow us “to take a holistic approach to fairness for customers”.²¹ The Campaign to Retain Payphones (CARP) also suggested that public telephone boxes be included in the framework.²²

Our conclusions

3.3 The focus of the framework on telecommunications services, which fall within the statutory definition of ‘electronic communications services’, is in line with the current focus of the public debate around fairness in our sector, such as the potential for longstanding broadband or mobile customers to pay considerably higher prices than new customers.²³

3.4 We also consider fair outcomes for customers of postal services are important. However, the different market circumstances and legislative framework applicable to that sector mean that we have not extended the scope to postal services. Some of the features that have led to fairness issues in other markets are not present in the postal services market. Individual customers and SMEs use the postal service as they need it (using ‘single piece’ products) without an ongoing contract or the need to negotiate terms with the postal service provider when they do so. We also already impose a price cap on standard class letters and small parcels through the ‘safeguard cap’.²⁴ This helps to ensure a basic

¹⁹ Ofcom, 17 June 2019, [Making communications markets work well for customers: A framework for assessing fairness in broadband, mobile, home phone and pay-TV](#), page 1

²⁰ Ofcom, 17 June 2019, [Making communications markets work well for customers: A framework for assessing fairness in broadband, mobile, home phone and pay-TV](#), paragraph 3.23

²¹ [CCP and ACOD response](#), page 2

²² [CARP response](#), page 1

²³ See for example, Citizens Advice, 28 September 2018, [Excessive prices for disengaged consumers: A super-complaint to the Competition and Markets Authority](#)

²⁴ Ofcom, 17 January 2019, [Statement: Review of Second Class stamp safeguard caps](#)

universal service is available to all at affordable prices, and to ensure that users of postal services, especially vulnerable customers, are protected. Public call boxes are also subject to specific universal service conditions for their provision.²⁵

Customers in scope

Our proposal

- 3.5 The primary focus as set out in our draft framework was on the relationship between providers and retail customers – or different groups of retail customers – rather than on relationships at the wholesale level.²⁶ We already have an established approach to dealing with fairness between providers and our fairness framework does not alter that approach.²⁷
- 3.6 In terms of the type of customers who are in scope, our discussion paper referred to customers as a whole and did not make any particular distinction, for example, between residential and business customers. We did, however, note that provider practices can affect customers differently. For example, business customers, in common with residential customers, may be subject to procedural unfairness but firms' purchasing decisions may be less likely to be subject to behavioural biases.²⁸ We also considered that distributive fairness concerns, which arise from differences in outcomes between customers, are less likely to be relevant where the customers in question are businesses.

Discussion paper responses

- 3.7 Some of the respondents to our discussion paper felt that it was unclear whether the framework was intended to apply to both residential and business customers. The CCP and Ombudsman Services suggested that small businesses should be included, given that they face similar challenges to residential customers.²⁹ BT Group felt, however, that the application of the framework to business customers had not been appropriately assessed. In BT Group's view, "...a different approach is required for business customers which reflects the fact that they are generally better equipped to engage."³⁰

²⁵ The designation of universal service providers can be found here: Oftel, 22 July 2003, [Designation of BT and Kingston as universal service providers, and the specific universal service conditions](#). Amendments to the universal service conditions can be found here: Ofcom, 23 April 2014, [Designation of BT and Kingston as universal service providers, and the specific universal service conditions](#)

²⁶ Ofcom, 17 June 2019, [Making communications markets work well for customers: A framework for assessing fairness in broadband, mobile, home phone and pay-TV](#), paragraph 1.3

²⁷ For example, under the [Communications Act 2003](#), Ofcom can set conditions on providers where significant market power has been established which may include requiring those providers to offer their services on "fair and reasonable terms", see Sections 78 to 104. The Access to Infrastructure Regulations also require that access to physical infrastructure is given on fair and reasonable terms. For a recent example see Ofcom, 28 June 2019, [Promoting competition and investment in fibre networks: review of the physical infrastructure and business connectivity markets](#)

²⁸ OFT, March 2010, [What does Behavioural Economics mean for Competition Policy?](#), section 3.2.

²⁹ [CCP and ACOD response](#), page 2 and page 7, [Ombudsman Services](#), page 3

³⁰ [BT Group response](#), page 8

Our conclusions

- 3.8 Unfair treatment by providers can affect both residential and business customers and as such the framework may be applied to both groups. This is consistent with the approach we have taken in our other work – like that on ECNs³¹ – where we make judgments about the types of interventions that should apply to residential customers and business customers.
- 3.9 However, while we expect to apply the framework to transactions involving either residential or business customers, we think it allows sufficient flexibility to take into account the particular circumstances of the customers being considered. For example, we acknowledge that some businesses may be better equipped with the skills and resources needed to manage their communications services and their interactions with providers than residential customers. As we noted in our ECNs statement, “...it is reasonable to assume that larger businesses are more likely to have a specialist responsible for the management of their communications services and are more likely to be better equipped to manage their communications contracts”.³² On the other hand, “some smaller businesses behave in a similar way to residential customers”.³³
- 3.10 In our ECNs statement we therefore imposed less prescriptive requirements for business customers than for residential customers, and providers have more flexibility in how they choose to communicate with their business customers.³⁴ This nuanced approach to different customer groups, while making the point that fairness is important for all customers, is consistent with our fairness framework.

Fairness standards in communications markets compared with other consumer markets

Our proposal

- 3.11 In our discussion paper, we noted that competition alone does not always achieve fair outcomes for customers in communications markets and that in some cases there may be cause for us to intervene to help secure fairer outcomes. We think this is important for maintaining customers’ trust that communications markets will work for them.³⁵

³¹ Ofcom, 15 May 2019, [Helping consumers get better deals: Statement on end-of-contract notifications and annual best tariff information](#), page 15

³² Ofcom, 15 May 2019, [Helping consumers get better deals: Statement on end-of-contract notifications and annual best tariff information](#), paragraph 8.12

³³ Ofcom, 15 May 2019, [Helping consumers get better deals: Statement on end-of-contract notifications and annual best tariff information](#), paragraph 8.13. The European Electronic Communications Code (EECC) also recognises that the bargaining position of small and micro businesses is comparable to that of consumers and that they should benefit from the same level of protection, [EECC](#), Recital 259.

³⁴ Ofcom, 15 May 2019, [Helping consumers get better deals: Statement on end-of-contract notifications and annual best tariff information](#), paragraph 8.6,

³⁵ Ofcom, 17 June 2019, [Making communications markets work well for customers: A framework for assessing fairness in broadband, mobile, home phone and pay-TV](#), paragraph 2.4

- 3.12 One element in our thinking about whether a practice looks concerning is the importance to customers of the service in question. We said we would be more likely to be concerned where customers view the service as being essential to their daily lives.³⁶

Discussion paper responses

- 3.13 Virgin Media said that Ofcom should consider whether a particular practice is “...common for other products or services throughout the economy” and that if they are not considered unfair in those cases then “special justification” is needed for them to be unfair in telecoms.³⁷

Our conclusions

- 3.14 We consider that the widespread use of a practice across sectors is not necessarily an indication of whether or not it is fair, either generally or in a specific sector. Some of the practices we have been looking into are typically considered unfair in a number of markets e.g. exploitation of disengagement, particularly where this affects vulnerable customers.
- 3.15 Moreover, markets and sectors differ in important respects, so applying a similar framework may lead us to conclude that some practices that might be permissible in other sectors might not be acceptable in communications markets and vice versa. For example, communications services are an essential part of many customers’ daily lives, especially as important services (including public services) increasingly shift online. This could be the case particularly for some vulnerable customers who depend on their communications services, for example if they cannot easily leave their homes because of disability or illness.

Application of the framework

Treatment of behavioural biases

Our proposal

- 3.16 In our discussion paper, we highlighted the increasing awareness that customers’ behavioural biases may constrain their ability to choose deals that are right for their needs.³⁸ We explained that the exploitation of behavioural biases would concern us where this impairs a customer’s ability “to make well-informed decisions or which mean they make decisions which are not in their best interests” or where this leads to the provision of a service quality which does not meet reasonable expectations.³⁹

³⁶ Ofcom, 17 June 2019, [Making communications markets work well for customers: A framework for assessing fairness in broadband, mobile, home phone and pay-TV](#), paragraph 3.43

³⁷ [Virgin Media response](#), page 1

³⁸ Ofcom, 17 June 2019, [Making communications markets work well for customers: A framework for assessing fairness in broadband, mobile, home phone and pay-TV](#), paragraph 2.6

³⁹ Ofcom, 17 June 2019, [Making communications markets work well for customers: A framework for assessing fairness in broadband, mobile, home phone and pay-TV](#), paragraph 3.27

Discussion paper responses

- 3.17 Many stakeholders agreed that Ofcom should consider the exploitation of behavioural biases as part of its fairness framework. For example, Citizens Advice said that, “we should be concerned when price discrimination results from the exploitation of behavioural biases and/or hurts vulnerable customers”.⁴⁰ Which? also thought that tackling unfairness required addressing the exploitation of behavioural biases.⁴¹
- 3.18 Vodafone agreed that deliberately exploiting customers’ behavioural biases would be unfair.⁴² However, they also considered that “in practice, it may be hard to draw the line between firms exploiting behavioural biases, or trying to attract consumers in a competitive market place”.⁴³
- 3.19 Several stakeholders sought more detail about the behavioural biases that may raise fairness concerns. Citizens Advice, for example, asked that it be made clear “that consumer inertia is a behavioural bias”.⁴⁴ Some providers, meanwhile, were of the view that the draft framework did not set out enough detail on how behavioural biases would be evaluated. Virgin Media and BT Group asked for further guidance on this. BT Group emphasised the importance of undertaking a careful assessment of customers’ revealed preferences in order to understand how customers make decisions and how firms respond, before intervening in cases of apparent exploitation of behavioural biases.⁴⁵
- 3.20 Sky felt that the section on behavioural biases warranted “further careful consideration” because, in Sky’s view, the draft framework suggested that acting upon biases is inherently unfair.⁴⁶ Sky said that, in fact, there may be circumstances in which such exploitation would not be concerning, giving the example of investment in a corporate logo that would explicitly or implicitly take advantage of a range of different behavioural biases e.g. a preference for pictures over words.

Our conclusions

- 3.21 There are a variety of behavioural biases that may affect customers’ decision making in different circumstances.⁴⁷ Where these biases are particularly common across customers, it is likely to be rational (profit maximising) for providers to take advantage of them. However, the more these behavioural biases are exploited in ways that harm customers, particularly vulnerable customers, the more we are likely to consider that providers are behaving unfairly.
- 3.22 Some of the most common behavioural biases are set out in Table 1 below.

⁴⁰ [Citizens Advice response](#), page 6

⁴¹ [Which? response](#), page 2

⁴² [Vodafone response](#), page 6

⁴³ [Vodafone response](#), page 6

⁴⁴ [Citizens Advice response](#), page 6

⁴⁵ [BT Group response](#), page 4

⁴⁶ [Sky response](#), page 4

⁴⁷ See for example, Amelia Fletcher, Centre for Competition Policy, 7 November 2016, [The Role of Demand-Side Remedies in Driving Effective Competition: A Review for Which?](#), paragraph 1.25

Table 1: Common behavioural biases affecting customers

Behavioural bias	Description
Status quo bias and loss aversion	<ul style="list-style-type: none"> • Customers give disproportionate weight to maintaining the status quo and value a loss relative to the status quo more highly than an equivalent gain • This can exacerbate the perception of costs that customers face in switching
Myopia	<ul style="list-style-type: none"> • Customer preferences can be biased towards the present at the expense of future implications of their choices • Customers may therefore fail to allow for future fees and charges when making choices
Default bias/inertia	<ul style="list-style-type: none"> • Customers tend to accept default options even when presented with more favourable alternatives • This can incentivise providers to set options which are more profitable for them as a default, when consumer needs would be better met by an alternative
Prominence / framing	<ul style="list-style-type: none"> • Customers may simplify their decision-making by focusing on the most salient or prominent aspects of the product • How alternatives are presented can then affect consumer decision making. Providers can frame choices to seek to influence consumer decision making to their advantage by, for example, making low introductory prices more prominent than higher charges that apply later
Over-confidence	<ul style="list-style-type: none"> • Customers may feel more confident than is justified about their own future behaviour, such as their ability to avoid high charges by switching provider at the end of a contract
Confirmation bias	<ul style="list-style-type: none"> • Customers may focus on evidence that confirms existing beliefs and ignore contradictory evidence

Source: Ofcom and Centre for Competition Policy (2016)⁴⁸

⁴⁸ Ofcom, 28 October 2019, [Online market failures and harms: An economic perspective on the challenges and opportunities in regulating online services](#), paragraph 3.19 and Amelia Fletcher, Centre for Competition Policy, 7 November 2016, [The Role of Demand-Side Remedies in Driving Effective Competition: A Review for Which?](#), paragraph 1.25

- 3.23 We would expect different behavioural biases to be relevant to different fairness concerns and therefore would assess their relevance on a case-by-case basis.
- 3.24 It is similarly difficult to set out *ex ante* the particular practices that would constitute exploitation. This is because different behavioural biases affect customers differently. However, we can set out when we would be more or less likely to be concerned about behavioural biases. We would be more likely to be concerned in the following cases:
- if the exploitation of biases resulted in an outcome that harmed vulnerable customers;
 - if many customers were negatively affected; or
 - if the harm to each affected customer was significant.
- 3.25 While providers could act in a way that exploits behavioural biases to the detriment of customers, we recognise that these biases also represent an opportunity for providers to help their customers if harnessed in the right way. For example, providers could utilise the bias of some customers to encourage movement towards a broadband service that is better suited to them by increasing the prominence of information that helps them make the right choice for their needs.
- 3.26 Taking Sky’s point about investment in brand image as an example of harnessing behavioural biases, we accept that providers are incentivised to exploit biases. We also note that there are many features of customer behaviour that will be exploited for commercial gain and that not all of these practices will be problematic.⁴⁹ Our framework provides a way of determining when these practices might be concerning, without being prescriptive.
- 3.27 Our assessments of this sort of conduct will be focussed carefully on whether the outcomes for customers are likely to be in their best interests, in particular, where some customers gain while others lose out. For example, where exploitation of behavioural biases results in some customers paying higher prices and others lower prices for the same service, we are likely to be most concerned where the conduct adversely affects vulnerable customers.

Time period for considering distributive fairness

Our proposal

- 3.28 In our discussion paper, we noted that distributive fairness 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.⁵⁰

⁴⁹ OFT, 2010, [What does behavioural economics mean for competition policy?](#) Page 30 states that, “In most circumstances, the pricing, marketing, and advertising practices of firms can still be viewed as benign with no need for action, even where they undoubtedly seek to exploit behavioural biases.”

⁵⁰ Ofcom, 17 June 2019, [Making communications markets work well for customers: A framework for assessing fairness in broadband, mobile, home phone and pay-TV](#), paragraph 3.1

- 3.29 We highlighted that distributive fairness may be significantly affected by practices that exploit the behavioural biases or vulnerability of some customers. Where this occurs, regulators are required to make judgements in which the benefits to one group of customers must be weighed against the costs to another group.⁵¹

Discussion paper responses

- 3.30 Virgin Media noted that distributive fairness should not only consider a static comparison of the customer's position against other customers at a particular point in time but that it should also take account of the customer's position relative to their own previous position.⁵² In particular, Virgin Media said that "[i]n broadband, competition and investment has meant that customers are much better off than they were in the past" and further that "[i]f all customers are better off than they were, but some are better off than others, this should matter".⁵³
- 3.31 Sky noted that the "dynamic benefit of differentiated pricing is often overlooked in discussion of this subject".⁵⁴ It noted that differentiated pricing could lead to new products being provided that would be unviable with uniform prices.
- 3.32 The CCP considered that guidelines on the measurement of distributive fairness would be useful.⁵⁵

Our conclusions

- 3.33 We agree that there is value in looking at how customer outcomes have evolved over time, as part of considering whether, in the round, customers are getting good deals in a market. In a competitive market, we would expect the benefits of cost reductions, investment and technical progress to be passed on to customers over time in the form of lower prices and better products. Given the scale of the improvements in broadband services noted by Virgin Media, it would be a concern if some customers were missing out on these gains completely.
- 3.34 However, even where all customers are getting a better or cheaper service than they used to, fairness concerns can still arise. For example, if the gains from progress are unevenly distributed, differences between customers can become accentuated over time. If so, we may then need to consider whether growing disparities between customers are the result of procedural unfairness or adversely affect vulnerable customers, using our framework.
- 3.35 Accordingly, even where customer outcomes are generally improving over time, we may still have fairness concerns about the outcomes for one group of customers as compared to another group at a particular point in time, or customers being treated in a way that

⁵¹ Ofcom, 17 June 2019, [Making communications markets work well for customers: A framework for assessing fairness in broadband, mobile, home phone and pay-TV](#), paragraph 3.16

⁵² [Virgin Media response](#), pages 2-3

⁵³ [Virgin Media response](#), page 1

⁵⁴ [Sky response](#), page 3

⁵⁵ [CCP and ACOD response](#), page 4

does not support them in finding the best deal for their needs. This is particularly the case, as we suggested in our draft framework, if vulnerable customers are amongst the customers getting poor deals. The approach in our broadband pricing review is consistent with this approach.⁵⁶

3.36 We agree with Sky that price discrimination can lead to beneficial outcomes for customers, for instance through offering discounts to lower income customers. We note the FCA's interim report on insurance pricing practices which says that price discrimination can intensify competition and reduce average prices. But it is not always the case that price discrimination produces these benefits.

3.37 The FCA's interim report also noted that price discrimination can dampen competition and raise average prices, stating that "this is most likely to happen where higher prices are charged to those consumers who lack awareness".⁵⁷ Similarly, discrimination of this kind in communications markets is likely to cause fairness concerns and to warrant intervention.

Approach to considering vulnerable customers

Our proposal

3.38 In our draft fairness framework we noted that we are most likely to be concerned when provider behaviour leads to poor outcomes for vulnerable customers.⁵⁸ This is in line with our regulatory duties which require us to take into account the vulnerability of those whose circumstances appear to put them in need of special protection, as well as the needs of people with disabilities, the elderly and those on low incomes.⁵⁹

Discussion paper responses

3.39 In its response, BT Group agreed that more should be done to ensure that vulnerable customers are able to engage in the market.⁶⁰ However, it suggested that Ofcom "moves beyond referring generically to "vulnerable customers""⁶¹ and also noted that "[t]here is no 'one size fits all' solution for identifying and supporting vulnerable customers".⁶² Vodafone also generally agreed that if customers were vulnerable and this affected their ability to engage in the market, causing them harm, there may be a reason for concern.⁶³ However, Vodafone noted that it is not easy to identify these customers and using "criteria such as age, or 'vulnerability flags' may both over and underestimate the number of customers who may be affected".⁶⁴ It also urged caution in "equating unengaged

⁵⁶ Ofcom, 25 September 2019, [Helping consumers get better deals: A review of pricing practices in fixed broadband](#)

⁵⁷ FCA, October 2019, [General insurance pricing practices interim report](#), paragraphs 5.4 – 5.6

⁵⁸ Ofcom, 17 June 2019, [Making communications markets work well for customers: A framework for assessing fairness in broadband, mobile, home phone and pay-TV](#), paragraph 3.41

⁵⁹ Communications Act 2003, [Section 3\(4\)](#)

⁶⁰ [BT Group response](#), page 6

⁶¹ [BT Group response](#), page 6

⁶² [BT Group response](#), page 6

⁶³ [Vodafone response](#), page 7

⁶⁴ [Vodafone response](#), page 7

consumers with vulnerable consumers”,⁶⁵ noting that consumers may not engage with the market for reasons that are unrelated to vulnerability.⁶⁶

- 3.40 The Consumer Council for Northern Ireland (CCNI) recommended that Ofcom provide guidance to providers on how to identify and provide assistance to customers in vulnerable circumstances.⁶⁷

Our conclusions

- 3.41 In light of our duties, the fair treatment of vulnerable customers is and will continue to be a priority for us when we carry out our functions.⁶⁸
- 3.42 General Condition C5.3 sets out a non-exhaustive list of circumstances that could indicate that a customer is vulnerable. These are age, a physical or learning disability, a physical or mental illness, low literacy, communications difficulties or changes in circumstances such as bereavement. We also recognise that other factors or changes in personal circumstances could contribute to a person becoming vulnerable, for example, job loss or other changes in income, and as noted above, our duties require us to consider the needs of those on low incomes.⁶⁹ Some people may face a combination of circumstances at any point and their vulnerability may change over time.⁷⁰
- 3.43 Vulnerable people may find it challenging to deal with some personal matters, including managing their broadband, phone and TV services. For example, a customer experiencing anxiety might find it very stressful to speak to their provider about their services over the telephone. Furthermore, someone with low literacy may struggle to understand complicated paperwork about the services they have purchased. In our proposed guide for treating vulnerable customers fairly,⁷¹ we therefore set out a range of measures firms can take to help improve customer service for vulnerable groups and give them the help, support and services they need.
- 3.44 We recognise that identifying who is potentially vulnerable can sometimes be challenging for providers, but this is a first step in providing better support to those customers. As noted in the proposed guide, it is important that providers take steps to improve how they identify vulnerable customers.
- 3.45 In response to Vodafone’s point, we agree that disengagement does not necessarily imply vulnerability and that not all vulnerable customers will have difficulty engaging. That said, our research shows that barriers to engagement and behavioural biases can be more

⁶⁵ [Vodafone response](#), page 8

⁶⁶ [Vodafone response](#), page 8

⁶⁷ [CCNI response](#), page 3

⁶⁸ Ofcom, 25 September 2019, [Treating vulnerable consumers fairly: A proposed guide for phone, broadband and pay-TV providers](#), paragraph 2.4

⁶⁹ Communications Act 2003, [Section 3\(4\)](#)

⁷⁰ Ofcom, 25 September 2019, [Treating vulnerable consumers fairly: A proposed guide for phone, broadband and pay-TV providers](#), paragraph 3.6

⁷¹ Ofcom, 25 September 2019, [Treating vulnerable consumers fairly: A proposed guide for phone, broadband and pay-TV providers](#)

prominent among some vulnerable customers.⁷² Further, we do have concerns about disengagement more generally, particularly where this is associated with procedural unfairness.

Remedies and monitoring

Our proposal

3.46 In our discussion paper, we said that where fairness concerns arise and where we think intervention is necessary, we would seek to impose appropriate and proportionate remedies. In broad terms this included making or modifying regulatory conditions, enforcing existing regulatory obligations and working with providers on a voluntary basis. We further noted that if we did not have the appropriate powers, we could raise the issue with Government.

Discussion paper responses

3.47 Citizens Advice⁷³ and Which?⁷⁴ asked for more detail on how Ofcom will choose the most appropriate remedy when ‘unfairness’ has been identified. Citizens Advice felt that Ofcom should be explicit about the powers it would use for redressing unfair practices when voluntary commitments fall short and should also explore in more detail the consequences of not intervening.⁷⁵ Citizens Advice also felt that Ofcom should outline the processes it will put in place to monitor provider practices.⁷⁶

Our conclusions

3.48 We have a range of interventions available to us and the appropriate remedy (or remedies) will differ with each case. Our approach is to seek the least intrusive remedies that are likely to be effective. In the initial conclusions to our broadband pricing review, for example, we set out a range of measures to help out-of-contract customers who are paying higher prices, particularly where those customers are vulnerable. These included voluntary commitments from providers and some targeted measures being considered by Ofcom, such as exploring the case for a new social tariff and guidance for providers in meeting the general condition on the treatment of vulnerable customers.⁷⁷

3.49 We agree that monitoring remedies once they have come into effect is very important to determine whether customers are getting a better experience as a result, and that any fairness concerns have been addressed. We are working on monitoring plans for ECNs and annual best tariff notifications as well as on mobile pricing and will also set out a

⁷² Ofcom, 25 September 2019, [Helping consumers get better deals: A review of pricing practices in fixed broadband](#), paragraphs 4.36-4.54

⁷³ [Citizens Advice response](#), page 5

⁷⁴ [Which? response](#), page 3

⁷⁵ [Citizens Advice response](#), page 5

⁷⁶ [Citizens Advice response](#), page 11

⁷⁷ Ofcom, 25 September 2019, [Helping consumers get better deals: A review of pricing practices in fixed broadband](#), paragraphs 1.34-1.46

monitoring plan when we conclude our review of broadband pricing. In relation to our fairness for customers commitments, we will monitor providers' progress in relation to the commitments and have plans to publish a progress report in autumn 2020.

Application of the framework in practice

Our proposal

- 3.50 Our discussion paper set out the types of questions we are likely to consider when we apply our framework, in order to identify whether unfairness is present. We also set out the types of factors which, if present, might make us more likely to intervene.⁷⁸ We note, however, that the sorts of questions and factors we outline are not exhaustive and nor are they a checklist. For any particular case, we would consider relevant questions in the round, with no one factor being determinative on its own.⁷⁹

Discussion paper responses

- 3.51 Which? suggested that Ofcom should publish the details of how it plans to apply the framework in practice.⁸⁰ Three noted that "it would be helpful to have more examples of what might be treated as 'fair' and 'unfair' practices"⁸¹ and also said that it would welcome "guidance setting out a practical example of how and when Ofcom may or may not consider fairness".⁸² BT Group made a similar point noting that it would be helpful to have practical examples of how the framework "would support decision making in practice".⁸³
- 3.52 The CCP asked specifically for further details on how Ofcom will establish "the extent by which customers are winners or losers" and on "why, when and whether some customers will subsidise others".⁸⁴

Our conclusions

- 3.53 As set out in our discussion paper, we would expect to assess fairness issues on a case-by-case basis, using the fairness framework as a tool in those assessments. Given the complex nature of fairness concerns and the fact that different considerations might point in different directions, we would not apply the framework in a mechanistic way but would consider the relevant factors in the round.
- 3.54 Setting out a step-by-step process for how the framework will be applied in practice is unlikely to provide greater clarity on the resolution of particular cases, since assessment

⁷⁸ Ofcom, 17 June 2019, [Making communications markets work well for customers: A framework for assessing fairness in broadband, mobile, home phone and pay-TV](#), paragraph 3.29

⁷⁹ Ofcom, 17 June 2019, [Making communications markets work well for customers: A framework for assessing fairness in broadband, mobile, home phone and pay-TV](#), paragraph 3.31

⁸⁰ [Which? response](#), page 3

⁸¹ [Three response](#), page 7

⁸² [Three response](#), page 7

⁸³ [BT Group response](#), page 3

⁸⁴ [CCP and ACOD response](#), page 4

will depend on the facts of the case – for example, how significant the effects found in relation to each question were – and an evaluation in the round. That said, the initial findings from our recent review of broadband pricing and our statement and consultation on bundled mobile contracts are examples of how the framework has been applied in our work to date.⁸⁵

3.55 In Annex A1 to this document, we reproduce the table we included in the initial conclusions of our broadband pricing review to show how the draft fairness framework guided our approach to that review. As shown in the table, we focused on identifying the form of harm and those who suffered it, placing particular emphasis on vulnerable customers and on remedies designed to protect them.⁸⁶

Interactions between the framework and Ofcom’s existing regulatory tools and practices

Our proposal

3.56 As set out in our discussion paper, the framework is likely to be used where, for example, we receive complaints, or where our market monitoring raises concerns about the fairness of outcomes for customers in communications markets.⁸⁷ We will continue to operate in line with our existing regulatory principles as well as our statutory duties, and with a bias against intervention, seeking the least intrusive regulatory mechanisms to achieve our policy objectives. We will ensure that these regulatory mechanisms are evidence-based, proportionate, consistent, accountable and transparent.⁸⁸

3.57 We also set out the factors which we proposed to take into account when considering the consequence of intervening. These included:

- whether the problem may be self-correcting over time, making intervention redundant (if a problem has persisted for a long time this suggests that self-correction may be unlikely);
- if the costs of regulation are likely to be higher than the benefits realised;
- whether the remedy is likely to be effective; and
- whether the proposed remedies could distort markets.⁸⁹

⁸⁵ See Ofcom, 25 September 2019, [Helping consumers get better deals: A review of pricing practices in fixed broadband](#) and Ofcom, 22 July 2019, [Helping consumers to get better deals in communications markets: mobile handsets](#)

⁸⁶ Ofcom, 25 September 2019, [Helping consumers get better deals: A review of pricing practices in fixed broadband](#), A2. Fairness Framework

⁸⁷ Ofcom, 17 June 2019, [Making communications markets work well for customers: A framework for assessing fairness in broadband, mobile, home phone and pay-TV](#), paragraph 3.25

⁸⁸ Ofcom, 17 June 2019, [Making communications markets work well for customers: A framework for assessing fairness in broadband, mobile, home phone and pay-TV](#), paragraph 3.24

⁸⁹ Ofcom, 17 June 2019, [Making communications markets work well for customers: A framework for assessing fairness in broadband, mobile, home phone and pay-TV](#), paragraph 3.47

Discussion paper responses

- 3.58 Providers were generally supportive of our proposals. Sky commented that “the amorphous nature of the concept of fairness potentially increases the regulatory uncertainty faced by firms, which is detrimental to investment, employment and innovation” and that the discussion paper “reduces the uncertainty faced by Ofcom’s stakeholders”.⁹⁰
- 3.59 However, there were some questions about whether or not it would lead to more interventions. Sky noted the risk that “delivering ‘fairness’ is used as a justification for an ever-increasing array of interventions”.⁹¹ Citizens Advice felt, however, that our fairness framework did not place enough emphasis on regulatory interventions, and that we ought to consider the benefits of intervening and the consequences of not doing so.⁹²
- 3.60 Other respondents were interested in what the framework meant for our regulatory principles, such as the bias against intervention and proportionality. Vodafone, for instance, recommended that we conduct impact assessments of potential intervention, including the impact on all customer groups.⁹³ There were also some questions about how the framework would interact with Ofcom’s other regulatory tools.
- 3.61 In particular, further explanation was sought on how the fairness framework would fit with existing laws, regulatory obligations and procedural guidance such as our enforcement guidelines. For example, BT Group sought clarity as to what the implications of the framework would be in respect of established consumer law principles, particularly regarding disputes around “core” contract terms, which are not subject to a legal test for fairness.⁹⁴ Three also considered that there was a need for “guidance setting out a practical example of how and when Ofcom may or may not consider fairness in the context of enforcing existing regulatory obligations”,⁹⁵ such as under Ofcom’s General Conditions, and especially in light of the implementation of the European Electronic Communications Code (‘the EECC’).
- 3.62 BT Group also raised a more general point about how fairness considerations would work in the context of Ofcom’s existing enforcement guidelines, and the legal basis on which the fairness framework was established. Both BT Group and Three were unsure of the relationship between the framework and the fairness commitments which they and other providers had voluntarily pledged to uphold.

⁹⁰ [Sky response](#), page 2

⁹¹ [Sky response](#), page 2

⁹² [Citizens Advice response](#), pages 4 and 10

⁹³ [Vodafone response](#), page 10

⁹⁴ [BT Group response](#), page 3

⁹⁵ [Three response](#), page 7

Our conclusions

- 3.63 The framework is a tool that fits within our existing regulatory processes. It does not change our regulatory principles and statutory duties, nor does it change what obligations are imposed on providers in light of them. Our principal statutory duty is to further the interests of citizens and consumers. Fairness is at the heart of that.
- 3.64 The framework is part of our broader programme of work on fairness for customers and reflects our strategic priority for 2019/20,⁹⁶ continuing into 2020/21,⁹⁷ to positively promote fair outcomes for customers at a time when communications services are playing an ever more essential role in our everyday lives.
- 3.65 It is intended to help providers by setting out how we are likely to assess fairness when considering whether and when to act. As part of our fairness programme we have also developed fairness for customers commitments which the UK's major broadband, mobile and pay TV providers signed up to in June 2019. Ofcom developed the commitments to strengthen how companies treat their customers throughout the customer journey. The commitments are designed to embed a culture of fairness within industry. Where a provider's practices are in line with the fairness for customers commitments, it is less likely that we would find a fairness concern for that provider.
- 3.66 We will apply the framework in a way that is consistent with our existing regulatory principles such as the bias against intervention, acting proportionately and targeting action only where it is needed. It does not signal a more interventionist approach but is an instrument to help us assess whether customers are getting fair outcomes and, where we have the power to intervene, whether, where, and how we might do so.
- 3.67 In relevant cases, we can use it to help us consider whether the bias against intervention should be overcome, or whether a case or single issue is one to which particular action should be targeted and where an intervention would be proportionate. We will continue to consider and take account of the possible impacts, costs and benefits of any given intervention. The framework does not alter, expand, or add to the legal tests required to justify intervention.
- 3.68 The framework is also consistent with existing regulatory obligations and consumer laws that seek to secure fair outcomes for customers and our enforcement guidelines. It does not replace or change providers' obligations under those provisions or the way we are likely to approach enforcement as set out in those guidelines. Nor does it impose new or additional requirements or tests that providers, or Ofcom, must meet in relation to enforcement. What the framework does is provide a reference point to help us to identify conduct which might be unfair and a legitimate focus for action – whether through enforcing existing requirements or seeking to impose new ones.

⁹⁶ Ofcom, 25 March 2019, [Ofcom's Annual Plan: Our programme of work for 2019/20](#)

⁹⁷ Ofcom, 7 January 2020, [Ofcom's proposed Plan of Work 2020/21](#)

Comments on the questions in the framework

3.69 Some responses specifically commented on the questions we included in our draft fairness framework. These comments and our responses are included in Table 2.

Table 2: Comments on the draft fairness framework questions and our conclusions

Framework question	Discussion paper responses	Our conclusions
How do providers treat customers throughout the customer journey?	The CCP said that fair treatment should encompass access to an easy-to-use complaints process and effective signposting to independent dispute resolution services. ⁹⁸	We agree with the CCP that having an appropriate complaints service and signposting to dispute resolution services is encompassed by the ‘customer journey’. GC C4 ⁹⁹ sets out a number of rules on providers to ensure clear, prompt and effective complaints processes, as well as signposting of dispute resolution processes. We closely monitor compliance and take action where we identify concerns.
	RNIB said that customers with sight loss should be informed of any aspect of their service which is “not accessible and therefore not usable by the consumer”. ¹⁰⁰	This is consistent with GC C5 ¹⁰¹ which requires providers to have clear and effective policies and procedures for the fair and appropriate treatment of consumers whose circumstances may make them vulnerable.
Who is being harmed?	Sky noted that the question of whether there are any offsetting benefits should be considered separately from who is harmed. ¹⁰²	We think that it is appropriate to consider offsetting benefits under the heading “who is being harmed” because, if there are offsetting benefits, we will need to consider trade-offs between customers.
What is the extent of the harm?	Vodafone suggested that this question be reworded to “Is there	We recognise that there may be cases where no harm arises, and have accordingly added the words “if any” to this question and have

⁹⁸ [CCP and ACOD response](#), page 6

⁹⁹ Ofcom, 1 July 2019, [General conditions of entitlement: Unofficial consolidated version](#), pages 33-41

¹⁰⁰ [RNIB response](#), page 2

¹⁰¹ Ofcom, 1 July 2019, [General conditions of entitlement: Unofficial consolidated version](#), pages 42-45

¹⁰² [Sky response](#), page 5

any harm?”, so that no assumptions were being made.¹⁰³

similarly added “if anyone” to the question on who is being harmed. In looking at the extent of the harm, it is open to find that there is no harm or that the harm is minimal. We will approach each element of the framework with an open mind.

How important is the service?

-

-

Does the service depend on risky new investment?

-

-

Other questions

CCNI suggested that Ofcom should consider including in the framework a question on whether society views the practice as egregious or socially unfair in line with the FCA’s fairness framework.¹⁰⁴

Within our framework, society’s views will play a role in whether we decide to look into an issue i.e. they will feed into the complaints we receive and into what market outcomes we monitor. We have therefore not added a separate question.

¹⁰³ [Vodafone response](#), page 9

¹⁰⁴ [CCNI response](#), page 5

4. Our fairness framework

Key elements of our approach


4.1 This section draws on our discussion paper to summarise the key elements of our approach to assessing fairness.

- **Our fairness framework extends to all aspects of the customer experience, including prices.** It is not always immediately clear if a provider's pricing practices are fair or unfair. This can be the case with price discrimination, where different customers pay different prices for the same service. We may welcome this practice where it involves applying discounts to the prices paid by certain groups of customers, such as those on low incomes; or where it promotes switching, thus encouraging healthy competition. But we may be more concerned where different prices are not applied transparently, where behavioural biases are exploited or where price discrimination adversely affects vulnerable customers. We think there are benefits in having an explicit framework for assessing these concerns. However, pricing is not the only aspect of the customer experience where issues of fairness arise and where guidance on our likely approach would be beneficial.
- **We think it is helpful to distinguish between procedural and distributive unfairness.** Procedural unfairness relates to a firm's conduct in how it treats customers. Distributive unfairness 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. Whether it is appropriate to intervene, and the appropriate type of intervention, if any, is likely to depend on, among other things, whether the issue is caused by firms' behaviour (procedural fairness) or arises from differences in outcomes between customers (distributive fairness).
- **The framework provides us with a tool to assess fairness concerns in the round.** We expect to use our fairness framework to assess individual practices and whether they might be considered unfair, on a case-by-case basis. In deciding whether to take formal action against practices which we consider are unfair to customers, we will continue to apply our existing regulatory principles and act in line with our statutory duties.
- **We think it is valuable to have consistency between regulated sectors in the assessment of fairness, where appropriate.** But we also recognise the need for flexibility to accommodate differences between sectors. Other regulators are also in the process of addressing fairness concerns in the sectors they regulate. However, there are differences between regulated sectors which need to be reflected in our approaches to achieving fairer outcomes for customers. Taking account of investment incentives is important in our framework given the significant technological change we see in our markets and the scope for network competition, which may sometimes only arise following substantial investment. We explicitly recognise this in our framework.

Questions to consider in a fairness assessment

- 4.2 We set out, in Figure 2, the types of questions we are likely to consider when we apply our framework. We also set out the types of factors which, if present, might make us more likely to intervene.
- 4.3 These factors are not intended to be exhaustive and we will not be taking a checklist approach. The framework is intended to be applied flexibly and should not be taken as a list of cumulatively necessary factors. The relevant questions would be considered in the round and no one factor is likely to be determinative on its own.

Figure 2: 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 and/or other barriers to engagement are exploited in ways that adversely affect customers; Customers are not supported in making well-informed decisions; Problems are not fixed promptly; Accessing complaints processes and independent dispute resolution services is difficult.
Who is being harmed, if anyone?	Vulnerable customers are being harmed; The practice has no offsetting benefits, such as market expansion through low price offers.
What is the extent of the harm, if any?	The harm to each affected customer is significant; Many customers are affected; The practice has persisted and is expected to persist for a long time.
How important is the service?	The service is seen by customers as highly important or essential, rather than 'nice-to-have'.
Does the service depend on risky new investment?	The service is a legacy service with predictable demand and costs (i.e. limited risk) and/or little need for new investment.

Source: Ofcom

How do providers treat customers throughout the customer journey?

- 4.4 Where we observe poor outcomes for customers in communications markets, that do not appear to be linked to competition concerns,¹⁰⁵ we will consider whether those outcomes are the result of, or are exacerbated by, providers not treating customers fairly.
- 4.5 In terms of the outcomes that are relevant, we would expect to look at all aspects of the service received by customers, including the information they are given, the price they pay, the quality of the service and whether it meets their needs, and their experience of interacting with their provider.
- 4.6 This will include looking at whether providers are exploiting behavioural biases in ways that make customers worse off, such as impairing their ability to make good decisions, or which mean they make decisions which are not in their best interests.
- 4.7 We also think it is important to consider the fair treatment of customers across the whole customer journey i.e. not just when customers are making an initial purchasing decision but also during all subsequent interactions.

Who is being harmed, if anyone?

- 4.8 Some provider behaviour, like price discrimination, can lead to different outcomes for different customers. There will be those who pay more than they would if prices were uniform but there will also be some customers who pay lower prices. The lower prices on offer might allow some customers to take up a service that they otherwise could not afford, or where they might otherwise have taken an inferior alternative.
- 4.9 The likelihood of intervening and the form of any intervention might depend on who is paying more and who is paying less in any particular case. We are most likely to be concerned when poor outcomes are experienced by customers in vulnerable circumstances.

What is the extent of the harm, if any?

- 4.10 In the case that customers are not being treated fairly, it is important to understand the extent of the harm that results, if any. We would seek to quantify that harm, where appropriate.
- 4.11 We would be more concerned where a large number of customers are affected and/or if the harm suffered is substantial. We are also more likely to be concerned where the practice has persisted for a long time as the cumulative amount of any harm caused will grow year-on-year.

¹⁰⁵ We have established approaches for looking at issues of significant market power through existing regulations and powers under the [Competition Act 1998](#).

How important is the service?

- 4.12 We would be more likely to be concerned where customers view a service as being essential to their daily lives and therefore are less likely to be able to avoid unfair treatment. We are aware that in communications markets this is not a static concept and what is considered to be essential evolves over time as new technology is introduced and new services are made available to customers.
- 4.13 There may be legacy services that are not considered essential for the majority of customers but are very important to those who do use them. The characteristics of those who use the services under investigation (for example, age or income level) and the importance to them of the service will be relevant considerations.

Does the service depend on risky new investment?

- 4.14 A particular feature of communications markets is innovation in physical networks and the services delivered via those networks, which often requires significant investments to be made. Encouraging such investment is important because of the benefits it can deliver to customers, which may include improved service quality and lower prices, as well as access to innovative services.
- 4.15 As with any service, it is important that new services have fairness built in at an early stage. Customers have a right to expect that new services will be marketed and provided fairly. However, in considering issues of fairness, and particularly appropriate interventions, we need to recognise that providers will only make a significant investment if they expect to make a reasonable return on that investment and that this is likely to be of particular importance for new services with uncertain costs and demand.
- 4.16 As with other elements of our consideration of fairness, we would expect to take a case-by-case approach to this criterion. However, preserving investment incentives is less likely to be a concern in the case of a legacy service where demand and costs are more likely to be predictable, for example, with standalone landline telephone services. In the case of a new service, we may need to be more careful that any interventions we make take due account of whether providers continue to have sufficient incentives to invest for the risks involved.

Next steps

- 4.17 Following the publication of this document, we will use the fairness framework when we receive complaints or when our market monitoring suggests customers are not being treated fairly.

A1. Application of the draft fairness framework to our review of broadband pricing

A1.1 Some respondents to our discussion paper asked for examples of how the fairness framework would be applied in practice. To illustrate this, we have reproduced below the table included in Annex A2 of the initial conclusions of our broadband pricing review to show how the draft fairness framework guided our approach to that review. As shown in the table below, we focused on identifying the form of harm and those who suffered it, placing particular emphasis on vulnerable customers.¹⁰⁶

Table A1.1: Copy of the table included in Annex A2 of the initial conclusions of our review of pricing practices in fixed broadband

Questions ¹⁰⁷	We are more likely to be concerned where...	Findings
How do providers treat customers throughout the customer journey?	Information is not clear, easy to understand and timely	<ul style="list-style-type: none"> Information is usually provided by providers (for example, on broadband speeds, usage limits, bundled services and new and out-of-contract prices) but our research indicates that some consumers find the broadband market confusing or difficult to engage with. Ofcom’s guide on choosing a broadband service was well-received by consumers in our research. End-of-contract and annual best tariff notifications will also provide clearer information. The impact of this intervention will be evaluated after it comes into effect in February 2020.
	Behavioural biases are exploited	<ul style="list-style-type: none"> Our consumer research indicates that behavioural biases are present for some consumers and can be more pronounced among some vulnerable consumers, potentially contributing to them remaining on high out-of-contract

¹⁰⁶ Ofcom, 25 September 2019, [Helping consumers get better deals: A review of pricing practices in fixed broadband](#), A2. Fairness Framework

¹⁰⁷ Note that that these questions are from the draft fairness framework. Two questions have been updated in the final framework, including “Who is being harmed, if anyone?” and “What is the extent of the harm, if any?”

		<p>prices or being less inclined to switch provider.</p> <ul style="list-style-type: none"> • Identified behavioural biases include loss/regret aversion, status quo bias and reduced headspace. • A number of customers appear to remain out-of-contract for a long time, despite the high-cost to them from doing so (i.e. taking account of the significant savings available from re-contracting with their existing provider or from switching provider).
	Customers are not supported in making well-informed decisions	<ul style="list-style-type: none"> • End-of-contract and annual best tariff notifications will help many consumers in making well-informed decisions but have yet to take effect. More may need to be done for vulnerable consumers. We found that providers could do more to identify their vulnerable consumers, some of whom may need additional support.
	Problems are not fixed promptly	<ul style="list-style-type: none"> • This is outside the scope of this review.
Who is being harmed?	Vulnerable customers are being harmed	<ul style="list-style-type: none"> • According to the data from providers, out of the 8.8m out-of-contract customers, 1.5m are vulnerable consumers (43% of all vulnerable consumers, compared to 41% for all consumers); and in some cases, pay more than non-vulnerable customers. • Certain vulnerable consumers may be less likely to respond to end-of-contract and annual best tariff notifications.
	The practice has relatively small offsetting benefits, such as market expansion through low price offers	<ul style="list-style-type: none"> • The practice of providing introductory discounts can benefit consumers, for example incentivising them to switch or take-up services (especially faster connections only available on new technology). Waterbed effects may be significant but incomplete, meaning high prices for some may not be fully offset by lower prices for others.

<p>What is the extent of the harm?</p>	<p>Many customers are affected</p>	<ul style="list-style-type: none"> • Around 8.8m are out-of-contract, of which more than 3m have been so for more than two years. • End-of-contract and annual best tariff notifications are expected to go some way to reducing the number of customers who are out-of-contract in future.
	<p>The harm to each customer is significant</p>	<ul style="list-style-type: none"> • Average out-of-contract vs new customer differential is £9-10/month and the average out-of-contract vs re-contracted customer differential is £8-9 per month. • However, the averages mask significant variation for certain customers and among providers. • There is likely to be some price rebalancing following the introduction of end-of-contract and annual best tariff notifications.
<p>How important is the service?</p>	<p>The service is seen by customers as highly important or essential, rather than 'nice-to-have'</p>	<ul style="list-style-type: none"> • Broadband is increasingly seen as essential by consumers to the way they live and work. • 80% of UK households have a fixed broadband connection and usage grows year-on-year (700% over the last five years to 2018).
<p>Does the service depend on risky new investment?</p>	<p>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</p>	<ul style="list-style-type: none"> • While standard broadband is increasingly a legacy service, superfast and ultrafast broadband – especially delivered over full-fibre – require (or recently required) risky investment. • Therefore, any interventions would need to be targeted so to avoid unintended consequences for take-up of (or incentives to invest in) fibre networks.