The role of fairness in regulation: what counts as 'fair' in fair competition?
A Beesley Lecture by Amelia Fletcher CBE, 16 November 2022

Introduction

The title of this talk was given to me by the organisers of the Beesley lecture series. I hadn't previously written on the topic of fairness, nor had I intended to do so. But I was intrigued by the question and accepted the invitation.

I should also just give my usual caveat. I am a NED at the CMA, but I am speaking with my academic hat on and nothing I say necessarily reflects the views of the CMA.

Some background

I want to start with a bit of background. In 2016, we saw a shift – on both sides of the Atlantic – in terms of how leaders of competition authorities were describing the benefits of competition policy. They were playing down the usual claimed benefits of economic efficiency, and even consumer welfare, and placing a far greater emphasis on 'fairness' as a key motivating factor.

For example, EU Competition Commissioner, Margrethe Vestager stated:

> *It is not enough anymore for business and government to simply ask people to trust them … We now need to show people that the system is fair. Competition enforcement can help to deal with the biggest concerns that Europeans face … because it helps to make sure the system works fairly.*

In the same year, US Assistant Attorney General for Antitrust, Renata Hesse, said:

> *Competition is fair because it gives a chance to the small business owner to succeed in her business venture, because it delivers lower prices to consumers and because it drives the innovation that improves products, business processes and more.*

Why the focus on fairness?

So suddenly fairness was on the agenda. But why?

I believe there were two primary drivers.

- First, the growing popular scepticism about whether free markets really were delivering the great outcomes that had been promised. This is reflected in the Vestager quote on the previous slide.

- Second, concerns that competition enforcement had not been successful even on its own terms; that the focus on intervening only where there was a clear evidence of likely consumer harm had resulted in under-enforcement and allowed the

development of substantial concentration and market power across a range of important markets.

For me, then, the big question here is:

- whether the focus on fairness was basically window-dressing, and a reformulation of what the authorities were doing anyway. This might certainly be what one might draw from Renata Hesse's quote, on the previous slide, which arguably doesn't say anything very different about competition from what might have been said in previous decades, other than adding the word 'fair'.

- or alternatively, whether a firmer focus on fairness was more meaningful and implied a need for a real change in approach, as might be more in line with Commissioner Vestager's quote. And I would note that Commissioner Vestager remains the EU competition commissioner and continues to mention fairness in almost every competition-related speech she gives.

I want to argue that real change was needed, and indeed that some of this is already happening.

We certainly needed – and need - to fix the under-enforcement issue. This is a general point, which is mostly outside the scope of this evening's talk, but I would note that the EU Digital Markets Act (which I will be discussing later) is to some extent a response to the issue of under-enforcement in the digital sphere.

My main point for today, though, is that a firmer focus on fairness has more direct implications for competition policy, and more specifically for competition-based regulation.

But if this is right, competition lawyer Maurits Dolmans (2017) has raised a possible problem, which he terms the 'fairness paradox'.

The 'Fairness Paradox'

Dolmans starts by quoting Lord Nicholls of Birkenhead, of the UK Supreme Court:

"Fairness is an elusive concept. It is an instinctive response to a given set of facts. Ultimately it is grounded in social and moral values. These values cannot be justified, or refuted, by any objective process of logical reasoning. Moreover, they change from one generation to the next. It is not surprising therefore that there can be different views on the requirements of fairness in any particular case."

Dolmans then argues that this creates a "fairness paradox".

- It sounds sensible that competition law (and law generally) should reflect principles of fairness.

- Yet, fairness as a decision criterion, given these very different perspectives of fairness, could in fact lead to inconsistent and potentially unfair results.

This is an important challenge. If the focus on fairness could in fact lead to unfairness, then clearly this would indeed be a paradox. But how much should we worry about this in practice?

I am more optimistic than Maurits, and I am hoping – by the end of this evening – that you will be too.

Outline of this talk

In this evening's talk, I am going to start by endeavouring to respond to the 'fairness paradox' by highlighting four things about fairness that we can (hopefully) all agree upon. I say 'things'. I could say 'lemmas' but that seems unnecessarily academic, so I will stick with things. I will then talk about the implications of these for policy.

I will then discuss fairness in the context of two recent regulatory initiatives: The new FCA Consumer Duty and the EU Digital Markets Act.

Thing 1: It is useful to distinguish between two fairness concepts

So let's start with 'Thing 1'. I hope we can all agree that it is useful to distinguish between two key concepts of fairness.

- Fair process
- Fair outcomes

These concepts are general, but we can also think about them in the context of competition.

Here:

- <u>Fair process</u> might be seen as a level playing field for firms on the supply side, with well informed, active customers on the demand side; while

- <u>Fair outcomes</u> can comprise customers making suitable purchases, receiving good value for money, and with equitable treatment across customers.

Fair process and fair outcomes both matter in their own right. There are obvious linkages between them, which I will return to shortly, but I believe it is both possible and useful to think about them separately. And I'm hopeful that you will agree.

Thing 2: Fair process is important for fair outcomes

Moving on to 'Thing 2'. I also hope we can all agree that fair process is typically important for fair outcomes.

There are two linked reasons for this.

(a) The first relates to perceptions, and perceptions are important when considering fairness. This is that perceptions about process are actually relevant for perceptions about outcomes.

(b) The second is more obvious: This is that fair process does typically help to deliver fair outcomes – even if they sometimes do so imperfectly.

(a) Perceptions matter

Looking a little more at these two reasons, I mentioned that perceptions about process are relevant to perceptions of fairness. What I mean by this is that people tend to be more comfortable that outcomes are fair if they think the process that generated those outcomes was fair.

A couple of examples demonstrating this point from the empirical literature.

First, Kahneman et al (1986) found that 83% of the people they surveyed felt it would be unfair for a small firm to reduce an existing employee's wages from $9 to $7 an hour in the light of increased local unemployment. But 73% that it would be fair to pay $7 to a new replacement, if the employee left.

That is, on average, it was not considered inherently unfair to pay the lower wage. What was critical was the deal that was agreed with an employee upfront. It was fair to pay less if this was agreed upfront, but not if it involve changing the deal *ex post*.

In the terms of my key concepts: The outcome could be fair, but only if the process is fair.

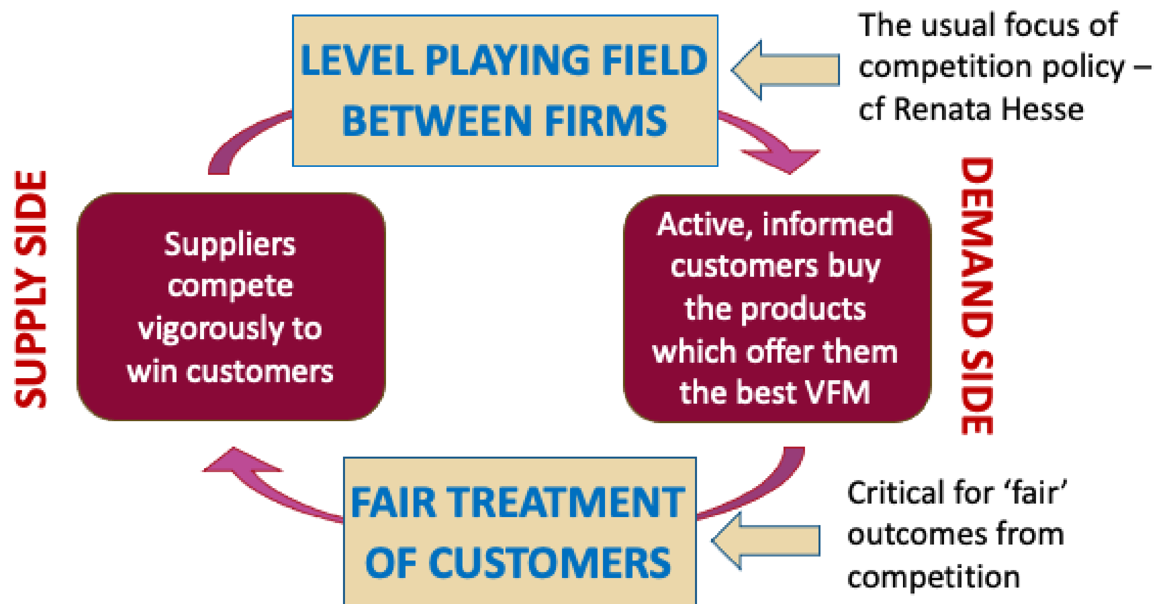
Secondly, in a cross-country study, Bjørnskov et al (2010) found that societies with higher actual social mobility are more likely to perceive income inequality positively and as being fair, compared with societies where there is much less social mobility and thus where income inequality is perceived to be more to do with your starting place in society and not what you did with that starting place.

Again, the outcomes are perceived as fair, if the process has been fair.

(b) Fair process typically helps to deliver fair outcomes

So what about my second reason, that fair process typically helps to deliver fair outcomes.

Beesley Lecture Series long-term aficionados might notice that I presented basically this same diagram when I last gave a lecture here in 2013!



The original idea of what I sometimes refer to as 'the virtuous circle of competition' was to encourage people to think not only about the supply side of markets, which had been the traditional focus of competition policy, but also the demand side. I developed it with colleagues back at the Office of Fair Trading, when it was still around, and it has since been adopted as a conceptual framework by a number of other regulators.

The key point that it emphasises is that markets will only stand a decent chance of delivering good market outcomes if there are both suppliers competing vigorously to win customers on the supply side and customers actively choosing the products which offer them the best value for money on the demand side

What I want to do today is to reframe the picture in terms of fairness.

On the supply side, a critical focus in competition policy is to ensure a level playing field between firms. This is really what the quote we started with from Renata Hesse is all about.

At the same time, if we are to have an effective demand side, and competition that delivers 'fair' outcomes, then the fair treatment of customers is critical.

When fair process fails

So what happens when the fair competitive process fails, either because there is an unlevel playing field between firms or unfair treatment of consumers?

We typically see unfair outcomes for consumers:

On the process side:

- Without a level playing field, we clearly get competition not on the merits, so that the best firm does not necessarily win.

- With an uninformed or biased demand side, we may see distorted competition, whereby firms might compete, but not necessarily to offer customers the best product for them

- We may also see dampened competition, due to customers not switching in response to better offers

- All of this can generate market power

- And both a non-level playing field and weak customer response can enable the leverage of market power into new markets

And in terms of outcomes, this can in turn lead to:

- Customers making unsuitable purchases – whether products they didn't really want, or products that aren't suitable for what they want

- An unfair split of surplus between firms and customers (typically in the form of poor value for money)

- And potentially even inequitable treatment across customers, for example when some customers are more active and get a better deal than others.

So, hopefully we all agree on 'Thing 2' that fair process is important for fair outcomes. I believe we can rely on broadly fair competition to deliver broadly fair outcomes much of the time.

And I use the word 'broadly' deliberately. It can be nigh on impossible to create markets that are perfectly competitive and perfectly fair. We also know that seeking perfection can be the enemy of the good. So 'broadly' fair competition will typically be the best we can reasonably expect.

Thing 3: Fair outcomes matter

I now want to move onto 'Thing 3', which again I hope we can all agree on. This is that fair outcomes matter.

Indeed, I want to argue that fairness is a deep-seated psychological trait that we essentially all exhibit.

To do so, I want us to consider a game that you may have heard of, a version of which was on the slide when you came in. This is the 'ultimatum game'.

That first slide asked you to imagine you were paired randomly with someone in this room.

- You were offered 10 x £50 notes (so, £500), while the other person was offered nothing initially.

- The catch was that you could only have the cash if you offered your partner some of it and if that person accepted the offer.

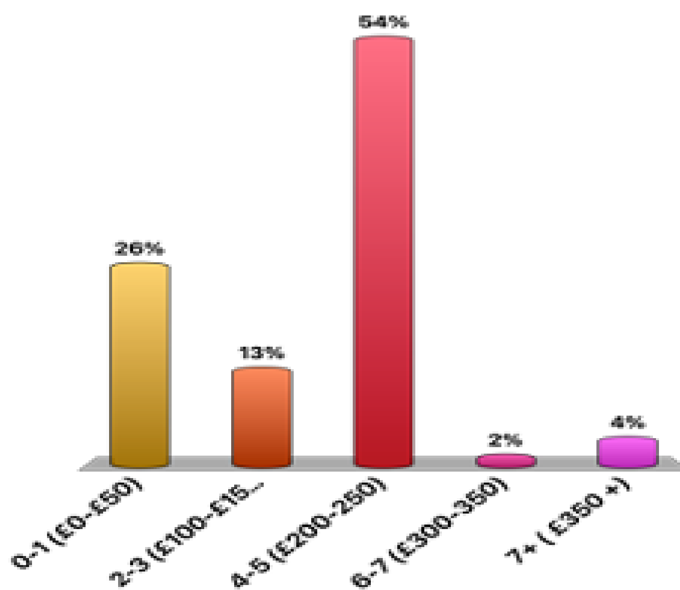
- Otherwise neither you nor your partner got anything.

- You only had one shot, so there was no negotiation. How many of the £50 notes did you offer up to the other person to accept the deal?

Clearly, we haven't played the game fully properly here, because I haven't actually partnered you up, but let's see what the results look like.

Ultimatum game results

How many of the 10x£50 notes (£500) will you offer the other person to accept the deal? – Beesley Lecture attendees.



Results of 'Ultimatum Game' – Beesley Lecture participants

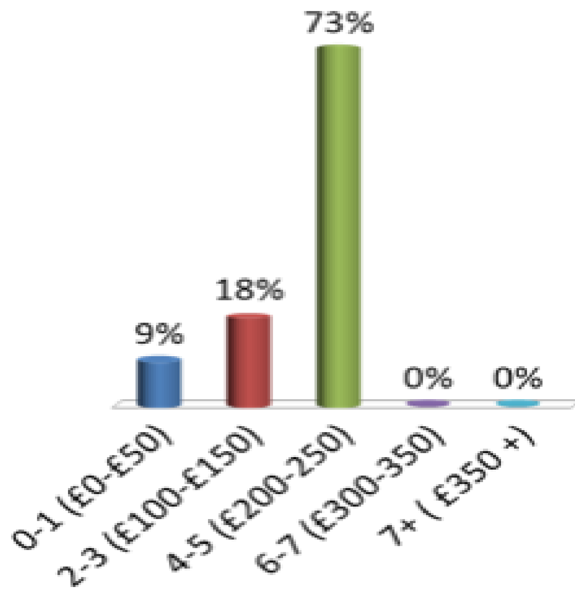
Interesting. Well, the mode is more or less right, but there are rather fewer people in this room than the norm who are inclined towards a generous offer. We don't normally see so many 0-£50 responses.

It probably does say that there are lots of rational economists in the room. Clearly, it would be rational for the responder to accept anything more than zero, and thus also rational for the proposer to offer only a single note. That is what we are seeing in the first column.

What is more interesting, though, is the modal answer, which involves sharing 40-50% of the initial endowment.

And typically we see an even stronger propensity towards this result. Here are the results from the same game played with UEA students earlier this year. We see that 73% of them offered 40-50%.

How many of the 10x£50 notes (£500) will you offer the other person to accept the deal? – Beesley Lecture attendees.



The 'ultimatum game' – Key drivers

In fact, what we almost always see in the ultimatum game, which has now been tested across many different social contexts, is that most offers tend to be around 40 to 50% of the initial endowment.

Why? Why not just offer a single £50 note?

The decision to offer more could in theory be driven by three possible drivers:

- **Altruism**: The desire to increase the well-being of others;
- **Reciprocity**: The desire for fair treatment. So this is the idea that you should "do onto others as you would have them do unto you", which is close to altruism not quite the same; and/or
- **Expected inequity aversion:** This is more about the expected negative reaction of the responder, and potential rejection of the offer, given their likely aversion to being treated unfairly.

The first two of these drivers are essentially self-motivated, while the last is about the expected reaction of the responder.

To drill down a little more, one can look at another version of this game called the 'dictator game'. The only difference here is that the responder gets no choice about whether to accept. What we see is that offers are still around 10 to 40%. Lower, but definitely well above zero.

This suggests that 'expected inequity aversion' and associated fear of an offer being rejected, is not the sole driver of the results in the 'ultimatum game'. We also exhibit some sort of mix of altruism and reciprocity.

Fairness games – more detail

We can gain some additional insights if we dig down into a little bit further into these sorts of fairness games.

There is another game called the 'public good' game.

- Here players have an initial endowment and have to decide how much to contribute to a group project.

- Every £1 that is contributed delivers more than £1 to the group as a whole but less than £1 to the player concerned.

- Everyone does better with more cooperation, but free riders – who don't pay into the pot – do best.

- On average, players typically offer 40 to 60% of their endowment. But, it is worth noting that:
    - around one third are purely self-interested
    - and that cooperation increases when people aren't playing anonymously.

This highlights a couple of additional points:

- We differ a lot in terms of our inherent views of fairness, at least as measured by our willingness is to pay in a 'social pot', but

- The anonymity finding shows that we also care about how others see us.

I just want to dwell on these games for a little longer and highlight some more detailed findings.

First, an interesting finding is that **culture** can matter. Henrich et al (2001) tested the ultimatum game across a number of small-scale indigenous societies. They found that those societies which relied heavily on cooperation for their economic success tended to offer a higher share, whilst more individualistic hunter gatherer tribes offered less.

A second finding is that **intention** can matter. Falk et al (1999) tested a variant of the ultimatum game in which proposers were given a fixed set of options for how much to give,

which were also visible to their partner. So one person might have a choice of 40%, 50% and 60% while another has a choice of 10%, 15% and 20%.

They found that rejection rates were very dependent on how the proposal compared with the alternative options available. So the idea is they might accept a 20% offer if that was the best option on offer, since the intention of the proposer was probably good, but might reject even a 40% offer if the proposer clearly had better options available.

Thirdly, it's been found that **mood** can matter. In the context of a public good game, Druvelis and Koskoff (2016) played film excerpts in advance to make participants feel happier or angrier. They found that the angrier cohorts contributed less to the public good, and thus overall earned less than their happier counterparts. I think this is particularly interesting and relevant given the somewhat angry times we seem to living through right now.

Recap on Thing 3: Fair outcomes matter

So just to recap where we've got to so far on 'Thing 3': fair outcomes matter.

We all care about fairness of outcomes. This is deep-seated and also cultural.

Just because we all care about fairness of outcomes doesn't mean we have aligned views on what fair outcomes actually are.

Nonetheless, there is more consensus than is sometimes suggested,

- We don't like being treated unfairly or inequitably ourselves.
- We tend to exhibit at least some altruism or reciprocity to others
- We care about how people see us.
- We care about other people's intentions.

Thing 4: Focussing on fair process may not be enough

So this takes us onto 'Thing 4'. If fair outcomes matter (as we have agreed), I would also like us to agree that **focussing on fair process may not be enough** on its own.

It often will be, of course. We have already agreed on Thing 2, that fair process is typically important for, and helps to deliver, fair outcomes. But we have to recognise that this need not always be the case

Suppose we do observe unfair outcomes? What next?

It is true that unfair outcomes can be a valuable indicator of an unfair process or unequal opportunity.

For example, and outside the area of competition policy, the publication by organisations of their gender and ethnicity pay gaps, while clearly an outcome measure, has proven to be a

useful indicator of the extent of equal opportunities within those organisations, and has led many to revisit their internal processes.

Similarly, in relation to competition policy, if we see consumers facing high prices or receiving poor terms and conditions, this can be a good indicator that the competitive process is not working well.

Where this is the case, one suitable response to the unfair outcomes may be to go back to the process and seek to make that fairer.

But this is not necessarily enough.

First, we should recognise that it can be impossible (or at least not cost-effective) to create a fully fair process.

For example, the people in this room will know as well as me how hard it has proven to enable the sort of searching and switching by consumers that is really needed to ensure that they always receive fair outcomes.

Indeed, there can even be some divergence about what a fair process is.

Recent market research commissioned by the FCA provides a nice example.[1] Respondents were asked their views on the fairness of two situations relating to insurance renewal.

- The first involves Alex. Alex gets her insurance renewal letter. She shops around using a price comparing website and gets an offer from a different insurance provider and saves £75. Is this fair or unfair? 80% of respondents felt it was fair.

- The second involves Sarah. Sara gets her insurance renewal letter. She doesn't shop around because she has just had a new baby. Had she had more time and energy she could've switched to a different provider and saved £75. Is this fair or unfair? 60% of respondents felt it was unfair.

This is a nice example of a situation where our natural views on what is a fair process are not terribly robust, and can be easily changed by a re-framing of the narrative. We might nonetheless be concerned about the fairness of outcomes.

Finally, it is important to note that even a fully fair process, which everyone agrees is fully fair, can sometimes generate unfair outcomes nonetheless. We know that markets work well in delivering outcomes that maximise total utility and are Pareto-optimal. But they needn't be 'fair'. No economist ever claimed that they were.

For example, markets themselves may not be well suited to delivering universal service, something which many of us here today would agree is 'fair' in certain markets. Hence the need for regulations that impose 'Universal Service Obligations'.

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[1] LE/YouGov market research (commissioned by FCA) on General Insurance Pricing Practices (2019)

To recap: Four things

So just to recap on those four things that we all agree on.

1. First, it useful to distinguish two concepts of fairness: fair process and fair outcomes

2. Second, fair process is important for fair outcomes

3. Third, fair outcomes matter

4. Fourth, focussing on fair process may not be enough to ensure fair outcomes.

Policy levers for 'fair' competition

I now want to turn to the possible policy levers that we have available to us in promoting 'fair' competition.

A fair process of competition has those two key elements.

- On the supply side, it requires a level playing field for firms. Here, competition law and pro-competitive regulation play an important role

- On the demand side, it requires the fair treatment of customers, and consumer protection law and conduct regulation are relevant tools.

Typically, these tools will be enough. If a broadly fair competitive process can be achieved, then broadly fair outcomes will follow, and we can relax.

However, in some cases, we may need to look more directly at the fairness of outcomes. Here, different tools are required.

- In terms of the split of surplus between firms and consumers being unfair, such that customers don't receive fair value for money, Chapter 2 of the Competition Act 1998 may be a valuable tool for preventing exploitative abuse, while economic regulation can also be used.

- In terms of helping to ensuring that customers make suitable purchases and that there is equitable treatment across customers, there may be some elements of consumer law that apply (such as minimum health and safety standards), but mostly here we are into the realm of regulation.

Thing 5: Firms often know unfair outcomes when they see them

I said I would try to gain agreement on 4 things, but I am going to add in a cheeky fifth. This is that the leadership within firms often know unfair outcomes when they see them.

Why is this relevant? Because, in seeking to intervene to create fairer outcomes, we have seen that regulators have a choice of tools. For example, they could set:

- Minimum requirements around suitability
- Economic regulation of prices (as in water) or of pricing structure (as has been introduced in home/motor insurance)
- Governance requirements

I want to highlight that the last of these of these is becoming a more heavily used, and potentially power tool. Effectively, governance requirements work by transferring responsibility for confirming that outcomes are 'fair' to the firm.

I will discuss the relevance of this idea to the FCA's Consumer Duty and to the EU's Digital Markets Act in a moment, but just to recall also the link between perceptions of fairness and intention. In general, this might seem to suggest that if customers are persuaded that firms are motivated to be fair, then those customers are more likely to consider the market outcomes fair.

Fairness in the context of two recent regulatory initiatives

So in the remainder of my presentation, I want to draw on what we have covered so far to discuss two recent regulatory initiatives.

The FCA's new consumer duty

First, the FCA's new consumer duty. For those of you that are not close to this, the FCA's new consumer duty is multi faceted.

- There is a new Principle 12, which is that firms must act to deliver good outcomes for retail customers

- Then there are three overarching cross-cutting rules:

    1. that firms must act in good faith (and note also that the duty embeds a concept of reasonableness. Firms must act reasonably)
    2. that firms must avoid causing foreseeable harm to retail customers; and
    3. That firms must enable and support retail customers to pursue their financial objectives

- And then, and this is especially interesting in the context of the discussion we have just had about the importance of fair outcomes, there are four headline areas where the FCA sets out expected retail customer outcomes.

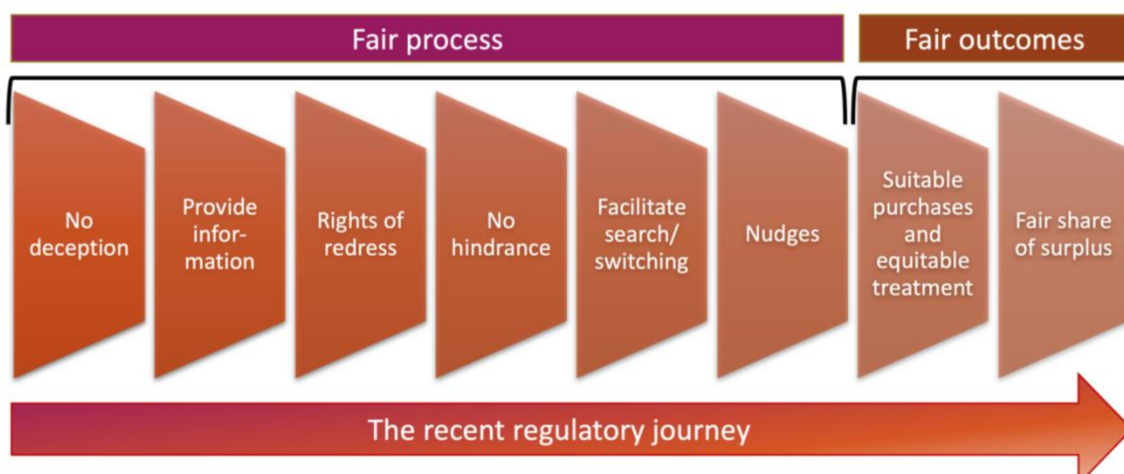
    1. <u>Products and services</u> - where the key issues are suitability and fair treatment
    2. <u>Price and value</u> - where the key issue is whether customers are receiving fair value for money

3. Consumer understanding - where the key issue is whether firms are providing relevant information, sufficiently clearly, to enable retail customers to make effective and properly informed choices
4. Consumer support - which covers the ability of retail customers to complain and also their ability to terminate their relationship and switch away to alternative providers.

What does this add to 'treating customers fairly?' (FCA Principle 6)

A natural question is what this new consumer duty adds to what the FCA already had in its existing Principle 6, which requires regulated firms to treat customers fairly?

I think it can be useful to think about the full spectrum of possible requirements that may be made of firms in relation to the fair treatment of consumers.



This figure shows how these can run from basic requirements of no deception at one end of the spectrum, through positive requirements to provide information, through rights of complaint and redress, through rights to switch, through requirements to actively facilitate search and switching or to even nudge consumers to consider switching supplier.

My perception is that over the last decade or so, there has been increasing realisation that there is a need to move ever rightwards along this spectrum if one is really going to create the sort of fair process that will deliver fair outcomes in terms of suitable purchases, equitable treatment of customers and customers getting a fair share of surplus.

As a result, the regulators have gone on a journey from simple requirements of minimum conduct standards, towards more proactive measures to drive search and switching, towards finally more outcome-based regulation. We've seen this in energy, with the various switching initiatives followed by the price cap, in telecoms for the price cap for fixed line only deals, and in financial services, with various attempts to enhance consumer behaviour now ending up with regulation of pricing structures for both overdrafts and home/motor insurance.

My reading of the situation as regards the 'treating customers fairly' principle is that in simple terms it didn't go far enough along this spectrum to deliver fair processes or fair outcomes. It became interpreted as lying very much at the left-hand side of the above figure.

The FCA's new consumer duty in context

If we look at the new consumer duty in this context, we can see the following.

In terms of cross-cutting rules (in the blue boxes):

- the cross-cutting rule to “enable and support retail customers to pursue their financial objectives” seems very close to a requirement of fair treatment of customer that we talked about earlier in relation to fair process.

- While the cross-cutting rule to “avoid causing foreseeable harm” seems very close to a requirement to ensure fair (or at least not unfair) outcomes.

Meanwhile, in terms of expected customer outcomes (in the gold boxes):

On the fair process side, we have

- The customer understanding outcomes. These are fairly basic consumer protection measures, and link to the requirements around no deception and providing information

- The customer support outcomes are also firmly on the left hand side, and relate to rights of redress and the requirement of no hindrance.

And then on the fair outcomes side, we have:

- The products and services outcomes, which are closely linked to suitability, and to some extent also to equitability[2]

- The price and value outcomes, which are partly linked to the split of surplus between firms and customers, but are also linked to equitable treatment across customers.

Do these latter requirements amount to price regulation? No. The FCA has taken a different approach. It does not intend to determine what prices should be but has instead placed clear responsibilities on regulated firms to take these customer outcomes seriously.

The role of boards in driving fairness of outcomes

Specifically, the new consumer duty requires that:

- Firms must monitor consumer outcomes, and prepare a report for their governing body setting out the results of this monitoring and any actions required as a result of the monitoring.

- Then, at least annually, the governing body of a firm must:
  - review and approve this monitoring report
  - confirm whether it is satisfied that the firm is complying with its obligations under the consumer duty and
  - assess whether the firm’s future business strategy is consistent with its obligations under the consumers duty.

[2] 2.A.3.4 requires that the manufacturer of the product must ensure that the design of the product does not adversely affect particular groups of customers.

- Where relevant it must also identify actions required to ensure compliance.

This is a very interesting and novel approach. It fits with the work of academic Lauren Willis who has long argued for a move towards outcomes-based regulation. Clearly, we will need to see how well it works in practice, but I am hopeful.

Pro-competition digital platform regulation - What is the rationale?

Turning now to pro-competition digital platform regulation, I thought we should start by just reminding ourselves of what the rationale is for this regulation.

We see a number of critical digital platform markets:

- which have tipped to being highly concentrated, seemingly long term
- where market power has been (or risks being) extended into related markets, and
- where platforms have what is sometimes called 'bottleneck power' or 'gatekeeper power' over competition in certain related markets – in particular in relation to business users who are seeking to gain access to end users on the other side of these platforms.

This situation has arisen partly due to a series of anti-competitive mergers and some anti-competitive conduct. But it is also due to the basic economics of these markets: economies of scale and scope, network effects, data feedback loops and consumer behaviour (including the ability of platforms to experiment and redesign their user interfaces until they get just the consumer behaviour they want).

These points were outlined in the 2019 Furman report and have since been reiterated by many other commentators, including academics, public bodies and consumer representatives, as well as by multiple businesses seeking to compete and innovate in this sector.

A key issue is that competition law has proven itself insufficient to deal with the issues arising. This is one element of the under-enforcement problem I highlighted earlier. Competition law is too slow, too narrow, too retrospective, and inherently ill-suited to the proactive opening up of markets to competition where they've already become concentrated.

As a result of these issues in recent years, we've seen a variety of *ex ante* regulatory initiatives across a wide range of jurisdictions internationally.

I'm going to focus in particular on the European Digital Markets Act (DMA), primarily because this is the key law that has actually been put in place and is being implemented. The UK also is preparing legislation and has already set up a shadow Digital Market Unit

within the Competition and Markets Authority to take forward this regulation. But we don't have the final wording of that legislation yet.

Fairness in digital regulation

I speak about this regulation a lot, from many different perspectives. But my focus today will obviously be on the role of 'fairness'. I would note that 'fair trading' is a proposed objective in the UK legislation too, but as I said my focus would be on the EU DMA.

The DMA has two stated objectives: contestability and fairness. It also includes 22 specific rules, covering issues such as interoperability, transparency, data portability, self-preferencing, tying, data sharing, and requirements related to end user switching and use of defaults.

Fairness in the DMA

A key point to highlight is that, as with the FCA's consumer duty, the DMA places substantial responsibility on the designated 'gatekeeper' platforms to ensure that they comply with the DMA.

Moreover, in doing so, they are required to demonstrate not only that they comply with the DMA provisions in themselves (the 22 rules), but that this compliance is also effective in achieving the objectives of the DMA – that is, fairness and contestability. Again this places strong weight on good internal governance within the firms to achieve these objectives.

I would also highlight that fairness as an objective is almost inevitably mentioned alongside contestability in the DMA, but where it is mentioned separately it is made clear that – unlike the FCA consumer duty – it relates to the fair treatment of business users. It is not about fairness to end users, other than indirectly on the basis that end users should get a fairer deal if the DMA is effective.

Does this mean that the fairness objective relates only to the supply-side though? Not necessarily. Recall the circle of competition that we looked at earlier.

Fairness in the DMA – brings together both sides

I talked about the importance of a level playing field between firms on the supply-side and the fair treatment of consumers on the demand-side. What I also want to highlight now is that there can be interactions between these.

Within the DMA, there are some provisions that clearly relate to establishing a level playing field between firms (or here 'business users'), such as:

- the requirement that platforms should not use data collected from their business users to compete against those business users

- that they shouldn't be self-referencing in rankings, or

- that they should provide access to app stores on fair, reasonable and non-discriminatory terms.

While these are all about directly about establishing a level playing field between business users, there are also a number of requirements that appear to be more about the fair treatment of consumers - or 'end users'. For example:

- end users must be enabled to switch default settings;
- there should be no hindrance of end users from switching;
- and end users should be enabled to port their data to third parties.

The key point to note here that, while these look like they are about the fair treatment of end users, they are really about enabling the search and switching that itself is critical to creating a more level playing field between firms. So the fairness objective in respect of business users is here in fact indirectly achieved through the fair treatment of end users.

Takeaways

I should wrap up. Just to reiterate a few key takeaways from this evening.

- We all care about fairness. While we all have different perspectives, there is much we can agree on.
- I described how a fair competitive process involves two critical elements: a level playing field between firms on the supply side, and the fair treatment of consumers (or end users) on the demand side.
- I talked about how, in many cases a fair competitive process will deliver fair outcomes, and indeed that unfair outcomes can be a good indicator of an unfair competitive process.
- But I also emphasised that in some cases unfair outcomes may nonetheless need to be addressed.
- The final key point I wanted to make is that I believe more can be done, and is being done in some cases, to get firms themselves to take more responsibility for ensuring these fair outcomes.

Overall, then, I hope we have persuaded ourselves that the 'fairness paradox' I started with, while important, doesn't mean that fairness is not itself a useful and usable legal concept.

I will leave it there and I look forward to the discussion.