Body of European Regulators for Electronic Communications

BEREC

BEREC's answer to the Commission's questionnaire on non discrimination

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1. Introduction and overall BEREC views

On 3rd October the Commission published a consultation on the application of the non-discrimination obligation under Article 10 of the Access Directive, with the objective of providing guidance to national regulatory authorities (NRAs) on the consistent application, monitoring and enforcement of this remedy.

The Commission notes that the scope, exact application, compliance monitoring and enforcement of this remedy vary considerable across Member States (MSs) which (in its view) gives rise to:

- "*a lack of clarity surrounding the scope of non-discrimination obligation which can result in ineffective regulation at national level;*
- *a too lenient approach towards implementing and enforcing non-discrimination obligations; and*
- *significant differences in the regulatory approaches across the EU which have a negative impact on the internal market...".*

As set out in its Digital Agenda for Europe (DAE), an important aim for the Commission is the reinforcement of a single market for telecommunications. In the Commission's view the "*single market logic requires similar regulatory issues to be given correspondingly similar treatment*". The Commission therefore sees the provision of further guidance on the application of non-discrimination obligation as a priority.

BEREC welcomes the opportunity to respond to the Commission's consultation and its detailed response is set out below.

Overall BEREC views

In general **the principle of non-discrimination** seeks to ensure that undertakings with Significant Market Power (SMP), in particular where they are vertically integrated, do not discriminate against their competitors in favour of their own downstream businesses, thus preventing, restricting or distorting competition. Therefore, the primary consideration under a general non-discrimination obligation is to ensure that SMP operators are required to treat all access seekers (domestic and foreign) on the same terms and conditions as their (internal) downstream divisions. Exceptions from this principle might be justified for objective reasons only.

In BEREC's view whether such terms would need to be exactly the same across MSs is likely to be less important to the development of competition, than the primary

objective of ensuring that vertically integrated operators with upstream SMP do not disadvantage downstream rivals by favouring their own downstream operations. More generally, differences in regulatory approaches are likely to matter less to the development of an internal market and/or consumer welfare or investment, than achievement of the primary aim: transparency of the regulatory rules in each MS and consistency of regulation within each MS once SMP obligations (including non-discrimination) are set. Moreover, the particular regulatory tools that can be used in each MS to address issues of non-discrimination will also depend on the particular design of the products in question. Therefore, an artificial harmonisation of the implementation of this remedy might jeopardise the objective of ensuring non-discrimination and/or could also infringe the principle of proportionality.

Wide margin of discretion in determining scope of non-discrimination obligation

At a high level, BEREC believes that NRAs are afforded a wide margin of discretion in determining the **form** and **scope** of the non-discrimination remedy under Article 10 of the Access Directive (subject to the specific transposition in MSs). We therefore welcome any clarity with regard to the problems experienced by NRAs that the Commission can provide on this front. Moreover, BEREC notes that there are additional tools available to NRAs to ensure non-discrimination: for example imposition of conditions regarding fairness, reasonableness and timeliness under Article 12 (of the Access Directive) can help to address non-discrimination concerns.

In BEREC's view any guidance from the Commission should take into account the tools already available to NRAs. Such guidance will also need to be **inclusive** – the formulation of an exclusive list of topics which would, by definition, restrict the interpretation of the Directive would be inappropriate.

The principle of equivalence important in creating a level playing field

Various approaches can be effective in defining the form and scope of the non-discrimination obligation. NRAs should choose the method which fits best within the overall national regulatory regime and with national case-law. For example, in some circumstances, it may be effective for NRAs to provide further clarification on how they would interpret the non-discrimination obligation in practice and on a case-by-case basis.

In this regard, BEREC feels the **principle of equivalence** is important in creating a level playing field and ensuring non-discrimination. This can be implemented to either achieve an equivalence of outputs (EOO) or an equivalence of inputs (EOI). A strict

application of EOI may not be proportionate in all instances if it is considered that this model might entail a major overhaul of business processes and operational support systems. A general high level principle may be to apply EOI where the benefits of imposing it outweigh the costs i.e. for those services where the incremental design and implementation costs of imposing it are low. In the case of other services EOO may be an acceptable and proportionate alternative to EOI.

However, in other cases, a **more prescriptive approach** may be found necessary in order to provide the necessary level of assurance in relation to specific issues of non-discrimination (for example, by defining precise rules as to the timely availability of wholesale products and fit for purpose migration processes). Ultimately the decision regarding the form of the non-discrimination obligation should rest with the NRAs who would need to take into consideration the costs involved.

KPIs a useful measurement and monitoring tool

As for the **application and monitoring of the non-discrimination obligation**, KPIs and SLAs/SLGs have a role to play in ensuring non-discrimination. KPIs are a useful measurement and monitoring tool which can detect discriminatory behaviour and in that can help reduce the SMP player's incentives for such behaviour. SLAs and SLGs ensure a specific level of service quality is provided and can be used to strengthen the SMP player's incentive to comply with the non-discrimination obligation, since they can also ensure the same level of quality is provided to all alternative operators. The use of SLAs without KPIs makes it harder to monitor non-discrimination. KPIs which are not related in some way to SLAs appear of limited value, since they would be measuring something which is apparently not considered to be important. On the other hand, the existence of SLAs and SLGs without KPIs might be enough or fit for purpose to prevent discrimination in certain cases.

Publication of KPIs is key to ensure transparency and can be a low cost way of verifying the reasonableness of the data reported.

Functional separation a remedy of last resort

Finally, BEREC sees **functional separation** as a remedy of last resort to be imposed when all other remedies relating to non-discrimination have failed.

2. Principles of Non-discrimination

Q1. What are the risks (if any) of divergent practices by national regulators regarding the application of non-discrimination obligations?

Q2. 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? If so, could you please illustrate your view with concrete examples?

In order to answer this question fully one would need to understand the specific divergences that may exist and how material in practice they may be. The primary consideration is to ensure that, under a general non-discrimination obligation, the SMP operators are required to treat all access seekers (domestic and foreign) on the same terms and conditions as their (internal) downstream divisions. Exceptions from this principle might be justified for objective reasons only.

Whether such terms would need to be the same across Member States (MSs) is likely to be less important to the development of competition, than the primary consideration of ensuring that vertically integrated operators with upstream SMP do not disadvantage downstream rivals by favouring their own downstream operations. More generally, differences in regulatory approaches are likely to matter less to the development of an internal market and/or consumer welfare or investment, than achievement of the primary aim: transparency of the regulatory rules in each MS and consistency of regulation within each MS once SMP obligations (including non-discrimination) are set.

By way of a simplified and theoretical example, suppose that in MS X a wholesale product is provided one month before the launch of the corresponding retail product and in MS Y two months before, provided there are no special circumstances that justify this difference.[1] Consistent application of the non-discrimination obligation will require that all (domestic and foreign) access seekers (including the SMP player's downstream arm) have access to the relevant wholesale product one month before in MS X and two months before in MS Y. The fact that the lead times are not the same in the two MSs matters much less than the question of whether the access seekers in each MS clearly understand the rules and the question of how consistently each NRA enforces the non-discrimination rules it sets.

[1] This is without prejudice to the BEREC answer in Question 9.

The above example also serves to highlight how national differences would make very specific non-discrimination rules designed to apply across the EU difficult to implement. For example, how would one make an objective choice on the best lead times? What if there are some subtle differences in the wholesale products in each MS which may justify the different lead times? To establish the same lead times across all MSs would require an in-depth knowledge of every wholesale product available and an understanding of the differences among them.

In conclusion, harmonization endeavours in this area should focus on ensuring that in all MSs access seekers are equally protected (such that vertically integrated operators with upstream SMP do not disadvantage downstream rivals by favouring their own downstream operations) and not be so much focused on making the detailed conditions homogeneous across Europe (unless this proves to be justified and proportionate under a cost-benefit analysis).

Q3. Would a lack of clarity surrounding the scope of a non-discrimination obligation render regulation at national level ineffective, in your view?

SMP operators have a clear commercial incentive to discriminate against their competitors, in particular by exploiting to the maximum any ambiguity about the meaning of a non-discrimination obligation. The key question is to determine if, and to what extent, such ambiguity exists in practice. In our view under Article 10 NRAs are afforded a wide margin of discretion in determining the form and scope of the non-discrimination remedy and it may be more appropriate for the Commission to clarify this by setting out some high level principles, rather than a too prescriptive guidance on non-discrimination. For example, a guidance which is too prescriptive may on the one hand provide more clarity and on the other hand reduce the flexibility of NRAs to respond to new discriminatory behaviours in a timely and appropriate manner.

BEREC also notes that any perceived lack of clarity around the scope of Article 10 (of the Access Directive) does not render national regulations ineffective, since that depends on how this article is implemented in national laws and regulations.

3. Scope of a non-discrimination obligation

Q4. In relation to the definition of a non-discrimination obligation, what are, in your view, the advantages of a more general approach and what are the advantages of prescribing in more detail which type of behaviour falls under the scope of the non-discrimination obligation and which does not? In this respect, 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?

As a general principle, the more prescriptive the guidance is around the scope of the non-discrimination principle, the more clarity will be given to market players on how the non-discrimination obligation is to be applied in practice. However there are also disadvantages associated with this approach – for the guidance to be comprehensive one would need to be able to determine *a-priori* all potential forms of (price and non-price) discrimination associated with different markets and/or products. In this respect, behavioural discrimination is even more difficult to determine in all its forms and shapes. One would also need to consider whether there would be any unintended consequences associated with an approach which tries to be too prescriptive from the outset. A very prescriptive approach could also be susceptible to gaming by SMP players and alternative operators alike.

In BEREC's view, it would be useful for the Commission to provide guidance on the scope of NRAs' powers to impose non-discrimination obligations. But any guidance should be **inclusive** – the formulation of an exclusive list of topics which would, by definition, restrict the interpretation of the Directive would be inappropriate.

BEREC also notes that there are additional tools available to NRAs in order to give clarity as to the exact scope of the non-discrimination obligation:

- NRAs can give *ex-ante* Directions on how the non-discrimination obligation is to be applied in practice and on a case by case basis, following an own initiative investigation or stand alone project.
- NRAs can also give more guidance by resolving disputes (*ex-post*) or sanctioning procedures on non-compliance with the non-discrimination obligation.
- It is also important to consider the configuration of other regulatory obligations imposed. Imposition of conditions regarding fairness, reasonableness and timeliness under Article 12 (of the Access Directive)

can help to address non-discrimination concerns. In effect, in various MSs NRAs have imposed remedies on the basis of Article 12 of the Access Directive as the primary instrument to address issues of non-discrimination. In addition, NRAs have also imposed transparency obligations under Article 9 (of the Access Directive) to help clarify how the non-discrimination will be interpreted under certain circumstances, particularly through the information requirements to be included in the reference offers (ROs).

Q5. In which markets is the imposition of a well functioning non-discrimination obligation most important? Why?

The answer to this question will, to a large extent, depend on the competitive conditions of the market in question and the nature of the competition issues faced. Generally speaking, a well functioning non-discrimination obligation is key in markets which are exhibiting a lot of change (technological change, new product launches etc) and where new retail products are being launched – this will ensure that the development of competition is safeguarded in these markets and consumer welfare maximised. On the other hand, a well functioning non-discrimination obligation is as important in a small market with only one competitor present. However, any approach adopted should not be applied mechanistically as we explain further in Q9 below.

Q6. Which are the most common (non-price) discriminatory behaviours which you observe?

Where the non-discrimination obligation is in place and it works, no discriminatory behaviours are generally observed.

Generally SMP operators have a commercial incentive to deny access to, delay the provision and degrade the quality of relevant wholesale products. Below we list the most common discriminatory behaviours BEREC has so far observed:

- *Timely availability of wholesale products and/or wholesale tariffs*. SMP player introducing new retail products before making available (equivalent) wholesale inputs to alternative operators. SMP player making available tariff schedules to its subsidiaries (for use in tenders) before informing alternative operators.
- *Longer lead times for alternative operators*. SMP player providing the wholesale products to alternative operators within the timeframes

prescribed in the SLAs, however such lead times being significantly longer than the ones allowed to its downstream operations.

- *Intentionally implementing different processes and procedures for the delivery of wholesale products to alternative operators*. The SMP operator might be setting different (potentially discriminatory) conditions relating to the ordering and delivery of wholesale products and access to information between alternative operators and its downstream arm. This could, for example, be the case if the SMP player intentionally (i.e. not as a result of legacy systems or other pre-existing situations) and systematically uses different procedures for delivery of unbundled access and bit stream access products.
- *Limiting the transparency and the level of detail of access services contractual conditions.*
- *Lowering the quality of regulated access services granted to access seekers.* This results in a poor quality of services for alternative operators and end users.
- *Asymmetries of information between the SMP player and alternative operators.* For example the SMP operator may have access to detailed information on the characteristics of the loop, coverage area of the central or the existence of space in the conduits which does not make available to alternative operators.

For specific country case studies see Annex I.

Q7. How do you think a non-discrimination obligation should be used to address any issues around price discrimination?

BEREC proposes a case-by-case investigation of the circumstance, in order to meet the right competition problem with the right remedy. The non-discrimination obligation is an instrument to create a level playing field. This obligation can be used not only to allow alternative operators to replicate the incumbent's proposition technically, but also economically.

Price discrimination can occur in different ways. One aspect of product pricing where discrimination might occur is in relation to discounts (volume, geographic and term). SMP operators can construct such discount schemes in a way that favour their downstream arm more than alternative operators. For example, an SMP player's downstream arm may be the biggest beneficiary of volume discounts as the player with the biggest market share and may also

not see a disadvantage in being contractually tied to the SMP player for long periods of time. However, such discount scheme can also support the development of new markets/products and confer great advantages to all operators if they can be structured in a non-discriminatory way. In fact the Commission's Recommendation on NGA supports term discounts if these are structured in a way that:

"

a) *long-term commitment prices only reflect the reduction of risk for the investor; and*
b) *over an appropriate period of time there is sufficient margin between wholesale and retail prices to allow for market entry...".*

Two other remedies can also address, at least partially, price discrimination issues:

- The obligation of cost orientation (which can be imposed following the regulatory objectives intended by the NRA regarding competition in each market) is primarily aimed at preventing excessive pricing, but can also take away price discrimination if the result is price points, not price caps that leave space for discrimination.
- The imposition of a margin squeeze test is primarily aimed at preventing margin squeeze. But it can also address some price discrimination issues where it ensures that the SMP player does not sell products in different parts of the value chain (upstream and downstream markets) at prices that mean alternative operators cannot compete due to too low a margin between these prices.

Q8. Are you of the view that it would be appropriate to apply different types of non-discrimination obligations (with a different definition and different scope) for different markets?

As set out in the answer to Q4 above, the more prescriptive the guidance is around the scope of the non-discrimination principle, the more clarity will be given to market players on how the non-discrimination obligation is to be applied in practice.

However, in principle it may be more appropriate and proportionate to define the non-discrimination obligation based on the characteristics of the relevant markets and/or products. In fact when implementing the non-discrimination obligations NRAs also need to take into account the requirements of Article 8.4 (of the Access Directive) which requires remedies to be based on the

nature of the problem identified and the requirements of Article 8 (of the Framework Directive) which requires such remedies to be proportionate and objectively justifiable.

This may be particularly relevant if markets are at different stages of development and/or competition or with different competition problems. For example:

- Not all markets (or products in the same market) have associated SLAs/SLGs and KPIs and where these are present they are not (and cannot be expected to be) the same.
- In principle, it may not be proportionate to apply the same remedies to all operators with SMP. This may be the case in some markets where a number of operators may be found to have SMP but the form/scope of remedies applied to the incumbent and other (smaller) operators may differ due to proportionality considerations.

Following from the above, it may be more appropriate for the Commission to clarify that NRAs have wide discretion on how to apply the non-discrimination obligation, rather than be too prescriptive in its application which is unlikely to capture all possible instances of discriminatory behaviour.

Q9. In which markets (if any) is there no need for a non-discrimination obligation despite the existence of an operator with SMP?

According to Article 8 of the Access Directive, the imposition of a general non-discrimination obligation in a specific market shall be based on the nature of the problem identified and be proportionate and justified in light of the objectives laid down in Article 8 of Framework Directive. On this basis, it is very difficult to establish *a priori* which markets may have no need for a non-discrimination obligation. As a general high level principle, in order to promote and safeguard competition, all markets may benefit from a general non-discrimination obligation, which on occasions, can also be interpreted more strictly on a case-by-case basis (see Q8).

Without prejudice to the BEREC answers to Questions 12 and 13 below in relation to the timely availability of wholesale inputs, in exceptional circumstances the regulator should be given the discretion to balance the principle of equal treatment and the first mover advantage in the case of innovative retail products where the risk of a long-term distortion to

competition is minimised.[2] An operator wanting to enter a market with an innovative retail product may need an incentive to recover research and development costs as well as gain profits out of it. The prospect of instantly sharing market demand for the new product with competitors may reduce the incentives for innovation. On the other hand, where an innovative retail service requires a new wholesale input,[3] a technical development at the wholesale level will be necessary. In such a case, retail exploitation of this development by the SMP player can also be maximised (and therefore wholesale profits maximised) through exploitation by multiple players rather than a monopolist.

Potential deviations from the general application of the non-discrimination obligation, in case of innovative retail products, should be treated as an exception for justified objective reasons and require careful consideration on a case-by-case basis. Specifically, the interest of the consumer should be at the centre of any such consideration, along with the effects on long-term competition.

Q10. 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?

In relation to the <u>scope</u> of the non-discrimination obligation:
Non-discrimination obligations imposed under *ex-ante* and *ex-post* regulation can be complementary.

A non-discrimination obligation imposed under *ex-ante* regulation, will relate to particular (price and non-price) behaviours between the providers acting in the market. If the regulated market is at the wholesale level, one would want to guard against any discriminatory behaviour by the SMP player in favour of its downstream operations and to the disadvantage of alternative operators (which need access to SMP player's wholesale products). In such cases, an *ex-ante* obligation not to discriminate will ensure the SMP player treats all

[2] In accordance with this reasoning the German Federal Administrative Court issued a ruling (6 C 47.06 from 18 Dec 2007) stating that in this case it was justified to offer the respective wholesale product only after the launch of the corresponding retail product of the SMP operator in order to safeguard legitimate first mover advantages. For judging the legitimacy of a first mover advantage in the case of innovative products, it is important to consider whether competition will be able to close up on the SMP operator in the market for the relevant product or not.
[3] For simplicity BEREC assumes that the new wholesale input is a regulated input, rather than a truly innovative product which may not be captured by regulation immediately.

alternative providers and its downstream affiliates or departments in a "similar" manner.

In *ex-post* antitrust cases, the scope of the discriminatory behaviours analysed under Article 102.c of the Treaty could be broader. These could potentially include all of the actions and agreements between the SMP player and alternative operators that could be regarded as anticompetitive and discriminatory (especially if they can have an exclusionary effect in relation to competitors and other providers/users). Moreover, in these instances discriminatory behaviour usually appears together with other abusive conduct.

The specific types of conduct that could be considered as abusive are not set out in *ex-post* competition law[4], as they are in the case of *ex-ante* regulation.

In relation to the <u>implementation</u> of the non-discrimination obligation:
A non-discrimination obligation imposed (on telecommunications operators having SMP) under the European Framework goes beyond those that would normally be imposed under Article 102 of the Treaty.

An *ex-ante* non-discrimination obligation is designed to prevent anti-competitive situations by restricting the behaviour of the SMP player and will only be successful in achieving this objective if it is precise in describing the behaviour that it is trying to prevent. Hence the implementation and monitoring of the non-discrimination obligation under *ex-ante* regulation will require more effort.

In *ex-post* antitrust cases the burden of proof in higher as it is necessary to determine if the SMP player's conduct can have an exclusionary effect (this is not required when non-discrimination is imposed under *ex-ante* regulation). For example, this is set out in the judgement of British Airways PLC vs European Commission (emphasis added):[5]

"*67 In order to determine whether the undertaking in a dominant position has abused such a position by applying a system of discounts such as that described in paragraph 65 of this judgment, <u>the Court has held that it is necessary to consider all the circumstances</u>, particularly the criteria and rules governing the grant of the discount, <u>and to investigate whether, in providing an advantage not based on any economic service justifying it, the discount tends to</u>*

[4] E.g.: Clearstream Banking AG and others vs Commission, General Court judgement of 9 September 2009, regarding time-frames of provision; Oscar Bronner GMBH, Court of Justice judgement of 26 November 1998, regarding refusal of access.
[5] Case C-95/04 P, judgement of 15 March 2007.

remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition (Michelin, paragraph 73).

*68 It follows that in determining whether, on the part of an undertaking in a dominant position, a system of discounts or bonuses which constitute neither quantity discounts or bonuses nor fidelity discounts or bonuses within the meaning of the judgment in Hoffmann-La Roche constitutes an abuse, **it first has to be determined whether those discounts or bonuses can produce an exclusionary effect**, that is to say whether they are capable, first, of making market entry very difficult or impossible for competitors of the undertaking in a dominant position and, secondly, of making it more difficult or impossible for its co-contractors to choose between various sources of supply or commercial partners.*

*69 **It then needs to be examined whether there is an objective economic justification for the discounts and bonuses granted**. In accordance with the analysis carried out by the Court of First Instance in paragraphs 279 to 291 of the judgment under appeal, an undertaking is at liberty to demonstrate that its bonus system producing an exclusionary effect is economically justified."*

Q11. With regard to the principle of equivalence, do you think that it is 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, in your view, 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?

BEREC regards the principle of equivalence important in creating a level playing field.

In relation to the principle of equivalence it may be useful to distinguish between **equivalence of outputs** (EOO) and **equivalence of inputs** (EOI)[6]. As described in the BEREC report[7], EOO implies that the wholesale access products the SMP player offers to alternative operators are comparable or identical to those it provides to its downstream arm in terms of functionality

[6] Where EOI applies that will subsume 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*."

[7] BEREC report entitled "*BEREC Guidance on functional separation under Articles 13a and 13b of the revised Access Directive and national experiences*", February 2011, pages 7 and 8 (BoR (10) 44 Rev1).

and price, but they may be provided using different systems and processes.[8] On the other hand, EOI requires the SMP player to provide the same physical upstream inputs to its downstream arm and alternative operators (e.g. same tie-cables, same electronic equipment, same space exchange etc.). Therefore, under EOI, the product development process is equivalent,[9] as is the provision in terms of functionality and price. In practice, however, under EOO some of the systems and procedures used by alternative operators can also be the same as those used by the incumbent.

NRAs are best placed to determine the exact application of the form of equivalence on a product-by-product basis. For example, a strict application of EOI is only proportionate in those cases where the benefits of imposing it outweigh the costs: therefore it may be more appropriate for those services where the incremental design and implementation costs of imposing it are very low (because equivalence can be built into the design of new processes) and for certain key legacy services (where the benefits are very high, despite the material costs of retro-fitting EOI into existing business processes). In all other cases, EOO would still be a sufficient and proportionate approach to ensure non-discrimination.

An additional important high level principle would be to only apply EOI at the appropriate level in the wholesale value chain, rather than multiple levels.

In exceptional cases, in order to facilitate effective competition in downstream markets, it may be opportune to consider alternatives for the strict application of the obligation of non-discrimination. Amongst the possible alternative solutions, BEREC will analyze the application of a principle which, when justified and proportionate, will aim at equalizing the total wholesale costs faced by both the downstream arm of SMP player and by competitors (while at the same time allowing end customers of all providers to benefit from the economies of scope which arise from the legacy of vertical integration). BEREC will further investigate the type of situation that could require such an approach and the possible ways to address it (including the possibility of using

[8] BEREC notes that in Italy, under EOO, exactly the same upstream input is provided by Telecom Italia to its downstream arm and alternative operators, although some business processes or operational support system might not be identical. Over time however they will likely converge or became identical.

[9] Although the product development process is exactly the same, this will require degree of software system separation (i.e. Operational and Support Systems (OSS)) and separate management information to safeguard against issues of confidentiality and consumer data protection.

the powers in Article 13 of the Access Directive to impose an appropriate pricing rule).

4. Application and Monitoring of the Non-Discrimination obligation

Q12. 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?

Competitors need assurance that suitable and fit for purpose wholesale products are available in time to permit them to offer new downstream services at the same time as the SMP player, provided there are no special circumstances. By itself, the non-discrimination obligation may be insufficient to provide this assurance. In the absence of more definitive measures, the SMP player may delay availability of the wholesale offer and/or delay provision of information which would be necessary to allow competitors to exploit the offer in a timely manner.

Various approaches can be effective in dealing with this problem. NRAs should choose the method which fits best within the overall national regulatory regime and with national case-law. For example, in some circumstances, it may be effective for NRAs to provide further clarification on how they would interpret the non-discrimination obligation in practice and on a case-by-case basis (two such examples are provided in Q11 above). In other cases, a more prescriptive approach may be found necessary in order to provide the necessary level of assurance in relation to specific issues of non-discrimination. Two such examples quoted by the Commission are discussed below.

"NRAs request notification of an adequate wholesale offer prior to the launch of retail product".

The advantage of this approach is that it incentivises the SMP player to make wholesale inputs available in a timely manner if it does not want to find itself in breach on the non-discrimination obligation. However, the success of such an obligation will depend on how it is structured in practice (we discuss this more in Q13 below).

"The ability to suspend the launch of the SMP player's retail offer until an adequate wholesale offer has been tailored".

This power might, for instance but not exclusively, be allowed under Article 10 of the Authorisation Directive and is usually accompanied with a sanctioning mechanism (national laws permitting). This may provide a strong incentive on the SMP player to make relevant fit for purpose wholesale products available on time (provided there are no special circumstances justifying a different approach) and as such prevent it from capturing the retail market. On the other hand, this should be treated as an exceptional instrument for the NRA, especially in cases where the NRA already imposed a wholesale obligation requiring the SMP operator to update the wholesale reference offer before launching the retail services based on that product.[10] In addition, under certain circumstances the sanctioning mechanism may not be sufficient to avoid damages to competition.

The main disadvantage of this approach may be the time/resource requirements imposed on the NRAs who may need to verify that all new retail offers are replicable before they are launched. One would also need to consider whether there may be any adverse impact on consumers as a result of the consequential delayed launch of new retail offers. In these instances, it is a good practice to require the SMP player to make the relevant wholesale inputs available as soon as possible and even set concrete deadlines in relation to when these are made available.

Q13. 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?

BEREC makes a distinction between <u>what</u> should be provided and <u>when</u>:

- **Phase 1: Provision of information on the charges, terms/conditions and technical characteristics of the wholesale product**. The SMP player could be required to provide relevant <u>price and technical information</u> on the characteristics of the new wholesale product, in advance of the commercial launch of any retail product, such that alternative operators can undertake their own network and commercial planning (including the decision of whether they would prefer to buy the wholesale product from somewhere else or provided it themselves).

[10] The NGA Recommendation advises the NRAs to adopt these remedies.

NRAs can further define the details of what information the SMP player should provide and give some guidance when required on specific lead times on a case-by-case basis, rather than being too prescriptive from the outset in all cases. This will ensure that the requirements imposed on the SMP player are better tailored to deal with the technical requirements/complexities of the new wholesale product to be introduced.

- **Phase 2: Provision of the actual wholesale product**. The key issue here is not when the wholesale product is made available, but ensure that it is made available to the SMP player's downstream arm and all other operators at the same time. A generic non-discrimination obligation will ensure this outcome, provided there are no specific circumstances.

Q14. 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?

KPIs can be designed to measure the SMP player's actual levels of performance, such that alternative operators can compare the levels of service they have received against those agreed through Service Level Agreements (SLAs). KPIs can also be used as a monitoring tool to assist alternative operators in determining whether they could have been discriminated against by comparing the service levels they have received with that provided to the incumbent's down-stream arm and the industry average (provided alternative operators have access to this information).

However, differences in the measured levels of KPIs are not an automatic proof of discrimination. Where the results measured by KPIs indicate potential differences in the levels of service provided to different operators there may be legitimate reasons for this (for example, extreme weather conditions could have impacted different parts of a country in different ways).

KPIs can therefore be useful in determining potential non-discriminatory behaviour, however should not be used as conclusive evidence of it. They can also provide a stronger incentive for the SMP player to comply with the non-discrimination obligation.

Finally, notwithstanding the above, there could be cases, especially where compliance with the non-discrimination obligation is already achieved by other means, where the imposition of KPIs could not be found to be reasonable or proportionate on the basis of a cost-benefit analysis. For example:

- In specific markets the level of service may be measured easily or there have been historically no issues in relation to discriminatory behaviour.
- In other markets, services may be provided on substantially the same terms (e.g. mobile termination) and therefore this in itself increases the incentives to act in a non-discriminatory way and deliver to the agreed levels of service.
- Services may be subject to a Universal Service Obligation (USO) which may raise the overall level of network and service quality at the wholesale level.
- The SMP player may already be providing information on KPIs on a voluntary basis and this approach may be successful in itself.

Q15. Does the use of SLAs and SLGs address concerns about potential non-discriminatory behaviour and, if so, how?

SLAs and SLGs are a normal part of a commercial agreement (and in some cases reviewed/approved by the NRA) and have a role in ensuring suppliers provide an acceptable level of service to their customers. SLAs set out a supplier's specific commitments to provide services to an agreed quality and the associated SLGs specify the level of compensation that the customer would be entitled to should the service not be provided at the agreed quality. Put another way, SLAs define the level of quality the supplier has promised to deliver and the SLGs provide the financial incentive for suppliers to deliver against that promise. It may be convenient – but should not be regarded as a pre-requisite – for the defined service levels to be enshrined in a document labelled "Service Level Agreement". For example, it would be equally effective for the appropriate service levels to be set out in the Reference Offer.

Therefore, SLAs and SLGs can be useful in reducing the incentives for discriminatory behaviour. For example, a regime which allows all operators to subscribe to the same SLAs may ensure all operators subscribe to the same terms and conditions (should they choose to). Automatic payment of SLGs (for failures on the part of the SMP player) can also act as a deterrent against discriminatory behaviour.

Q16. 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?

As described in the responses to Q14 and Q15 above, KPs and SLAs/SLGs have a role to play in ensuring non-discrimination. KPIs are a useful measurement and monitoring tool which can detect discriminatory behaviour and in that can help reduce the SMP player's incentives for such behaviour. SLAs and SLGs can be used to strengthen the SMP player's incentive to comply with the non-discrimination obligation and harmonise the services provided to a certain level of quality. It could also be desirable for KPIs to be designed in a way which are consistent with the relevant SLAs by measuring the SMP player's performance in service areas which are of importance to alternative operators.

The use of SLAs without KPIs makes it harder to monitor non-discrimination, but could be reasonable in certain markets. KPIs which are not related in some way to SLAs appear of limited value since they would be measuring something which is apparently not considered to be important.

Q17. 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?

In instances where the SMP player provides a service of low quality this should not give rise to non-discrimination if this occurs on an equivalent basis to SMP player's downstream arm and other wholesale operators (a point the Commission itself recognises). The counter argument the Commission brings forward is that a poor quality service on all retail products may discourage switching and therefore indirectly favour the SMP player. It would be very difficult to provide evidence of such behaviour in practice, as there may be a number of reasons for the reduced levels of switching which could be attributed to the SMP player, the alternative operators and/or other exogenous factors (such as environmental causes).

However, in principle,[11] there may be benefits in setting minimum levels of service quality in instances where it is appropriate and proportionate to do so. In the first instance, the best approach to adopt would be for alternative operators to agree the (minimum) service quality levels through commercially negotiated SLAs and corresponding SLGs. The advantage of this approach is that such commercial negotiations are part of the business as usual activity for industry players, who have the expert knowledge of the products and a detailed understanding of their (retail) customer requirements.

Another potential avenue is for all market players to come together in a forum (chaired by an objective third party) to try and agree such minimum service quality levels.

If deemed proportionate and appropriate, NRAs can play a formal role in defining the required service quality levels. For example NRAs can:

- impose an obligation on the SMP operators to provide SLAs and SLGs as part of their regulatory ROs and be called upon to resolve disputes in case of non-compliance with such obligations;
- take a formal role in industry proceedings or participate in an informal capacity; and/or
- consider the merits of imposing KPOs, especially in cases where SLAs and/or KPIs are not provided or are deemed to be insufficient. In such instances NRAs need to carefully consider the costs and benefits of imposing KPOs. For example, NRAs would need to take into account the potential time and resource requirement of setting such KPOs for many products/markets, especially when the NRA itself does not have the relationship with the final end customer (and therefore the risks of imposing incorrect/irrelevant KPOs may be too high and costly for the industry as a whole).

Q18. Which areas of service need to be monitored by KPIs in order to ensure a fully functioning non-discrimination obligation?

As a starting point one needs to determine whether certain levels of quality are defined by other means (for example, performance features and certain

[11]Low quality of service may be more detrimental to alternative operators as they may need to establish their own reputation and could be unable to do so due to the general poor quality of service, which is likely to benefit the incumbent operator with an already established reputation.

technical parameters may be covered by existing technical standards)[12] which the relevant contract is referring to and therefore discriminatory behaviour in these instances is unlikely to be an issue. When considered necessary, and in order to ensure a level playing field between the SMP player's downstream arm and alternative operators, the KPIs could cover key service areas which are essential to the provision and maintenance of a wholesale service. Most of the respondent's to the BEREC questionnaire noted the presence of KPIs in the below mentioned service areas, with some areas scoring higher in usage than others.[13]

Service areas with KPIs scoring a high usage in the BEREC questionnaire:

- Ordering
- Delivery
- Repair
- Maintenance

Service areas with KPIs scoring a low usage in the BEREC questionnaire:

- Information systems
- Billing

Q19. Is there a need to ensure that the same KPIs are used in all Member States?

In general, no. A limited set of comparable KPIs could help compare service levels (received by alternative operators and the SMP player's downstream arm) in a single member state and also amongst member states. Such a comparable set of KPIs across all member states would have value in identifying those SMP operators currently delivering low quality which should be capable of improvement, however it is not necessary to address discrimination.

[12] For example, ISDN30 performance features are guaranteed by ETSI 300 356-1.

[13] The BEREC questionnaire revealed the following usage of KPIs per service area: Maintenance (64%), Delivery (68%), Repair (44%), Ordering (48%), Information systems (24%) and Billing (12%).

In practice, there may also be practical issues which may be impossible to overcome and which would need to be evaluated through an impact assessment:

- The KPIs set in different member states relate to existing SLAs/SLGs and may be linked to established commercial practices. Therefore determining a (new) set of comparable KPIs may imply a modification to the whole SLA/SLG regime imposed in different member states. In some instances, implementation of a new set of KPIs may also require modifications to the IT systems and procedures of the SMP players and alternative operators (leading to additional costs).
- Difficulty in defining a reasonable set of comparable KPIs. For example, is delivery of 98% of orders within 2 days better/worse than delivering 95% of orders in 1 day?
- The KPIs should reflect the aspects of service which are important to the wholesale purchasers. Different purchasers in different member states may have different preferences as to the detail.
- The need to set SLAs (and corresponding SLGs/KPIs) to reflect specific national circumstances. For example in some member state there may be a distinction in service levels between urban and rural areas (if distances are large or terrain is hilly), where such a distinction may not make much sense in other countries.

Q20. Which are the KPIs you consider most important? Could you please set out the reasons for your view?

See Q18.

Q21. Which practical complications or disadvantages do you see with regard to the use of KPIs?

In general the costs of imposing KPIs should not exceed the benefits. One of the key challenges is to set the structure of KPIs in such a way that they are not gamed by either the SMP player or alternative operators. For example, the KPI may be defined in terms of number of days to deliver a new service. The SMP player could game this by measuring the KPI not from the delivery date specified by the alternative operator, but from the delivery date specified by the SMP player.

Q22. How should NRAs and access seekers be involved in the definition of the KPIs?

As described in Q21, the structure of KPIs can also be open to gaming by SMP player and alternative operators. In the first instance, and to minimise these risks, all industry players should be encouraged to come together to develop suitable KPIs. At the same time, NRAs should have sufficient oversight to ensure that the KPIs comprise a reasonable set for the needs of the market. They can achieve this through informal (by, for example, participating in the relevant industry discussions) or more formal means (by for example "approving" the KPIs set and allowing the participation of alternative operators in the process).

Q23. What are the shortcomings/disadvantages of using KPIs?

See Q21.

Q24. 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?

The SMP player

It is worth noting that, in a competitive market, a successful player would need to maintain such statistics about the levels of service provided to its customers or else find that its customers move elsewhere. A reasonable level of costs would therefore be borne in a competitive market. SMP operators should not be exempted from such a requirement simply because their customers cannot go elsewhere. In addition, in some instances SMP operators may have already implemented unified information systems to enable access and therefore the additional costs of reconfiguring their systems to produce KPIs may be lower.

It is difficult for BEREC to provide a general quantification of the compliance costs that the SMP player may need to incur for the reporting of the agreed KPIs. This is because, in general, such improvements will be made as part of a generic upgrade to the incumbent's systems to take advantage of synergies. From a qualitative perspective, the costs the SMP operators may incur may fall into two generic categories:

- System development costs. The SMP player may need to incur system development costs to enables it to extract the necessary information from its current technical/financial operational systems (for example for certain wholesale products the SMP player's systems may not separately record sales to its downstream arm and sales to external operators).
- Staff costs. The remainder of the costs will relate to the time and resources incurred for the preparation, reporting and verification of the agreed KPIs.

The monitoring authority

The monitoring authority will incur costs in relation to the verification of the reported KPI data. The costs it will incur will be proportional to the level of comfort required: for example, if the verification is to include the SMP player's systems as well the data itself, the level of costs incurred will be substantially higher than if the verification was to only include a simple check of data.

In cases where the NRA is the monitoring authority:

- CMT suggests that it would need to dedicate a quarter of a person's time (e.g. 25% of his/her time every day) for data processing and analysis. If the objectives of the exercise are to also include the validation of the data provided by the SMP player, than the NRA would need to increase its resources significantly as it would need to also check the SMP player's internal systems (which would increase the workload considerably).
- AGCOM's implementation group (GMI) is in charge of the whole monitoring of TI's Undertakings and collects and analyses quarterly and annual reports. This group is supported by an internal staff of five people. The workload may increase with the frequency of KPIs reported.

As discussed in Q30 below, such costs can be avoided if alternative operators can compare the service levels they receive with those the SMP operators provide to their own downstream arm and the industry average.

Q25. Which other indicators may be useful to detect or measure the level of discrimination (e.g. consumer switching rates etc.)?

In general one would need to approach with caution the indicators which may be used to detect/measure the level of discrimination. This is because in many instances it would be difficult to establish a causal link between the indicator and the behaviour itself. For example, low levels of consumer switching away

from the SMP player may be due to discriminatory behaviour, but they can also be due to poor customer services by alternative operators.

A more appropriate tool would be the use of *ex-post* investigations conducted in relation to non-discrimination issues. NRAs can also consider the merits of conducting a be-spoke consultancy study which can investigate the measures the SMP player has put in place to ensure non-discrimination.

Q26. 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?

In general, alternative operators have the ability to influence the decisions regarding the design and characteristics of new wholesale products. This can be achieved in different ways, all with equally successful outcomes:

- In the **UK**, the Office of the Telecoms Adjudicator (OTA) was established in 2005 as an independent industry body[14] to find prompt, mediated resolution to working-level implementation issues. The OTA helps its members to reach agreement on and, where necessary, make non-binding recommendations on appropriate product functionality, process specifications, change management, implementation plans and monitoring activities for in-scope products in order to maintain appropriately industrialised products and processes. Where new functionality for in–scope products is introduced, it also ensures that such new functionality is reasonably fit for the purpose it is intended to fulfil. Ofcom (the NRA) can also attend such meetings in an informal capacity.
- In **Spain** specific fora of cooperation are established for the development of new and complex products. For example, the NEBA (new bitstream service) product required deep cooperation between the involved parties. An open forum was established, where the main operators assessed and agreed every technical aspect of this new product. In this instance the NRA played an informal role facilitating agreements between the parties. In instances where the parties could not reach an agreement CMT intervened

[14] In the UK the Telecoms Adjudicator Office (OTA) was set up in 2005. http://www.offta.org.uk/index.htm

to take the final decision.

- In **Germany**, AKNN and the NGA Forum are set up as voluntary working groups. The AKNN is a working group that establishes technical interfaces, develops operational and organisational processes in a multi-carrier environment and solutions for general numbering and network interconnection issues. In order to deal with problems arising from NGA, BNetzA established the NGA Forum which already defined a layer-2-bitstream access product. AKNN and NGA Forum are voluntary, consensus-based working groups. In case agreement cannot be reached, BNetzA could impose characteristics for wholesale products under access regulation based on national norms transposing Article 12 (of the Access Directive).
- In **Italy**, OTA Italia, established in March 2009, has been entrusted with the task of preventing possible disputes of technical and operational nature that can arise between operators, primarily over the supply of network access services, as well as making attempts at settlement of the disputes that may arise. The OTA Italia is obliged to inform AGCOM in a timely manner about the beginning and conclusion of any settlement attempt, submission of a dispute for its examination and subsequently about its outcome.
- In **Poland**, the chamber of commerce (for telecom undertakings) can actively participate in Polish administrative proceedings. Through this process they can influence the final shape of the administrative decisions imposing regulatory obligations and approving wording and scope of the reference offers.

In addition to the above, in BEREC's view NRAs have the power to require the SMP player to either establish specific processes for the design of the relevant wholesale inputs or implement specific characteristics for such wholesale products in the ROs (usually under Article 12 of the Access Directive) and/or in the market analysis consultation. Therefore there is no need to formalise such process under non-discrimination obligations.

Q27. 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?

The type of non-discrimination issues which may arise during the migration from legacy wholesale products to NGA based products are:

- *Access to new network information*. At every stage of the process the SMP player will have access to more information than the alternative operators. The incumbent can also change its plans in relation to network development (location of aggregation points) and thereby change the information at every stage.
- *Phasing out of legacy network*. The incumbent is also the owner of the information about when the legacy product/network will be phased out and it can use this information in a discriminatory way.

In its report on the Implementation of the NGA Recommendation[15], BEREC considered it important that an efficient procedure is put in place beforehand, to ensure that migration is carried out in an efficient and non-anti-competitive way, enabling wholesale customers to migrate in an orderly and timely fashion, and minimising the level of disruption to customers. BEREC also considered it important that migration is performed in a non-discriminatory way between the retail arm of the incumbent and alternative operators and that this relates to quality aspects of migration and to time periods. This also implies that the assets can only be phased out if the incumbent does no longer use the assets itself.

The new NGA product should be an alternative with (as much as possible) comparable quality diversifications and comparable functionality options to approach the same level of product competition in an NGA world. Different levels to connect with the Ethernet network give the alternative operators the possibility to use their existing infrastructure investments in a fibre network for collection and transport of backhaul traffic.

Other relevant implementation issues regarding migration may be:

- Enabling migration in an earlier stage if the NGA network infrastructure and the legacy infrastructure still co-exist may facilitate a level playing field.

- Payment of migration costs. It is important that it is clear which (direct) costs of migration, such as time wages, penalties actually paid out to customers of alternative operators in accordance with contractual

[15] BEREC report entitled "*BEREC report on the Implementation of the NGA Recommendation*", BoR (11) 43.

obligations, administration costs and IT and network re-configuration costs are reimbursed by the incumbent and which costs will have to be paid by alternative operators. (E.g. in Belgium for the migration from bitstream ATM products to bitstream Ethernet products, the following actions are not billed: de-connecting ATM access; configuration of shared LAN of same quality as existing VP; configuration of dedicated LAN of same quality as existing VC; reconfiguration of end-users to VLAN with same quality; commencement of new configuration).

- Compensation payment in the case of stranded assets. It is important that compensation payments do not include business risks that are not related to the phasing out of assets (e.g. risk of economic downturn, technological developments, changes in demand patterns, changes in retail prices). Such inevitable business risks should be borne by each operator for their own investment.

Q28. 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.

In cases of modifications to network topology, SMP operators could be requested to set relevant information in the Reference Offers and to provide NRAs and alternative operators with information on such transformations in advance (the appropriate timelines would need to be determined on a case-by-case basis such that the complexity of the modifications can be properly taken into account). As a general principle, it may be appropriate to require the SMP operators to propose such network modifications in a manner which take into account the infrastructure investments already incurred by alternative operators and in such a way as to ensure no loss of access.

In relation to specific migration processes please see Q27 above.

5. Enforcement of a non-discrimination obligation

Q29. If KPIs are required how should NRAs be involved in the design and implementation of such KPIs? In this respect which sanctioning mechanism(s) should in your view be implemented?

See answer to Q22. In BEREC's views NRAs may not be best placed to devise detailed KPIs without, at least, the involvement of both incumbent and alternative operators. At the same time, NRAs should be comfortable that the KPIs comprise a reasonable set for the needs of the market. They can achieve this through an NRA led process or through informal means, by for example being present in the industry discussions where such KPIs are discussed and agreed.

In cases where the SMP player fails to comply with the set of KPIs agreed with industry or defined trough a NRA-led process, alternative operators can bring a dispute to the NRA which will allow NRAs to intervene. NRAs can then direct SMP operators to implement specific SLAs which might require the payment of "daily fines" as a way to incentivise compliance with the non-discrimination obligation.

Q30. 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?

To determine whether they could have been discriminated against, alternative operators would need to be able to compare the levels of service they have received to those provided by the SMP player a) to its downstream business and b) the industry average. In this way, each alternative operator would have access to three sets of data determining the service levels received by itself, the SMP player's down-stream arm and the industry average (where only the letter two would be in the public domain).

Publication of KPIs can also help with the verification of such information. Independent verification and auditing of KPIs in a systematic way may be considered disproportionate compared to the costs of doing so. Formal verification of the KPIs (calculated by the SMP player) by a third party may not be necessary if KPIs are published as alternative operators will be aware of the service levels they have received and therefore would, at a high level, be able to determine whether the reported KPI data looks reasonable or not.

Q31. What are the advantages of publishing the results of monitoring KPIs (if imposed) and how would this aid in ensuring compliance with a non-discrimination obligation? Are there any potential disadvantages concerning their publication?

See answer to Q30 above. There may be some disadvantages to the publication of KPI information, if this could, for example, lead to the publication of confidential or commercially sensitive data. However, these considerations do not seem to apply to industry averages.

Q32. Are there any other useful ways of enforcing a non-discrimination obligation?

Periodic or *ad-hoc* inspections could be used to monitor the degree of compliance with the SLAs and the obligation of non-discrimination. NRAs can undertake such inspection under the discretional powers awarded to them or through the use of independent third party contractors. In addition the use of access and transparency obligations can also help enforcing the non-discrimination obligation (e.g. transparency through the RO helps to ensure non-discrimination).

See also response to Q29.

6. Functional Separation

Q33. How does the new remedy of functional separation, in your view, relate to the general principle of non-discrimination?

In its report on Functional Separation[16], BEREC noted that the term "functional separation" is defined in Recital 61 of the Better Regulation Directive: "*The purpose of functional separation, whereby the vertically integrated operator is required to establish operationally separate business entities, is to ensure the provision of fully equivalent access products to all downstream operators, including the operator's own vertically integrated downstream divisions*". The recital then underlines the benefits of functional separation, where other remedies have not worked, to reduce the firm's incentives to discriminate, but reminds also that "*it is very important to ensure that its imposition preserves the incentives of the concerned undertaking to invest in its network and it does not entail any potential negative effects on consumer welfare*". Therefore BEREC views functional separation as an enabler of the principle of equivalence.

[16] BEREC report entitled "*BEREC Guidance on functional separation under Articles 13a and 13b of the revised Access Directive and national experiences*", February 2011, page 5 (BoR(10) 44 Rev1).

Q34. Which would, in your view, be the market circumstances that could justify the imposition of functional separation as a regulatory remedy as foreseen in Article 13a of the Access Directive?

BEREC highlighted the necessary market circumstances that could justify the imposition of functional separation in its report on this issue.[17]

Q35. 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 a functional separation obligation?

BEREC discussed the likely evidence that NRAs would need to submit in order to justify imposition on functional separation in its report on this issue.[18]

Q36. 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?

In its report on functional separation BEREC[19] highlighted the importance for NRAs to do a comprehensive assessment before imposing functional separation as a remedy. Given the risks, in BEREC's view functional separation cannot be a justified remedy when there is a lack of sufficient enforcement of other regulatory obligations.

Q37. What information should the Commission require from NRAs in the process of a voluntary approval of proposed undertakings under Article 13b of the Access Directive?

Art. 13b does not provide for any form of "approval" of voluntary undertaking, it only contains an obligation for the SMP operator to inform the NRA of its intention to voluntarily separate its local access network (or a part of it).

[17] BEREC report entitled "*BEREC Guidance on functional separation under Articles 13a and 13b of the revised Access Directive and national experiences*", February 2011, page 13 (BoR(10) 44 Rev1).
[18] BEREC report entitled "*BEREC Guidance on functional separation under Articles 13a and 13b of the revised Access Directive and national experiences*", February 2011, pages 14 to 15 (BoR(10) 44 Rev1).
[19] BEREC report entitled "*BEREC Guidance on functional separation under Articles 13a and 13b of the revised Access Directive and national experiences*", February 2011, pages 15 and 16 (BoR(10) 44 Rev1).

Moreover, the rule does not provide for any specific obligations on the NRA to inform the Commission of the voluntary separation.

In any case, whether the intended separation impacts on existing remedies, NRAs shall inform the Commission of the draft measure containing the assessment of the voluntary separation during the market analysis phase by means of the usual notification procedure under Article 7 FD (See BoR (10) 44).

There is only one experience so far on this topic: in the comments letter on the Italian case n. 987/988/989 (remedies on markets 1, 4 and 5), the Commission suggested NRAs should notify the voluntary measures only if they *i*) constitute, *ii*) directly relate to or *iii*) are ancillary to remedies.

In any case, NRAs may keep a frequent interaction with the Commission's offices in order to avoid difficulties in the implementation of EC rules.

Annex I Most common (non-price) discriminatory behaviours observed in Member States

Denmark

In Denmark the most common (non-price) discriminatory behaviour is related to ordering and delivery procedures and access to information. This can be illustrated by two cases:

In November 2007 NITA concluded that TDC had violated the non-discrimination obligation by implementing and practicing different procedures for delivery of unbundled access and bitstream access products. TDC has since changed its procedures and practice in accordance with NITA's decision.

In 2008/2009 NITA carried out a general investigation in order to examine whether TDC discriminated against its wholesale customers with regard to ordering, delivery etc. of unbundled access and bitstream access products. During the investigation, TDC changed its procedures on several points. For instance, TDC made it possible for the wholesale customers to seek certain information with regard to specific lines when ordering - information that makes it easier for the wholesale customers to choose whether to order technical assistance in connection with the delivery.

Furthermore, the investigation led NITA to conclude that TDC violated the non-discrimination obligation by not allowing wholesale customers to carry out removals of bitstream access lines in the same way that TDC itself could carry out such removals.

Italy

In the Italian experience, particular attention was devoted to avoid situations whereby the incumbent could have an incentive to:

- Put in place delaying tactics, resulting in a first mover advantage in the launch of new products, by time-framing the supply of regulated access services to access seekers;
- Limit the transparency and the level of detail of access services contractual conditions; and
- Lower the quality of regulated access services granted to access seekers resulting in a poor quality of services for ANOs and end users.

Recently, the focus was on the procedures to migrate end users from a provider (including Telecom Italia Retail) to another, due to lock-in practices. In that context, AGCOM established sectoral rules to ensure that end-users can switch provider efficiently and without significant down-time.

Poland

The SMP player favouring its own downstream business unit and dependent entities in the context of providing access is one of the most common (non–price) discriminatory behaviours observed in Poland.

The discriminatory practices of Telekomunikacja Polska (TP) were revealed through the measurement of relevant Key Performance Indicators (KPIs). The KPIs revealed a lower efficiency in the provision of BSA broadband services to alternative operators than to TP's downstream arm (Neostrada). The KPIs also revealed an inequality in the process of activation between BSA broadband provided to alternative operators and TP's downstream arm (Neostrada). In addition, the required parameters of the trunk in BSA orders from alternative operators were more restrictively verified and assessed than the parameters in orders received from TP's retail units. As a result, a higher number of BSA orders from alternative operators were rejected.

The observed discriminatory practices also included:

- preferential treatment of TP's retail units in terms of time taken to complete orders, period of repair, quality of service;
- delaying formal procedures in order to hinder the negotiations of the commercial terms in the agreements for receiving access to wholesale services;
- unreasonable conditions that did not meet the minimum standards set in relevant reference offers;
- impediments in providing wholesale services, resulting from the threat of losing profits from the retail markets, justified as conflict of interests;
- the flow of information within groups of companies related to TP, hindering the competition in the retail market (i.e. win-back activities);
- delays in the implementation of orders from alternative operators and further realization of services;
- hindering the provision of reliable information indispensable to alternative operators;
- provision of low quality of information in relation to infrastructure and networks and the lack of access to information in case of unusual situations related to realization of orders, as well as providing incorrect and incomplete technical information;

- impediments related to order of the collocation services.

Spain

In the Spanish experience, considering the disputes submitted before the CMT (apart from the cases regarding price discrimination, which have been more common) we have observed discriminatory practices regarding time-frames of supply of regulated services. On 6 of November 2008, the CMT sanctioned (€10 Million Euro) the incumbent in Market 4 for discriminating in the time taken to supply wholesale fully unbundled and shared access (WLA) to alternative operators and its downstream division (self provision).

Although the SMP player provided the wholesale services to alternative operators within the time-frames established in the Service Level Agreements (SLAs) set out in the Reference Offer (RO), these were significantly longer than the time-frames it offered to its downstream division. This treatment was declared as an infringement of the non discrimination obligation. The National Court confirmed that this different treatment resulted in an obstruction of the RO that damaged competitors and could slow down the retail services of these competitors.

Other cases of no-compliance with the non-discrimination obligation include the launch of retail products that cannot be replicated through a wholesale product available to the alternative operators. There have been some cases (not many) during the last year that have resulted in an amendment of the RO and compelling measures towards the incumbent.

Recently, some problems have also arisen in relation to the migration of users between third party alternative operators (where the incumbent is not one of the parties involved), for differences in the procedures followed. In these cases, CMT has established some rules to ensure that wholesale migration and portability are accomplished in an efficient and transparent manner for the alternative operators: it has settled that a procedure for direct switching between third operators is set out in the RO and that the incumbent assumes certain functions of coordination regarding portability between third operators, as it does when it is involved as a losing or gaining operator.

The Netherlands

In the Dutch experience of the past two years the most attention went to margin squeeze. The margin squeeze test is an instrument to test the financial replicability of downstream services.

Another common (non-price) discriminatory behaviour is related to the lead times of new products, or new tariff schedules. According to obligations laid down in the market reviews the incumbent has to announce the availability of upstream inputs before introducing new downstream products. An important aspect here is the timely availability of products and specifications, but also the related pricing plans. Most cases are still under scrutiny.

Annex II Glossary

DAE: Digital Agenda for Europe

EOI: Equivalence of Inputs

EOO: Equivalence of Outputs

KPI: Key Performance Indicator

KPO: Key Performance Objective

MSs: Member States

NGA: Next Generation Access

NRA: National Regulatory Authority

OTA: Office of the Telecoms Adjudicator

RO: Reference Offer

SLA: Service Level Agreement

SLG: Service Level Guarantee

SMP: Significant Market Power

TI: Telecom Italia

USO: Universal Service Obligation