Ofcom review of automatically renewable contracts - appraisal of behavioural economic underpinnings

A report for Sky

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Table of Contents

Summary

We focus on the behavioural economic underpinnings of the proposed Ofcom prohibition of automatically renewable contracts (ARCs) and the argument relating to competition and a possible negative externality (which would apply even were consumers assumed to be rational and unbiased).

We conclude that overreliance is placed on a partial reading (as reported in the consultation document) of the behavioural economics literature:

- First, relatively sophisticated consumer behaviour may be interpreted as irrational not because it is but because the model against which it is judged is wrong or does not reflect the context in which decisions might be made in practice.
- Second, where bias and irrationality is genuinely evident, in multi round experiments or real markets consumer behaviour may converge on more rational and less biased outcomes through learning from experience and/or from others.

In relation to a possible negative competition externality we found that the literature cited in relation to this focussed on long term contracts in a monopoly provider situation – a situation that does not apply in this context. More generally, as the OFT note in their February 2011 consultation on consumer contracts, there may be benefits of long term contracts to consider including the ability of consumers to hedge price risk and revenue certainty for firms which may enable them to finance entry or other speculative investments – with a potentially pro competitive impact from the latter. Further, prohibiting a specific activity may blunt the process whereby firms invest in brands and enhance or harm them through their conduct, thereby motivating good behaviour and lowering information and search costs for consumers.

Turning to the specific question of ARCs we find the Ofcom argument that the market is mature and "...*we can expect their introduction by suppliers to 'snowball' quite rapidly...*" unconvincing. ARCs are not currently widespread and the market is arguably in a state of dynamic transition with consumers migrating to next generation access and mobile-fixed substitution pressures intensifying as spectrum is released and with LTE in prospect.

Where markets are competitive the burden of proof in relation to intervention should be high and the possibility of "regulatory failure" versus "market failure" should be carefully weighed up consistent with the principle of a bias against intervention. Where it is decided to intervene, the least intrusive regulatory mechanism consistent with achieving policy objectives should be chosen. Indeed it could be argued that these principles are designed as a check against the possibility that regulators themselves are subject to bias and irrationality and that the checks and balances applying to them are weaker than those applying to producers and consumers in the marketplace.

Banning ARCs does not appear consistent with the Ofcom regulatory principles; rather monitoring of outcomes and potentially taking steps to improve transparency and consumer information appear appropriate. This is the approach adopted by Ofcom in relation to, for example, net neutrality and advertising of broadband speeds. It is also the approach adopted by the OFT in relation to consumer contracts, with specific enforcement activity against particular service providers where justified (the OFT have not sought to ban ARCs). A much less interventionist approach should be considered in relation to ARCs given the balance of economic and market evidence.

1 Introduction and context

1.1 Introduction

Plum was asked by Sky to consider the behavioural economic aspects of the Ofcom proposal in relation to automatically renewable contracts.[1] We focus on:

- The interpretation and weight placed on the behavioural economics literature as a basis for intervention in competitive markets generally, and in particular in relation to ARCs.
- The argument that the voluntary adoption of contracts would constitute a negative externality since it would diminish competition.
- Lessons from analysis of other markets (OFT analysis of consumer contracts generally and Ofgem analysis of long-term contracts in retail energy markets).
- The Ofcom approach in other areas (net neutrality and broadband marketing).
- The evaluation of options.

1.2 Context

We note that as a rule it is assumed that competitive markets can be expected to produce good outcomes. This is the underlying reason for putting lack of competition at the core of the grounds for intervention under the Communications Act and for the objective "*to further the interests of consumers in relevant markets, where appropriate by promoting competition*." It also underpins the Ofcom regulatory principles, in particular the following three:[2]

- *"Ofcom will operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required.*
- *Ofcom will strive to ensure its interventions will be evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome.*
- *Ofcom will always seek the least intrusive regulatory mechanisms to achieve its policy objectives."*

These principles acknowledge that whilst markets may be imperfect they may nevertheless perform better than regulation – no matter how well intentioned – in a range of circumstances.

[1] Ofcom. March 2011. "Automatically renewable contracts." http://stakeholders.ofcom.org.uk/binaries/consultations/arcs/summary/arcs.pdf

[2] http://www.ofcom.org.uk/about/what-is-ofcom/statutory-duties-and-regulatory-principles/

2 Evaluation of behavioural economics literature

The behavioural economics literature seeks to examine the economic implications of human behaviour as it is rather than taking as given an assumption of rational economic agents. It admits the possibility of inconsistency across sets of choices and bias in behaviour.[3]

Ofcom discuss aspects of the behavioural economics literature in the ARC consultation and refer to other applied applications, for example, by the Office of Fair Trading (OFT) in their discussion of consumer contracts.[4] A survey was also carried out for the Communications Consumer Panel in December 2010.[5]

We have examined the behavioural economics literature with a view to assessing whether the analysis Ofcom have relied on is complete and sufficiently robust to support a prohibition of automatically renewable contracts. In particular, we consider whether:[6]

- To the extent that behavioural economics conclusions relating to bias and irrationality are based on experiments they may abstract from circumstances applying in typical contexts where such behaviour may be 'rational'.
- Biases and inconsistency from the perspective of the assumptions of economic rationality may be rational when viewed from the perspective of optimal strategy in an evolutionary context.
- Individuals may be aware of cognitive failings and attempt to compensate for them.
- The model of efficient behaviour against which rationality is assessed may simply be wrong.
- Conclusions from behavioural economics may apply to individuals within institutions as well as to individuals in the market.

These points apply in general and suggest a high degree of caution is appropriate in moving from a view that consumers may be biased and irrational to a *per se* prohibition of specific conduct in a competitive market.

We discuss each of the above points in greater detail below.

2.1 Experiments may abstract from typical circumstances

> *"True irrationality lies in failing to perceive this sensitivity to context"*
> John Kay, 2011[7]

[3] An obvious possible basis for such differences might be that preferences and the rules of thumb 'hardwired' into the human brain by evolution may be near optimal in certain contexts that approximate our ancestral environment but perform less well in others. The surprising thing from this perspective is that we function as well as we do in the "modern" world. See Thomas J. Brennan and Andrew W. Lo. November 2009. "The Origin of Behavior." http://web.mit.edu/alo/www/

[4] http://www.oft.gov.uk/OFTwork/markets-work/current/consumer-contracts

[55] John Kay. 20 April 2011. "Consistency depends on context."
http://www.communicationsconsumerpanel.org.uk/Behavioural%20Economics%20and%20Vulnerable%20Consumers%20final%20report%20correct%20date.pdf

[6] For an early critique touching on some of these issues see Posner. May 1998. "Rational Choice, Behavioral Economics, and the Law." *Stanford Law Review*, Vol. 50, No. 5.

[7] http://www.johnkay.com/2011/04/20/consistency-depends-on-the-context

There are many ways in which laboratory experiments may abstract from circumstances which would typically be relevant to real world decisions. Apparent irrationally and bias may therefore be identified which would, in a different more realistic context, turn out to be good strategies. What this would indicate is an inability to adapt fully to the circumstances of the laboratory and not necessarily an inability to function effectively in real life. For example, apparent evidence of very high rates of time preference may reflect the fact that something definite now is often worth much more than a promise in the future given the possible transaction costs of gaining the future payoff and the risk that what is promised in the future may not eventuate (unless there are strong relationship or institutional/contractual reasons to believe it will).

2.2 "Inconsistent" behaviour may be optimal from an evolutionary perceptive

This point relates to the previous one, but considers typical circumstances in terms of those that apply over long (evolutionary) time-scales. Biases and inconsistency from the perspective of the assumptions of economic rationality may be rational when viewed from this perspective.[8]

> *"We show that risk aversion, risk-sensitive foraging, loss aversion, probability matching, and more general and previously inexplicable forms of randomizing behavior can all be derived from evolutionary forces acting on an arbitrary set of behaviors over an extended period of time."*

It is therefore important to consider whether departures from the rationality assumptions of economics do in fact represent poor strategies or whether they are sound strategies but in a different game to the one assumed. The implications of this for economics and markets may be complex and poorly understood, but it may be wrong to jump to the conclusion that individuals follow poor strategies.

2.3 In practice people may learn

Markets involve repeated interactions with opportunities to learn from experience and to learn from others (particularly with online consumer discussion forums available[9]). However, experiments or short run observations of the market response to supplier innovations may allow insufficient time for learning and therefore be misleading in terms of the implications in practice.

There are a number of examples from the literature of apparent anomalies in consumer behaviour reducing with experience. For example, market experience may reduce endowment effects.[10] [11] Another example involves a field test of behavioural research on gift exchange. In the abstract to the paper Gneezy and List (2006) state that:

> *"Recent discoveries in behavioral economics have led scholars to question the underpinnings of neoclassical economics. We use insights gained from one of the most influential lines of*

[8] Thomas J. Brennan and Andrew W. Lo. November 2009. "The Origin of Behavior." http://web.mit.edu/alo/www/

[9] For example http://community.bt.com/

[10] List. January 2003. "Does market experience eliminate anomalies?" *The Quarterly Journal of Economics*. http://karlan.yale.edu/fieldexperiments/pdf/List_Does%20Market%20Experience%20Eliminate%20Market%20Anomalies.pdf

[11] List. March 2011. "Does Market Experience Eliminate Market Anomalies? The Case of Exogenous Market Experience." http://www.nber.org/papers/w16908

behavioral research—gift exchange—in an attempt to maximize worker effort in two quite distinct tasks: data entry for a university library and door-to-door fundraising for a research center. In support of the received literature, our field evidence suggests that worker effort in the first few hours on the job is considerably higher in the "gift" treatment than in the "nongift" treatment. After the initial few hours, however, no difference in outcomes is observed, and overall the gift treatment yielded inferior aggregate outcomes for the employer..."

2.4 Individuals may compensate for known biases

Ofcom discuss 'over confidence bias' whereby individuals are excessively optimistic regarding their own abilities (paragraph 3.50). As an example Ofcom cite a study that shows that people signing on for gym membership frequently believe they will attend more than they actually do and make inappropriate contract choices as a result.[12]

However, a possible alternative explanation is that some individuals are aware of the fact that they will be paying more per visit under annual membership than paying per visit but chose annual membership in order to lower the incremental cost of going to the gym. They may know that whilst it would be cheaper to pay for each visit they would not go at all if they had to.

There are numerous other examples of formal and informal commitment devices which individuals utilise to offset known biases and irrationality in their behaviour including cutting up credit cards, buying smaller higher price per gram chocolate bars and paying up-front membership fees for things that are seen as desirable.[13] There are also examples of people voluntarily contracting to change their behaviour and facing penalties if they do not, with some apparent success.[14]

2.5 Our <u>model</u> of behaviour may be inadequate

"If an economist finds something – a business of one `sort or another – that he does not understand, he looks for a monopoly explanation. And as in this field we are very ignorant, the number of un-understandable practices tend to be very large, and the reliance on monopoly explanation, frequent." Robert Coase, 1972

We should be careful about the risk that the above quote applies, but with behavioural economic explanations substituted for a monopoly explanation. An example from the Ofcom consultation paper helps illustrate the point, namely the argument in paragraph 3.32-3.33:

"However, there is growing recognition that consumer behaviour is influenced by psychological factors as well as careful cost-benefit calculations...Of particular relevance for ARCs is the general tendency of individuals to exhibit inertia in their decision making (this is sometimes labelled 'status quo bias')."

Individuals may exhibit inertia, but we need to carefully assess whether this is in fact irrational. Only comparatively recently have economists developed a model of efficient investment decisions when

[12] Vigna and Malmemdier. April 2005. "Paying not to go to the gym'. http://www.econ.berkeley.edu/~sdellavi/wp/gymemp05-04-20.pdf

[13] Bryan, Karlan and Nelson. April 2010. "Commitment devices." http://karlan.yale.edu/p/AnnualReviewEdits4.pdf

[14] Xavier Giné, Dean Karlan and Jonathan Zinman. January 2010. "Put Your Money Where Your Butt Is: A Commitment Contract for Smoking Cessation." http://karlan.yale.edu/p/CARES_27jan2010.pdf

there is irreversibility and uncertainty (analogous to personal decisions where there is some cost to changing behaviour). It is found that substantial "inertia" or status quo bias can be perfectly rational.

As Dixit and Pindyck put it in relation to investment *"The option insight also helps explain why the actual investment behaviour of firms differs from the received wisdom taught in business schools."*[15] Predicted inertia can be large. For example, an estimate of the impact of real options in relation to entry in the copper mining industry implied that the "dynamic" entry premium was over six times the "static" entry premium and that almost 90 percent of the time the industry would be in a state that according to static (Marshallian) theory would not exist i.e. price is above long-run average cost without attracting entry or below average variable cost without inducing exit.

In relation to individual behaviour there are less applications of the theory. However, using internal migration in Germany Burda[16] points out that migration rates from East to West Germany were too slow in the face of a large wage deferential to be consistent with the deterministic static models of migration. Applying the real options theory, Burda shows that the lethargy of the potential migrants is perfectly rational given uncertainty and the positive option value of waiting.

2.6 Institutions also suffer from irrationality and bias

To the extent that various forms of irrationality and bias are real and material they may also apply to individuals within an institution. All of the decision making biases the paper for the Communications Consumer Panel describes in relation to consumer behaviour (in Box 2) might also apply to an agency such as a regulator, namely: status quo bias, loss aversion and endowment effects, short-termism, bandwagon effects, ambiguity aversion and framing effects.

A recent paper discusses some of the biases that may apply to regulators and notes that *"cognitive psychology offers many findings that may be instrumental in emphasizing the limits of government intervention"*.[17]

Institutions objectives in law, processes and values may seek to correct for bias, though agency problems (the difficulty in aligning individual and institutional interests) may nevertheless exacerbate such problems since institutions may lack high powered corrective mechanisms. These considerations may in part explain the adoption of a pro competition bias in the European Communications Framework and the Communications Act, and the bias against intervention adopted as a guiding principle of regulation when Ofcom was founded.

[15] Dixit and Pindyck. 1994. "Investment under uncertainty." Pages 6 and 265.

[16] Michael C. Burda. June 1995. "Migration and the Option Value of Waiting."

[17] Slavia Tasic. October 2010. "Are regulators rational?" http://brunoleonimedia.servingfreedom.net/Mises2010/Papers/IBL_Mises2010_Tasic.pdf

3 Is there a negative competition externality?

In paragraph 3.47 Ofcom argue that the presence of contractual externalities may mean that consumers will purchase ARCs, even where they are fully informed, which are harmful to competition i.e. there is an externality on other consumers. Ofcom state in paragraphs 3.53 that:

> *"By removing themselves from the pool of 'available' customers their decision can reduce competition".*

In support of this Ofcom cite a paper by Rasmusen *et al* (1991) which addresses coordination failure.[18] However Rasmusen *et al*. examines a model where exclusionary agreements can allow a monopolist to exclude potential entrants because of the inability of customers to coordinate their actions. The paper does not therefore apply to the situation under consideration by Ofcom, namely a market which is already competitive.[19]

More generally arguing that potential harm to others from market transactions constitutes an externality can be misplaced. For example, an individual's demand or lack of it for a given service may drive up demand thereby increasing prices for others or result in the non-availability of the service in question if there is insufficient demand.[20] Neither would constitute a genuine externality.

Focussing on the possibility of competition externalities we note that any long-term relationship including fixed mortgages, employment contracts etc is potentially open to this argument. *Reductio ad absurdum* one might therefore contemplate banning such relationships.

Clearly, there may be benefits of long term contracts to consider including the ability of consumers to hedge price risk and revenue certainty for firms which may enable them to finance entry or other speculative investments (which may imply that such contracts may increase competition and innovation). We note, for example, in relation to mortgage markets that it has been argued that consumers give insufficient weight to the benefits of long-term contracts due to behavioural biases.[21]

The reputational harm to a brand that can arise from adopting practices that customers dislike may itself attract innovation by others in the market, for example, clearly signalling that they do not engage in such practices. In turn this may damage the brand of other firms and motivate increased attentiveness to customers' interests across their retail activity more generally. Prohibiting a specific activity may blunt this processes by reducing the importance of brands. The risk of this should be considered in deciding on what, if any, form of intervention is appropriate.

[18] Rasmusen et al. 1991. "Naked Exclusion", *American Economic Review*, Vol. 81(5) pp. 1137-1145.

[19] Rasmusen *et al* subsequently commented further in 2000 noting that evidence of naked exclusion had not been demonstrated in practice. "Naked exclusion: reply." *The American Economic Review*, volume 90(1).

[20] Such pseudo externalities are known as pecuniary externalities. Baumol and Oates. 1994. The theory of environmental policy. Second Edition. Page 29.

[21] http://webarchive.nationalarchives.gov.uk/20071204181447/hm-treasury.gov.uk/consultations_and_legislation/miles_review/consult_miles_index.cfm

4 Impact of future evolution of the market

Ofcom put weight on the risk of a sudden shift towards ARCs as grounds for a more interventionist response now (as opposed to transparency measures for example). Ofcom state in their analysis that:

> *"In our view ARCs are particularly likely to spread where market shares become relatively stable...So far it appears that BT is the only large provider that has regarded ARCs as a profitable business strategy. However, once multiple firms have an incentive to adopt ARCs we can expect their introduction by suppliers to 'snowball' quite rapidly, since the reputational risks to any one firm will decrease as ARCs"* Paragraph 3.56
>
> *"As some communications markets mature and firms focus their attention more on customer retention than acquisition, there is a significant risk that ARCs will spread in the communications sector. Widespread adoption in a market could be very sudden if the major providers decided to introduce and support them."* Paragraph 5.1

There are two different assumptions here. First, that the market may mature and a shift to widespread adoption of ARCs would follow. Second, that reputational risk will not limit this.

We do not agree that the market is, or is necessarily approaching a state of maturity with stable market shares for the following reasons:

- Investment in fibre to the cabinet and fibre to the home means that there is an expectation of a transition of customers to next generation access, just as there was a transition from what might have been perceived as a mature dial-up market to broadband over the past decade (dial up connections were 99.2% of internet connections in January 2001[22] and had reached a plateau in 2002 in terms of overall take-up of around 42% of households [23]). Providers will compete to attract customers to their next generation offering and might gain or lose market share in the process.
- Infrastructure competition is increasing with cable moving to DOCSIS 3.0 and with anticipated wireless gains in terms of coverage, speed and capacity/unit-cost from spectrum liberalisation, additional spectrum (with 2.6 GHz and 800 MHz auctions planned)[24] and a transition to LTE.
- The growth of smart personal devices including smartphones and tablets is changing behaviour in ways that may prove disruptive, for example, potentially reducing bandwidth requirements for some applications and facilitating data transfer away home since devices can readily be carried. This may expand the prospects for fixed to mobile only substitution.

The transition is illustrated in Figure 1.[25] Whilst it is not known how customers will segment by access technology given uncertainty over their preferences and willingness to pay, the market cannot be reasonably be described as mature.

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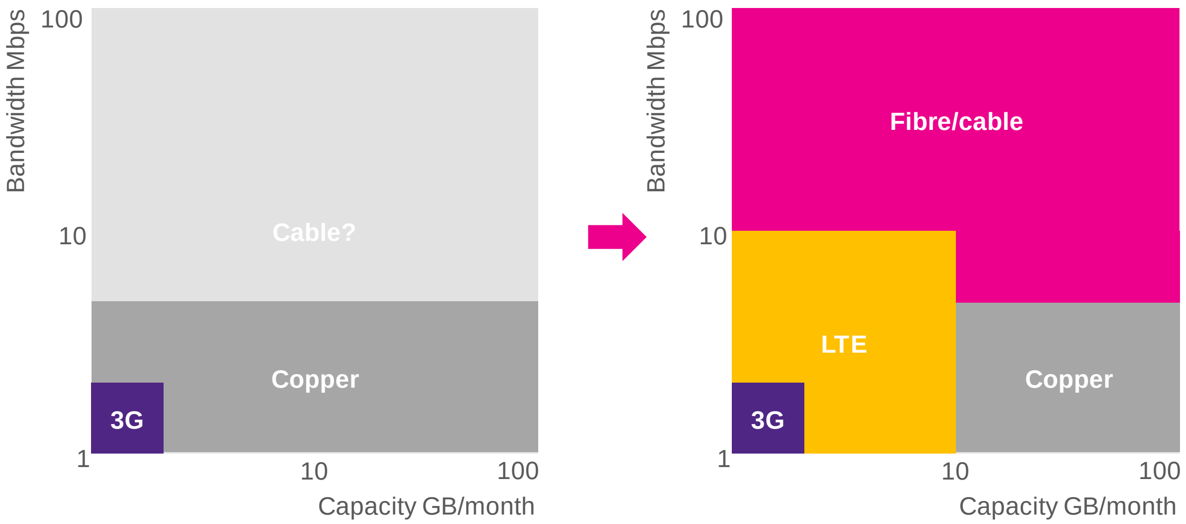
[22] http://www.statistics.gov.uk/statbase/product.asp?vlnk=8251

[23] http://www.ofcom.org.uk/static/archive/oftel/publications/research/2002/trenr1002.htm

[24] The Government has also published a target for the reallocation of 500 MHz of spectrum from public sector use to commercial use by 2020. DCMS. March 2011. Enabling UK growth – Releasing public spectrum.

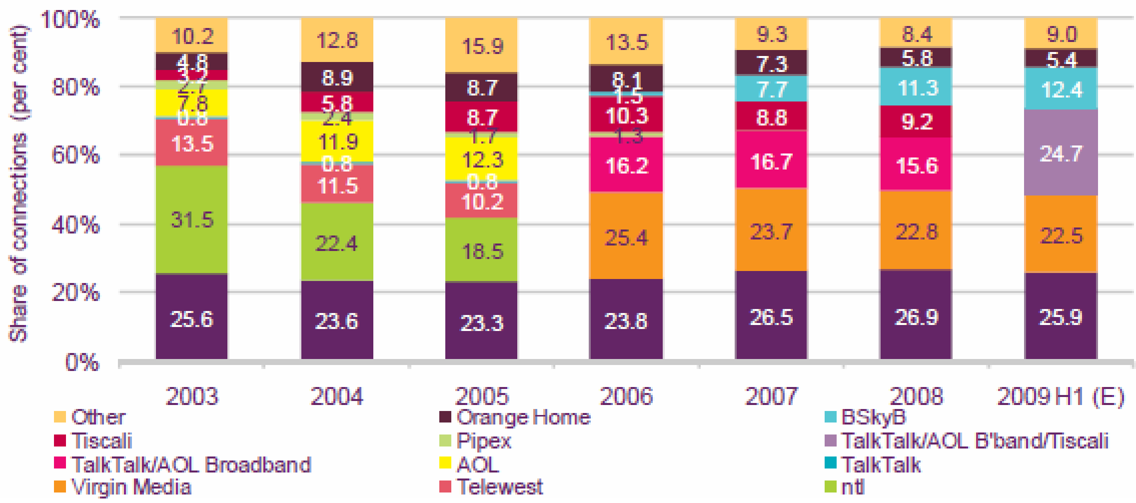
[25] Brian Williamson. 2010. Nomadicity and the evolution of applications, networks and policy. *Telecommunications Journal of Australia*, Volume 60(4). http://www.plumconsulting.co.uk/pdfs/Plum_TJA_Nomadicity_Nov_2010.pdf

Figure 1: The market is in transition



Further, the ISP market has seen entry and changing market share (Figure 2).[26]

Figure 2: ISP market share



In relation to the second point, namely that "...we can expect their introduction by suppliers to 'snowball' quite rapidly, since the reputational risks to any one firm will decrease", the potential payoff to an individual firm from offering non ARC contracts in a transparent manner may increase. Even was one to imagine ARCs to dominate the market it may be profitable for a market player to defect from such a strategy i.e. universal adoption of ARCs would not constitute a Nash equilibrium.

In conclusion, whilst the future state of the market is uncertain, we do not consider it credible to presume that the market will tip into a state dominated by ARCs.

[26] Ofcom. The communications market 2008 (the 2010 report does not include this data). http://stakeholders.ofcom.org.uk/binaries/research/cmr/CMRMain_4.pdf

5 What other regulators have done in the UK

We consider two cases where other regulators in the UK have considered automatically renewable contracts and behavioural economics, namely the OFT analysis of consumer contracts in general and the consideration by Ofgem of fixed terms offers and automatic contract rollover in gas and electricity retail markets. These cases are discussed below.

We find that both the OFT and Ofgem draw on the literature in a more general and pragmatic manner and emphasises remedies that rely on using existing enforcement mechanisms and improved consumer information.

5.1 OFT: consumer contracts

The OFT set out their economic framework in an Appendix and discuss two possible equilibria in consumer markets with asymmetric information and/or consumer mistakes.[27] In the first consumers are suspicious and spend excessive time and resources on avoiding problems, or are trapped by terms they don't expect or assess. In the second equilibrium, consumers can focus their efforts on understanding the key elements of the deals they enter and can trust honest traders to treat them fairly. The OFT state that they see their role as promoting the honest equilibrium by taking enforcement action against firms that betray consumers' trust.

In the main consultation document the OFT discuss a range of potential contractual forms which might involve consumer harm, their prioritising principles for addressing them (in Figure 6) and the scope for utilising existing provisions in the law.[28] The OFT note that consumer law does not regulate contracts prescriptively but that the OFT can use the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs), the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) and potentially other legislation such as the Consumer Credit Act 1974 to tackle unfair contract terms.

The OFT also discuss measures taken in relation to potentially unfair contracts. In relation to gyms the OFT have published guidance for consumers on terms.[29] In addition the OFT takes court action in specific circumstances.[30] However, the OFT have not sought to ban ARCs.

5.2 Ofgem: automatically renewable contracts in retail energy markets

Ofgem published a consultation paper in January 2011 on fixed term automatically renewable contracts.[31] The document makes one explicit reference to Behavioural Economics with regard to

[27] OFT. 2011. February 2011. "B – Economics framework." http://www.oft.gov.uk/shared_oft/market-studies/consumercontracts/oft1312b.pdf

[28] OFT. February 2011. "Consumer contracts." http://www.oft.gov.uk/shared_oft/market-studies/consumercontracts/oft1312.pdf

[29] OFT. March 2002. "Guidance on unfair terms in health and fitness club agreements." http://www.oft.gov.uk/shared_oft/business_leaflets/unfair_contract_terms/oft373.pdf

OFT. March 2002. "Are they fit to join? A guide to health club membership terms." http://www.oft.gov.uk/shared_oft/consumer_leaflets/general/oft380.pdf

[30] http://www.oft.gov.uk/news-and-updates/press/2010/25-10

[31] http://www.ofgem.gov.uk/MARKETS/RETMKTS/COMPET/Documents1/Fixed%20Term%20Offers_Consultation%20Final.pdf

termination costs referring to a paper that finds individuals are "loss averse" i.e. a loss has a significantly higher impact than an equivalent gain.[32] This implies that termination fees may be perceived by consumers as having greater weight than the potential savings from switching.

Ofgem considered four potential changes to the market:

i. Continue to use existing arrangements.
ii. Draw on existing rules and issue guidance.
iii. New rules to increase transparency and increase consumer engagement.
iv. New rules to limit a suppliers' ability to automatically role over a Fixed Term Offer.

Ofgem recommend a combination of options 2 and 3 in order to protect consumers without being detrimental to market innovation. However, Ofgem decided not to make any changes at this time given that their Retail Market Review proposes a number of changes to the nature of tariff offerings.[33]

[32] Kahneman, D., Knetsch, J. and Thaler, R. 1990. "Experimental tests of the endowment effect and the Coase theorem." *The Journal of Political Economy*. 98, 1325-1348.

[33] http://www.ofgem.gov.uk/MARKETS/RETMKTS/COMPET/Documents1/Decision_letter_FINAL.pdf

6 Ofcom approach in other areas

In what is arguably a comparable situation, namely actual and prospective restrictions on discrimination against internet based applications and content, Ofcom have chosen a voluntary approach with the aim of improved consumer information:

> *"Where competition thrives, however, the case for a highly interventionist net neutrality policy is harder to justify on the grounds of consumer protection. But that only works when consumers know what they are being offered and what is being denied to them.*
>
> *As we move into implementation of the Framework's requirements we now need to consider together whether greater transparency of traffic management policies will be sufficient, and will accord with how people actually make choices in the marketplace."* Ed Richards, FT World Telecoms Conference. November 2010.[34]

Yet arguably restrictions on internet based applications might also snowball given the existing lack of transparency in relation to restrictions, the possibility that consumers might not be using such applications at present but might wish to in the future, the possibility that such applications may be perceived as posing an increasing threat to integrated service offerings including voice and IPTV and as network operators seek new revenue streams to support the transition to next generation access.

In contrast to the prohibition proposed in relation to ARCs, the policy response in relation to 'net neutrality' has been cautious and measured. In March 2011, facilitated by the Broadband Stakeholder Group, a voluntary industry code of practice on traffic management transparency for broadband services was published. A number of Internet Service Providers (ISPs) have signed up to the code.[35]

A similar approach is proposed in relation to broadband speeds where the practice of advertising 'up to' speeds has been relatively widespread.[36] In response, a new strengthened voluntary code will apply from July 2011.

Enforcement of existing transparency requirements, improved consumer information and potentially a voluntary code should also be considered as possible proportionate remedies in relation to ARCs.

[34] http://media.ofcom.org.uk/2010/11/16/ft-world-telecoms-conference/

[35] http://www.broadbanduk.org/content/view/479/7/

[36] http://media.ofcom.org.uk/2011/03/02/average-broadband-speed-is-still-less-than-half-advertised-speed/