



12 August 2019

**RESPONSE to OFCOM Discussion Paper**  
***Making communications markets work well for customers.***  
***A framework for assessing fairness in broadband, mobile, home phone and pay TV***

I am pleased to have the opportunity to contribute to this Discussion Paper.

The proposed approach is to set out what is described as a *framework* that contains two elements, namely

- (a) an analysis of the *concept* of fairness, which is undertaken in terms of procedural fairness and distributive fairness;
- (b) a mode of applying the proposed *methodology* set out in the framework.

Separately, Six Fairness for Consumers Commitments have been issued and are described as ‘designed to inspire providers to raise standards in relation to customer fairness. By signing up providers can demonstrate, to customers and the public, their commitment to embedding customer fairness in their business.

I warmly welcome Ofcom’s engagement with ensuring that customers receive fairness in their dealings with energy customers [sic]. However, in making a very significant change by moving from a rulebook approach to an approach seeking fair outcomes, I suggest that further changes in structures and approach are necessary so as to increase involvement and predictability on fair behaviour.

I wish to make three main points.

**1. Who should decide on fairness? And by what mechanisms?**

It is most welcome to see thinking that is based on ethical principles and delivering fair outcomes, and also encouraging companies to think in terms of fairness in their behaviour and cultures. However, the proposed approach will not build trust in the energy market [sic] or its regulator if decisions on what is fair are taken solely by the regulator. In a system based on rules, decisions are taken by independent authorities (judges) on a binary ‘legal/unlawful’ basis. In a system based on society’s values, members of the society should be involved and represented both in discussions on what is in general substantively fair and in individual decisions. Decisions on what is fair are far more complex than binary one based on legal rules, and need wide debate, extensive evidence and sophisticated nuancing. Ombudsmen, rather than regulators, are the primary mechanism for making decisions on fairness, supported by increasingly extensive consumer and general involvement.

Where is the consumer voice in the proposed fairness framework? Should a consumer advocate such as Citizens Advice not have a permanent institutional role in the general and ongoing debate? Should the general approach not be informed by building up a matrix of individual decisions in individual cases by an independent Ombudsman? The DP refers only to decisions being taken by Ofcom, and to action being taken through remedies that it instigates. Surely the front line for a multitude of day-by-day decisions on what is fair should be taken by a (single) Ombudsman, rather than by a regulator? On the back of that experience from the aggregated data on individual cases, a debate should be had on what outcomes, behaviours and cultures are in fact fair? Surely such debate should involve the voice(s) of consumers the Ombudsman, companies and as well as the regulator?

## 2. Translating Fairness into Outcomes: Intention not Frameworks

The focus on frameworks is helpful in terms of encouraging companies to focus on their intentions. [The list of unfair practices in Para 3.27 repeats the word ‘exploitation’. That rightly goes beyond just looking at outcomes and considers the wider issue of intent.] However, intention only translates into outcomes through consistent execution. There is now a great deal of evidence that the critical factor to delivering acceptable operations throughout the whole of a business is for it to focus on creating a consistently ethical *culture* throughout the organisation.

If the proposed framework were to be adopted, Ofcom would be setting itself up for a number of particular risks. How would it successfully prove intention in individual cases? How would it prove exploitation? Would that not involve an extensive internal investigation in almost every case, that would take too long, often risk being inconclusive, drive division between industry and regulator, and lower their combined reputations with the public?

I suggest that describing ‘how a firm treats its customers’ as ‘procedural unfairness’ is to adopt an analytical lens that is too limiting. Surely the underlying and critical issue is indeed ‘how a firm treats its customers’ – and also how a firm treats its staff, suppliers, and all stakeholders, including society as represented by regulators. Is that basic consideration there not substantive fairness?

The proposed framework and the Six Commitments surely give rise to some inconsistency? The former promises that customers will receive fair treatment, service and deals, whereas the latter is a means of maintaining discrimination between different consumers (based on undertaking a highly technical and theoretical exercise). Do the proposed analytical approach and decision-making procedures lead to outcomes, actions or intentions that people generally would regard as being fair? There are various points that I would certainly want to argue in greater detail.

Further, would gaming by companies not be encouraged? Para 3.28 proposes:

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

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

That proposal would encourage firms to seek to produce evidence that they intended to expand the market (by how much, to which types of users and over what period?) or that customers had chosen not to engage (I put the phone down on a cold call last week, and bin offers regularly – would that be evidence of lack of engagement?) or that although customers’ behavioural biases were affected this was not deliberate. Arguing such points could be potentially interminable and fail to engage with the critical issue of the ethical motivation of a company.

## 3. The Critical Role of Organisational Culture

The challenge of aligning delivery of consistently fair practice with intent to do so means that the whole of a business has to be involved in a permanent, consistent and ethical way. This has been recognised in highly significant recent shifts to emphasise

- (a) that corporations should have a social purpose<sup>1</sup>

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<sup>1</sup> Colin Mayer, *Prosperity* (Oxford University Press, 2019).

- (b) that all organisations should align the cultures throughout their multiple internal groups to conform consistently to ethical values.<sup>2</sup>

Strong steps have been taken in this direction by, for example, G20/OECD,<sup>3</sup> the Financial Reporting Council<sup>4</sup> and OFWAT.<sup>5</sup>

Underlying these changes is a fundamental shift in the manner of regulating. The traditional approach is a system based on rules, identifying breaches and imposing sanctions. The new approach involves producing evidence of social purpose and ethical culture, demonstrated through evidence of behaviours of outcomes, intentions and relationships. The latter needs new structures (eg for voice, debate, monitoring, interventions and responses) and different forms of evidence (that an organisation can be trusted, including to show how it has reacted when things went wrong).

The models already exist for holistic cultural mode of operation (Ethical Business Practice) and the relationship between regulator and companies (Ethical Business regulation).<sup>6</sup> They are beginning to be implemented by commercial and public organisations across the world. I would be happy to explain the concepts and experience further.

Christopher Hodges MA PhD FSALS

Professor of Justice Systems and Supernumerary Fellow of Wolfson College, Oxford  
Head of the Swiss Re Research Programme on Civil Justice Systems, Centre for Socio-Legal Studies  
Fellow, European Law Institute

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<sup>2</sup> Christopher Hodges and Ruth Steinholtz, *Ethical Business Practice and Regulation: A Behavioural and Values-Based Approach to Compliance and Enforcement* (Hart, 2017).

<sup>3</sup> G20/OECD *Principles of Corporate Governance* (OECD, 2015) “The purpose of corporate governance is to help build an environment of trust, transparency and accountability necessary for fostering long-term investment, financial stability and business integrity, thereby supporting stronger growth and more inclusive societies.”

<sup>4</sup> *The Wates Corporate Governance Principles for Large Private Companies* (FRC, June 2018) “An effective board promotes the purpose of a company, and ensures that its values, strategy and culture align with that purpose.” *The UK Corporate Governance Code* (Financial Reporting Council, July 2018) “The board should establish the company’s purpose, values and strategy, and satisfy itself that these and its culture are aligned. All directors must act with integrity, lead by example and promote the desired culture. .... The board should assess and monitor culture. Where it is not satisfied that policy, practices or behaviour throughout the business are aligned with the company’s purpose, values and strategy, it should seek assurance that management has taken corrective action.”

<sup>5</sup> *Board leadership, transparency and governance – principles* (Ofwat, 2019) “The regulated company board establishes the company’s purpose, strategy and values, and is satisfied that these and its culture reflect the needs of all those it serves.”

<sup>6</sup> Christopher Hodges and Ruth Steinholtz, *Ethical Business Practice and Regulation: A Behavioural and Values-Based Approach to Compliance and Enforcement* (Hart, 2017).