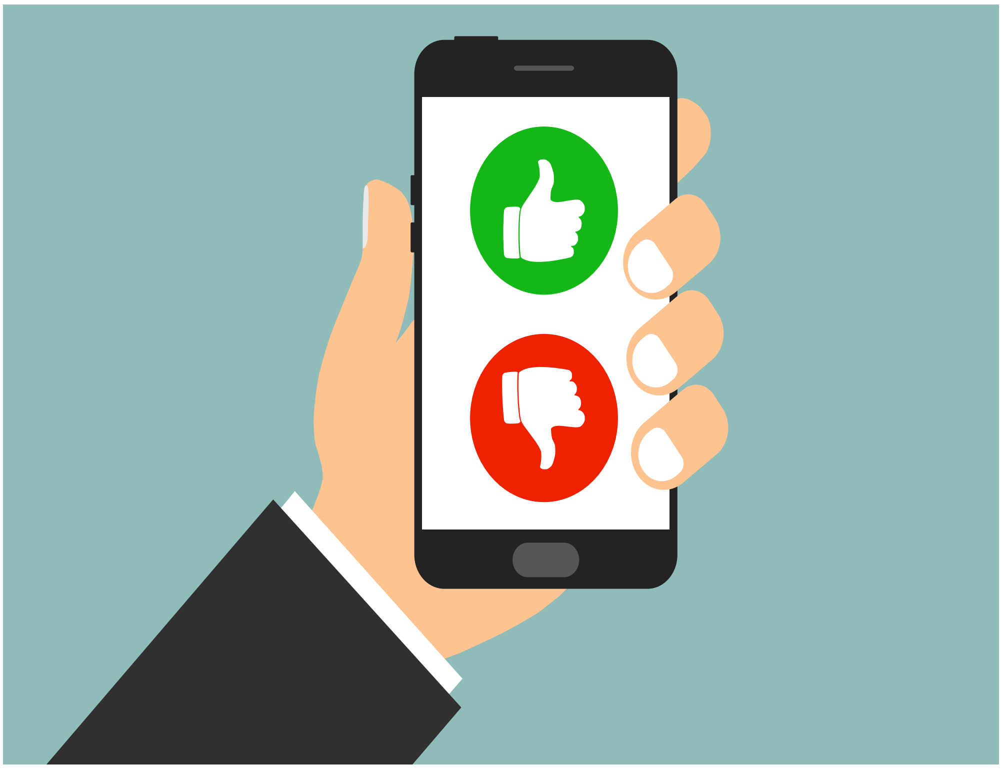


FRAMING FAIRNESS

Getting a fair deal for consumers in the digital age is an evolving challenge. **TIM HOGG** considers what regulators are doing and how providers can respond

While fairness may seem like an odd area for economic regulators to stray into, concepts of fairness underpin competition and consumer law and are increasingly motivating regulation across Europe's telecoms, media and technology (TMT) sectors. But what is fairness? And how can providers respond to fairness driven regulation?

WHY ARE WE TALKING ABOUT FAIRNESS?

The concept of fairness has been a key motivating factor in European TMT regulation for over a decade. For example, ending "unfair" roaming charges,[1] ensuring fair use of consumer data through General Data Protection Regulation (GDPR),[2] treating all internet traffic equally through net neutrality,[3] and ensuring that platforms treat businesses fairly.[4]

Recently there has been renewed focus on fairness in the media and by policymakers and regulators as a result of market developments and corresponding shifts in regulatory practice.

First, fairness in TMT has been hitting the headlines, for example concerns about the "loyalty penalty" in the UK, where longstanding customers pay more than new customers for the same service through "price walking" – whereby prices steadily increase once the customer is out of contract (i.e. at the end of the initial contract period).[5]

Second, (and partly as a result of the media coverage) fairness is now firmly on the agenda of TMT regulators across Europe. "Exploring new ways to boost consumer empowerment" is one of the five strategic priorities for the Body of European Regulators for Electronic Communications (BEREC).[6] Ofcom has published a fairness framework as part of its "Fairness for customers" programme of work.[7]

Third, concerns about fairness have increased as a result of market developments, such as greater collection of consumer data, more personalised pricing, bias in the design or use of automated decision making and more tailored business-to-consumer communication.

Fourth, the last 20 years of economic regulation in Europe have seen a gradual shift towards outcomes-based regulation, whereby regulators evaluate the outcomes enjoyed by consumers (rather than just considering whether firms are obeying the letter of the rules). The measurement and evaluation of consumer outcomes is one of the most topical debates today.[8]

Last, fairness considerations have also been brought to the forefront of competition policy. In the words of Margrethe Vestager, the European Commissioner for Competition and Digital:[9]

"Because our only goal, as competition authorities, is to make sure that consumers get a fair deal. [...] Competition rules are about making life better for consumers. So that when they spend their hard-earned money, they get a fair deal."

WHAT ARE REGULATORS DOING ABOUT FAIRNESS?

Regulators are increasingly looking to firms to ensure that their practices are "fair" in terms of the process followed and the outcomes delivered.

One manifestation of recent fairness regulation is the European Electronic Communications Code (EECC) which includes a number of measures aimed at ensuring procedural fairness for consumers, such as:[10]

- Ensuring consumers are given a "concise and easily readable contract summary" (Article 102).
- Requiring providers "publish comprehensive, comparable, reliable, user-friendly and up-to-date information" regarding quality of service (Article 104).
- Ensuring that, after contract renewal, consumers can cancel their contract with no more than a one month notice period (Article 105).
- Mandating that, prior to renewal, providers inform consumers about the renewal and how to cancel the contract (Article 105).
- Requiring providers to give consumers "best tariff advice" (at least) annually and at renewal (Article 105).

The EECC is being applied by regulators across the EU. For example, in February 2020 Ofcom's new rules around end-of-contract notifications and best tariff advice came into force.[11] Ofcom interpreted "best tariff advice" as requiring providers to display their best tariff available to any residential customer, regardless of whether the customer receiving the advice would be eligible for it.

Indeed, Ofcom has been at the forefront of regulating for fairness in TMT, and in January 2020 published its framework for assessing fairness.[12] This framework sets out Ofcom's principal considerations when assessing fairness, such as whether vulnerable customers are being harmed; whether the service is seen by customers as essential or a "nice to have"; and whether behavioural biases are being exploited.

Concerns about fairness are wide-reaching within TMT, and reach a variety of digital markets. For example:

- In January 2019 the French data privacy authority (CNIL) fined Google €50m for breaching GDPR due to presenting consumers with insufficiently transparent and clear information about how their data was used.[13]
- The UK Competition and Markets Authority is investigating whether anti-virus software and online gaming firms have been using unfair practices through contracts that auto-renew.[14]
- In February 2020 the European Commission published plans to ensure that artificial intelligence (AI) is used in a trustworthy and fair way, such as avoiding bias and discrimination.[15]

In summary, regulators and competition authorities are deploying a new remedy toolkit to tackle fairness concerns across markets. This new toolkit has three main elements:

- **Supply-side remedies** such as restrictions on the use of auto-renewal contracts, or the mandatory unbundling of mobile phone handsets and airtime.
- **Demand-side remedies** such as transparency over a range of tariffs and simplification of choices.
- **Governance remedies** such as sunlight or transparency remedies (where firms are required to publish data on quality of service, complaints, or value for money), or making boards more actively responsible for value for money. The focus here is on ensuring that providers embed good governance in their organisations.

In the face of these regulatory trends and new remedies, how can providers respond?

HOW CAN PROVIDERS RESPOND?

Concepts of fairness can be operationalised

WHAT IS FAIRNESS?

While a comprehensive definition of fairness is elusive, judgements over fairness can be categorised as concerning either the "means" or the "ends":

- Procedural fairness. The fairness of the process in arriving at an outcome - how prices are set, how information is communicated.
- Distributive fairness. The fairness of the outcome - distribution of prices, extent of cross-subsidy.

See further Oxera (2019). Fair ground: A practical framework for assessing fairness. Agenda, March. bit.ly/2Rgr4wp

These judgments are applied when thinking about vertical or horizontal fairness:

- Vertical fairness. The fairness of how the economic "pie" is divided among the economic agents in the value chain, including consumers.
- Horizontal fairness. The fairness of processes or outcomes within a particular group (e.g. across consumers).

As we saw above, many of the regulations relating to fairness have focussed on consumers in particular (i.e. horizontal fairness), regarding both procedural and distributional dimensions.
See further Oxera (2019). Fairness and competition in online markets: Friends or foes? Agenda, April. bit.ly/2XdpRcY

SUPPLY-SIDE REMEDIES	DEMAND-SIDE REMEDIES	GOVERNANCE REMEDIES
● Such as restrictions on the use of auto-renewal contracts, or the mandatory unbundling of mobile phone handsets and airtime	● Such as transparency over a range of tariffs and simplification of choices	● Such as transparency over data, for example quality of service, complaints, or value for money, or making boards more responsible for value for money

through practical frameworks, drawing on economics to highlight the trade-offs between the different perspectives of consumers and the provider.[16] For example, the tension between delivering consumer value to different customer segments and generating a commercial return across the customer base. Businesses will already be striking such a balance - but frameworks make these trade-offs explicit, and provide a tool that management can use to take decisions about them. Indeed, an economic framework can help providers create space for achieving their commercial objectives, while treating customers fairly.

Behavioural economics illuminates how consumers respond to prices and marketing techniques, including customer communications, and therefore enables assessments of procedural fairness.[17] Furthermore, working together with standard economic and financial analysis techniques, behavioural economics can also unlock questions of distributional fairness with insightful customer segmentation.[18]

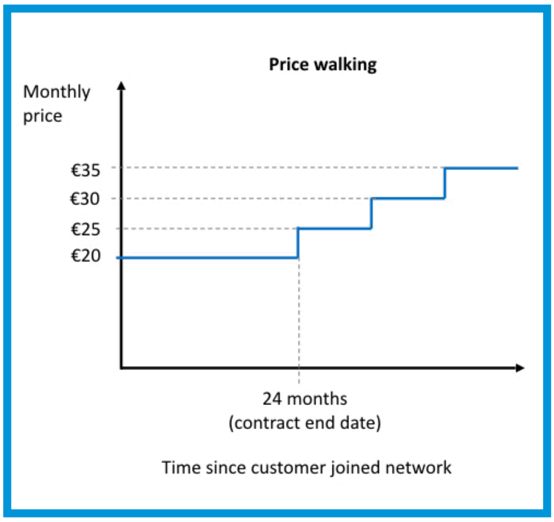
Using such a fairness framework enables TMT providers to proactively communicate how and why the consumer outcomes they generate are good and fair. Gathering evidence on the distribution of consumer outcomes bolsters this case, and illuminates any risks (for example, proactive assessment of the outcomes for segments of vulnerable customers).

New evidence might also be required in some cases, such as running experiments to show that customer communications are clear and fair, and ultimately lead to effective consumer decision making.

This is not to say that every provider must have the same fairness approach – it is likely to differ by provider, according to brand value and risk appetite. But taking the first step towards understanding consumer outcomes and codifying a view on fairness is likely to lead to the most sustainable business strategy in the long run.

WHAT NEXT?

Issues around fairness are increasingly driving the regulatory, consumer protection, and competition policy agenda across TMT markets. In the face of this, the most sustainable long term strategy for providers is to proactively develop tailored fairness frameworks, to create space for commercial success while ensuring that customers enjoy a fair deal.



Source: Oxera

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