

Public Consultation on the Application of a Non-discrimination Obligation under Article 10 of the Access Directive

response from the International Telecommunications Users Group (INTUG)

Summary

INTUG welcomes this consultation, which addresses a critical issue for business users of electronic communications, especially in the context of roll out of Next Generation Access Networks. Rapid establishment of an international competitive market for services based on fibre access technology is a vital enabler for economic growth, improved productivity and job creation throughout the European Union. It is also a central issue to successful achievement of the Digital Agenda.

The overall aim must be to ensure consistency throughout the European Union, with clear, well defined approaches transposed in a way that prevents incumbents exerting undue influence in interpretation. This can be helped by ensuring that obligations extend to cover all aspects of life time service delivery, and to all conditions applying to access seekers.

Wholesale broadband services and international mobile services for business customers are of key importance, since both currently suffer access discrimination. Accounting separation has proved ineffective in preventing discrimination. Other ex-ante measures, including ultimately some form of regulatory separation must be available. The measures should apply to all fixed and mobile markets. The topology of incumbent networks needs to be assessed to ensure that the wholesale market is not fragmented to a point where only the incumbent can obtain a sufficient volume of customers to compete effectively.

Service Level Agreements (SLAs) and Key Performance Indicators (KPIs) should be used to ensure that non-discrimination can be achieved and be seen to be achieved, but this will only work if these are subject to consistent and transparent definition across the EU. The reports on such measures could usefully be published by NRAs through BEREC. There would be further benefit if definitions were not confined to the EU, and were used globally.

Current discrimination in access provision includes wholesale broadband access for alternative service providers, who find that the terms they can acquire from incumbents makes competition virtually impossible, causing many international service providers to withdraw from the market, and international mobile services, where there is no effective competitive market and MVNOs find it impossible to establish operations across the EU.

This leads to the lack of a competitive market for business services in fixed and mobile communications, which cannot be addressed by the regulatory framework. There is no Relevant Market for the business segment of national markets, which has different needs, nor is there a Relevant Market for international services. The multi-site and cross border elements of business services are overlooked by national consumer market analysis.

**Specific answers to each of the questions in consultation are in the following pages
The numbering of the Commission document questions has been retained.**

About INTUG

The International Telecommunications Users Group (INTUG) represents the interests of public and private business users of telecommunications globally. Users include some of the world's largest financial institutions, car manufacturers, pharmaceutical companies, fast moving consumer goods enterprises, retail and distribution companies, and small and medium enterprises (SMEs), as well as public sector utilities and other services.

The INTUG community includes user associations in many large EU Member States, including Belgium, Denmark, France, Germany, Spain, the Netherlands, Sweden and the UK, and the multinational user group EVUA, plus user groups in other parts of the world.

INTUG consulted its members on the response to the Access Discrimination Obligation questionnaire, and took account of members' own responses.

Nothing in this submission is confidential and the contents can be considered to be in the public domain. The submission is available on the INTUG web site at www.intug.org.

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INTUG Response to Access Discrimination Questionnaire

Question 1: What are the risks of divergent practices by national regulators regarding the application of non-discrimination obligations?

Answer: Additional costs, inefficiencies, and service inconsistencies for providers and their customers, through inability to obtain, commit to, or deliver consistent price and quality for equivalent wholesale broadband access services.

Question 2: Would significant differences in regulatory approaches across the EU have a negative impact on the development of an internal market, consumer welfare and/or investment conditions? Please illustrate your view with concrete examples?

Answer: Yes, it prevents a single market operating in communications services. This damages service availability, customer welfare, business productivity, investment in improved processes and underlying infrastructure and competition. Companies experience difficulties in many Member States when moving to another operator, particularly with locations that are not near existing concentrations of business users, as the incumbent's infrastructure must be used. The incumbents remain strong despite years of liberalisation. Businesses need a mobility strategy based on a common approach across multiple countries, but this is impossible due to differences in regulation and implementation, which do not affect businesses in the same way as mass-market private consumers.

Question 3: Would a lack of clarity surrounding the scope of a non-discrimination obligation render regulation at national level ineffective, in your view?

Answer: Yes, because local pressure at national level by incumbents will result in failure to transpose the regulation in a way which achieves the desired effects. The outcome is most likely to be a far longer period of survival for the status quo.

Question 4: In relation to the definition of a non-discrimination obligation, what are the advantages of a more general approach and of prescribing in more detail which type of behaviour falls under the scope of the non-discrimination obligation and which does not? Which other tools are available to NRAs in order to give clarity as to the exact scope of the non-discrimination obligation and what are their dis-/advantages?

Answer: As stated in the answers to Questions 1-3, consistency provides a stable environment for the creation of competition in business services. The scope of the non-discrimination obligation must cover all aspects of service quality, including not just price and performance, but the whole life cycle of delivery and operation.

Question 5: In which markets is the imposition of a well functioning non-discrimination obligation most important? Why?

Answer: (i) Wholesale broadband access for business users and alternative network operators (ii) international mobile services, including MVNOs, because these are the basis for international network support of business customers.

Question 6: Which are the most common (non-price) discriminatory behaviours?

Answer: Delayed installation, fault diagnosis and correction, tariff package manipulation (volume discounts) and disinformation about competitors are all examples of how companies are treated differently, depending on whether they are a customer of the incumbent or a customer of an alternative network operator, who is using the incumbent's infrastructure.

Question 7: How do you think a non-discrimination obligation should be used to address any issues around price discrimination?

Answer: Accounting separation has failed to achieve the desired end result and even functional separation has not been completely convincing. Whilst structural separation may be necessary eventually in such circumstances, it is hoped that effective enforcement via transparent, consistently defined KPIs may suffice.

Question 8: Would it be appropriate to apply different types of non-discrimination obligations (with a different definition and different scope) for different markets?

Answer: The problem is the same in each market, requiring the same obligations.

Question 9: In which markets (if any) is there no need for a non-discrimination obligation despite the existence of an operator with SMP?

Answer: None.

Question 10: What are the differences in terms of the scope and implementation between the non-discrimination obligation imposed under ex ante regulation and discrimination as an abuse in ex-post antitrust cases you have witnessed?

Answer: Ex-post obligations are too late to have any useful effect when the damage has already been irreparably done.

Question 11: With regard to the principle of equivalence, is it important in order to create a level playing field that wholesale access is provided on a strictly equivalent basis, i.e. under exactly the same conditions to internal and third-party access seekers? Does that include the requirement that the SMP operator should share all necessary information pertaining to infrastructure characteristics and apply the same procedures, by means of the same systems and processes, for access ordering and provisioning?

Answer: A strictly equivalent basis is absolutely essential for fair competition. It must include an obligation to share all information and use identical procedures.

Question 12: What are the advantages/disadvantages of having an NRA request notification of an adequate wholesale offer prior to the launch of retail products or suspend the launch of the SMP operator's retail offer until an adequate wholesale offer allowing replication has been tailored?

Answer: It allows synchronising of comparable retail offerings by SMP competitors.

Question 13: If the SMP operator should be required to provide the relevant wholesale input prior to the launch of its new retail offer, which factors need to be taken into account when calculating an appropriate lead time?

Answer: The length of time required to plan and implement the retail offer. A price change will require a shorter period than new technologies and processes.

Question 14: Is it necessary to use KPIs in order to detect potential discriminatory behaviour and, if so, how does the use of KPIs help to detect this type of behaviour?

Answer: KPIs are potentially useful in exposing discriminatory behaviour after the event, but only if the definition, measuring and reporting of the KPI is standardised.

Question 15: Does the use of SLAs and SLGs address concerns about potential non-discriminatory behaviour and, if so, how?

Answer: Partially, although this is subject to the qualification above regarding the definition, measuring and reporting of SLA and SLG criteria. Different SLAs should be made available by incumbents and alternative operators for business services, as companies are willing to pay for better reliability, performance and time to repair.

Question 16: How do you see the relation between the use of SLAs and SLGs on the one hand and KPIs on the other? In particular, do you consider it useful to have KPIs without SLAs and vice versa?

Answer: KPIs form part of the definition and reporting of SLAs and SLGs. KPIs are often interlinked and can have a waterbed relationship, hence an overall SLA assessment is also necessary to obtain a fair judgement.

Question 17: Do you consider it necessary and/or advisable to use Key Performance Objectives (KPOs) under a non-discrimination regime in order to address a potential problem of low quality of service provision?

Answer: Yes.

Question 18: Which areas of service need to be monitored by KPIs in order to ensure a fully functioning non-discrimination obligation?

Answer: Service Level Agreements are long and complex documents and a full response to this question is beyond the scope of this consultation. Obvious KPIs include availability of components and end-to-end service, fault frequency, MTTR, latency, peak transmission speed and busy hour congestion. Business SLAs should protect service even when the supplier is an alternative operator, since there are examples where despite an SLA between the incumbent and the alternative operator, when a cable broke, the SLA was considered to be invalid.

Question 19: Is there a need to ensure that the same KPIs are used in all Member States?

Answer: Absolutely yes.

Question 20: Which are the most important KPIs? Why?

Answer: The KPIs quoted above in Question 18 are amongst the most important since they impact directly on service quality provided to business customers, and service quality delivered by businesses from their applications to end consumers. As stated above, this must be allied to more stringent SLAs for business services.

Question 21: What practical complications or disadvantages apply to the use of KPIs?

Answer: Inconsistent definition, measurement and reporting between operators.

Question 22: How should NRAs and access seekers be involved in definition of the KPIs?

Answer: By developing a standard reference model endorsed by BEREC, which is also reviewed with other organisations outside the EU, e.g. OECD and ITU.

Question 23: What are the shortcomings/disadvantages of using KPIs?

Answer: As in the answer to Question 21, they are subject to inconsistent definition, measurement and reporting, and to manipulation, for example in time periods used.

Question 24: What are the potential cost implications with regard to the use of KPIs, both for the SMP operator subject to a non-discrimination obligation using KPIs and the monitoring authority? Could you please quantify any implementation costs in this respect?

Answer: Some existing network operations may initially be unable to report some KPIs at all, or on the basis of a commonly agreed definition. This may require amendment to network management systems, acquisition of new equipment, and development of new reporting systems. It would be unwise to estimate implementation costs on any general basis.

Question 25: Which other indicators may be useful to detect or measure the level of discrimination (e.g. consumer switching rates etc.)?

Answer: Churn can be a useful indicator, but discrimination tends to affect parts of an overall operation negatively, without necessarily justifying the significant cost and disruption of switching supplier for an entire multinational network operation.

Question 26: How is the design process for relevant wholesale inputs in SMP markets organised in your country? Do alternative operators have the ability to influence the decisions regarding product characteristics, interfaces etc.? Is there an independent industry body overseeing the process, which has the power to direct the SMP operator to take certain design decisions? If not, do you think that any such process should be established under non-discrimination obligations?

Answer: As INTUG is an international organisation, a response is not applicable.

Question 27: Do any issues of non-discrimination arise during the migration from legacy wholesale products to NGA-based products? If so, could you please provide examples and specify at which stages of the process these arise?

Answer: NGA migrations are at an early stage due to the absence of a competitive market for provision of such services. Historically, alternative network providers have experienced discrimination when migrating services from incumbents. This can be reflected in lack of knowledge by the incumbent about issues such as SIP trunking, and packaging new IP services with mobile. Competition must not be diluted by interpretation of the new Framework as Member States transpose it.

Question 28: In case of network topology modifications, how do you consider NRAs should ensure non-discrimination? Please refer in particular to operational processes used for implementing the migration of the wholesale offers.

Answer: This is a prime area for non-price discrimination, for example where the topology fragments the market, thus destroying economies of scale for potential competitors. The original topology envisaged by KPN, eliminating all exchanges and going direct to cabinets, was such a case and had to be blocked by OPTA.

Question 29: If KPIs are required how should NRAs be involved in the design and implementation of such KPIs? Which sanctioning mechanism(s) should be implemented?

Answer: Through a collaboration facilitated, and ultimately endorsed, by BEREC.

Question 30: To what extent do you find it justified to create an additional monitoring system conducted by an independent body (e.g. auditor) to check the SMP operator's compliance with non-discrimination rules?

Answer: BEREC should provide a check and balance on member NRAs, who are by definition independent bodies, if there is suspicion or allegation of non-compliance.

Question 31: What are the advantages of publishing the results of monitoring KPIs and how would this aid in ensuring compliance with a non-discrimination obligation? Are there any potential disadvantages concerning their publication?

Answer: Publishing KPIs helps to converge disparate definitions, measurements and interpretations, which can be easily exposed. This has been successful in exposing widely different answers for mobile termination rates/universal service. Reporting only to the NRA, and not publishing openly, might raise suspicions. Some operators might feel there are commercial risks in publishing service quality.

Question 32: Are there any other useful ways of enforcing a non-discrimination obligation?

Answer: Possibly functional separation in a way that eliminates discrimination.

Question 33: How does the new remedy of functional separation, in your view, relate to the general principle of non-discrimination?

Answer: As in the answer to Question 32, it makes discrimination more difficult.

Question 34: Which would be the market circumstances that could justify the imposition of functional separation as a regulatory remedy as in Article 13a of the Access Directive?

Answer: Continued absence of effective and efficient competition in business services and/or lack of competition in wholesale services domestically.

Question 35: What evidence do NRAs need to submit in order to prove that previously imposed obligations, with particular references to non-discrimination obligations, have failed to achieve effective competition and that there are persisting competition problems and/or market failures that can only be remedied by introducing functional separation?

Answer: Complaints from alternative operators and customers, continued SMP.

Question 36: Can functional separation be a justified remedy even where there is a lack of sufficient enforcement of other regulatory obligations, and in particular non-discrimination obligations, imposed in the past?

Answer: Yes, since it suggests that lack of effectiveness by the NRA in question has resulted in failure to establish a competitive market, and hence further delay cannot be justified.

Question 37: What information should the Commission require from NRAs in the process of voluntary approval of proposed undertakings under Article 13b of the Access Directive?

Answer: Trends in the market shares of the incumbent and its competitors.