Response to the ‘Consultation on the Application of a Non-Discrimination Obligation Under Article 10 of the Access Directive (Including Functional Separation Under Article 13a)’.
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Introduction.

The FTTH Council Europe (hereinafter the FTTH Council) welcomes the opportunity to participate in this 'Consultation on the Application of a Non-Discrimination Obligation Under Article 10 of the Access Directive (Including Functional Separation Under Article 13a)'.

The FTTH Council Europe is an industry organisation with a mission to accelerate the availability of fibre-based, ultra-high-speed access networks to consumers and businesses. The Council promotes this technology because it will deliver a flow of new services that enhances the quality of life, contributes to a better environment and increased competitiveness. The FTTH Council Europe consists of more than 150 member companies. Its members include leading telecommunications companies and many world leaders in the telecommunications industry (additional information is available at www.ftthcouncil.eu). Telecoms operators are not members of the FTTH Council and we have our own perspectives regarding the appropriate regulatory policies to accelerate NGA deployments.

The FTTH Council's interest is to see the benefits of FTTH made available to the greatest extent possible and in the shortest possible period of time. The FTTH Council believes that the best way to ensure a rapid deployment of FTTH for the mass market is through the competitive process. Like almost every other commentator, the FTTH Council see investment and competition as synonymous and mutually reinforcing. However, beyond this mantra of 'competition drives investment' there are very different interpretations about what this means in practice. The FTTH Council believe that the nature of competition facilitated by the regulation put in place will have a very dramatic impact on the scope and speed of deployment.The FTTH Council believes at a very basic level that competition will drive the investment in FTTH for the mass market and that measures which ensure effective competition are critical for the Commission's goal of achieving widespread FTTH deployment and take-up by 2020.

It is in this regard that the FTTH Council's fully supports an effective form of non-discrimination, particularly as regards access to those network elements which lower deployments costs and makes possible for all operators to plan their network deployments.

On the one hand, it must be ensured that costs and returns ensure that there is sufficient incentive to invest in these networks, strategic choices will also be critical because the threat of pre-emptive investment by competing operators may cause the incumbent to either invest itself or bring it, with real commercial intent, to a co-investment negotiating table.

On the other hand it must also be ensured that consumers perceive those benefits that only FTTH can bring. Competition has shown across all economic sectors its ability to bring new and innovative products and services to consumers by many suppliers, to lower costs and to speed up delivery processes.

So whether competition is pushing the investment profile directly in FTTH or whether it is creating the demand that is critical to driving the take-up of FTTH, the role of the competitive process is central to achieving good outcome for the industry and for society.

Discriminatory practices in all its forms undermine and weaken competition. If further guidance from the Commission can lead to a more effective application of non-discrimination obligations, then that should be warmly welcomed by all industry stakeholders. The FTTH Council makes its experience and views available in answering the questions below but remains available for any follow up issues that may arise.

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

The FTTH Council agrees with the Commission's statement in the NGA Recommendation that:

'In general, the Commission considers the facilitation of infrastructure competition as the preferred regulatory option. It allows longer term sustainable competition and increases consumer choice and innovation. With civil works representing up to 80% of the total rollout costs of NGA, ***an efficient remedy would be to ensure a cost orientated non-discriminatory sharing of legacy physical infrastructure****.'* [Emphasis added]

It is extremely likely that infrastructure competition will not be viable everywhere because the ducts are not available or because the population density is too low for a sustainable business model. In such cases access, to other passive elements such as dark fibre or access to active elements - service based competition ("bitstream") – will be needed.

It is also very likely that new models of investment such as co-investment and the creation of special purpose vehicles will emerge where credible, alternative infrastructure operators exist. Credible alternative investor in infrastructure will only exist where there is a choice to build or buy without fear of price, and more importantly, non-price discrimination.

Non-price discrimination is particularly invidious because it is very difficult to identify it clearly for what it is, a means of raising rivals costs and foreclosing entry and delaying market development.

Credible infrastructure competition can only exist where there is a fair access to ducts and other passive access mechanisms (or to other network elements or services where densities are low). The experience in many countries has shown that the market for renting of local loops (ULL) moved very slowly initially while Regulatory Authorities came to grips with abusive behaviour on both price and non-price behaviour. For the most part this was piecemeal with some Member States moving more slowly. If a similar pattern occurs in the regulation of passive access for NGA deployment the pace at which NGA remedies will be effective in facilitating entry in some form will vary significantly. Crucially, effective access remedies will depend on given NRA's ability to implement an effective form of non-discrimination.

Divergent practices in applying non-discrimination will lead to different access regimes in practice with higher/lower costs of deployment depending of the efficacy of that access regime. The pattern of investment will likely reflect such features and a single market will not be achieved in Europe. Instead, a continuation of fragmented national and cross border investments (often sub-scale) can be expected to continue.

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

Yes, the FTTH Council believes that different approaches will have a negative impact on investment.

The FTTH council has considerable experience monitoring FTTH developments across the EU and to date. While FTTH is unfortunately at a very early stage of development in the EU, it can be seen that most of today's FTTH investments have been made by new entrant operators, local authorities and other regional initiatives. There is a body of opinion that believes that only when incumbent operators commit to making FTTH investments will Europe see a mass market deployment of fibre. The Council does not necessarily subscribe to this view. The Council believes that under the right conditions, new entrants could make the first moves on mass market deployments and already there are indications in some Member States that this could be the case. A prerequisite to having entrant operators in a position to take the initiative for mass market deployment is access to the passive infrastructure which constitutes such a large proportion of costs and where access facilitates a speed of deployment not possible without such access.

Creating the possibility for entrants to move first creates its own dynamic. Even if entrant operators do not ultimately engage in a full mass market deployment, the threat that it could happen may, of itself, stimulate incumbent investments in NGA or more likely, stimulate a move to co-investment type models where risks can be shared. The Council believes fully that competition based on access to passive infrastructures and the ability to pursue independent deployment strategies is the best mechanism for ensuring a competitive market and deployment in an appropriate and timely manner.

The Council would also stress the need and importance of harmonisation in this respect. Cross border strategies by both incumbent and entrant operators will be an important element of European mass market roll-out. A consistent regulatory approach, particularly as regards the terms of access to passive infrastructures, even where network topology or the level of competition is very different is crucial in the Council's view. Clarity regarding regulatory interventions is best observed by comparison with other States and such clarity will lower risks and allow business planning to be done with far more confidence.

Those operators whose networks will lead the migration to FTTH are doing so because of competitive pressures. Those network operators are compelled to make their investments irrespective of the regulatory regime to some extent. However, by observing regulatory practice in those Member States, operators for whom investing in NGA is a more marginal decision need to have confidence concerning the regulatory regime they will face. A poor enforcement of non-discrimination obligations, particularly in relation to passive infrastructures where other challenges may be many, will raise cost of deployment and will inevitably forestall entry and deployment.

In turn, this will lead to a series of sub-scale deployments which will in turn lead to consumers being deprived of the benefits of FTTH.

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

Yes, the FTTH Council believes a lack of clarity would render any obligation ineffective. That does not mean that there cannot be variations in the manner in which a remedy is applied but any such variations must build upon a very clearly defined obligation which can ensure non-discriminatory access.

The FTTH Council believes that where the provider of the basic access product set is also a vertically integrated broadband operator, adequate safeguards should be put in place to avoid any conflict of interest, undue discrimination or any other hidden indirect advantages.

Any lack of clarity in those obligations undermines the remedy proposed.

Market operators should be in a position to mutually agree additions or even variations to those basic obligations to ensure a maximum of business flexibility.

Question 4: 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?

The FTTH Council believes that detailed non-discriminatory obligations are important to protect both the supplier and customer of regulated access products.

A lack of specification can lead to a situation where a supplying firm does not know what its obligations are and will naturally test the extent to which it can avoid supplying a competitor in a related market. Subsequently learning that it went too far and incurring penalties does not help it or its customer. However, it is probably the customer who will suffer more, not simply on the direct effect but also as regards the impact that is imposed on future investment plans.

There may however be some discretion to specify certain aspects of delivery. However, this is a different factor that detailing the obligation. The obligation must be specified in sufficient detail that all doubt regarding the meaning is removed.

It may then be that certain parameters can be set or altered by mutual agreement between the parties.

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

The FTTH Council believes that effective non-discrimination as a vital element in making infrastructure competition a reality but most particularly in the area of Market 4. Investors in infrastructure need to understand clearly what regulatory conditions will exist so that they can be incorporated in their business model.

The NGA Recommendation of the Commission has identified the need for equivalence of access to network information, to delivery times, to service management and finally to service level agreements. The only area of concern in the Council's view is whether adequate conditions regarding 'Chinese Walls' between the manager of the passive infrastructure and the manager of the network deployment will exist within SMP operators.

The FTTH Council believes that the ability of non-SMP operators to take a leadership position and initiate their own NGA deployment plans is one of the most elements most likely to initiate a step change in the levels of FTTH investment. Even if non-SMP operators ultimately fail to deliver on this promise, particularly in areas where the deployment of more than one infrastructure looks unlikely, the threat that the non-SMP could deploy first will create important competitive pressure on the SMP operator and may stimulate important co-operation between operators and other initiatives to share risks.

Operators who wish to rely on the passive infrastructures of another operator to deploy their networks need to have confidence that indicating where they plan to roll out their network will not trigger a strategic response from the owner of that passive infrastructure.

If the SMP operator is confident that it will be aware at the earliest possible stage of any strategic deployment initiative by a competitor, this will remove a significant proportion of any competitive threat which the FTTH Council sees a key contributor to the competitive dynamic. Similarly, the ability to thwart another operator's deployment plans by not investing and simply obfuscating and debilitating their efforts through non-price discrimination can not only crush a firm's ambitions, but more fundamentally, raise the cost of deployment to a point where the business case can fail.

Therefore, the FTTH Council believe that the lower down the ladder of investment in the access markets (closer to the consumer), the greater impact non-price discrimination has and the greater the need to ensure effective enforcement.

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

Not answered.

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

The FTTH Council believe that it should be recognised that all discrimination ultimately amounts to a form of price discrimination, whatever the form.

When an SMP operator changes the terms of supply or does not deliver on the agreed terms by delaying or altering access in whatever way, this ultimately results in raising rivals costs compared to the SMP operator just as assuredly as if direct price discrimination had occurred.

The issue could be reconciled by requiring an equivalence of outputs, that is to say that the wholesale input supplied would have to be identical to that used by the SMP operator and at an equivalent price.

Question 8: 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?

The FTTH Council believes that certain access products are more fundamental to the competitive process and that those access products should have a stricter application of the non-discrimination process to reflect that importance.

The purpose of the 'ladder of investment' appeared to be to force operators as far down the value chain as possible, thereby ensuring that competition happened over as much of the value chain as possible. Where an NRA identified a remedy lower down the value chain (e.g. duct access or other forms of passive access) as being viable for achieving access competition then such an input product should have the strictest form of non-discrimination applied.

Other remedies higher up the value chain (e.g. LLU or a dark fibre offer) would be identified on a sliding scale and if they were not deemed to be viable to support competition, then remedies even further up the value chain could be identified (e.g. WBA). By identifying the appropriate remedy in this way, the incentive for operators to utilise the appropriate remedy was very large if they wished to compete in the market.

The FTTH Council believes that one of the most important aspects of the Regulatory Regime is to create both the incentive and means for a third party operator to take the initiative and deploy their investment in advance of the incumbent. This can only be done where access is effective on basic access markets. The FTTH Council believes that the forms of non-discrimination should be more stringent the further down the ladder of investment and that therefore, differences compared to the non-discrimination imposed further away from the consumer could be envisioned.

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

Not answered.

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?

Not answered.

Question 11: 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?

The FTTH Council believes that there is merit in encouraging and facilitating co-investment structures and believes such mechanisms are more likely to come into being if the incentive structure is such that investors would be prepared to enter into the arrangements in the first place. The probabilities of firms entering into such arrangements would seem to hinge on two factors. The first is whether the firm faces a credible alternative infrastructure already (e.g. cable) in which case the addressable market for the new fibre network is diminished such that co-operating with rivals guarantees that the addressable market will sit on that network in one form (retail customers) or another (as wholesale customers). The second possibility is where two or more operators are credibly looking at deploying their own physical infrastructures. In these circumstances the firm investing can build individually but the loss of retail/wholesale customers will not be likely to differ whether the firm deploys individually or collectively. However, if the firms deploy collectively then the deployment costs will be lower and the speed of deployment will likely increase.

The extent to which cable acts as an investment incentive and a multi-fibre incentive is significant but cable is geographically limited. Of far greater significance is the extent to which two or more operators could be credibly looking at deploying their own physical infrastructures or engaging in a joint deployment. Such a deployment is not likely to be credible if non-discrimination is not enforced effectively. If an SMP operator can block entry it will. The best way to ensure that an entrant is facilitated is to ensure that wholesale access is provided on strictly equivalent basis.

The FTTH Council believes that this can be best achieved by 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.

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?

The FTTH Council notes the provisions which state that

NRAs should oblige the SMP operator to make new wholesale broadband access products available in principle at least six months before the SMP operator or its retail subsidiary mar-kets its own corresponding NGA retail services, unless there are other effective safeguards to guarantee non-discrimination.

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NRAs should apply non-discrimination principles in order to avoid any timing advantage for the retail arm of the SMP operator. The latter should be obliged to update its wholesale bitstream offer before it launches new retail services based on fibre to allow competing operators enjoying access a reasonable period to react to the launch of such products. Six months is considered a reasonable period to make the necessary adjustments, unless other effective safeguards exist which guarantee non-discrimination

The FTTH Council understands that the Commission wants to avoid giving incumbents first mover advantage in the launch of new products or the adaptation of products based on technological evolutions in the belief that this would lead to competition distortion on the retail market. To guarantee non-discrimination between incumbent and alternative operator, both products are to be able to launch on the same date and this can only be possible if the alternative operators get access to all the necessary information sufficiently in advance (six months) of the product launch in order to adapt their internal operational processes and develop their communication strategy for the new product.

However, a concern remains that such a provision could soften competition between the incumbent and entrant or that it could undermine the incentives to innovate. How to balance of the effect on competitors against the right of firms to exploit its innovation? In the first instance it should he assured that if a broadly equivalent product can be created using existing access products then there should be no notice period and the need for the SMP operator to make additional access products available should be assessed on a case by case basis. In the second instance, the Council believe that for new retail products that require a new wholesale input, that the notification period could be shorter and would suggest a 3 month period should be sufficient.

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?

Please see answer to question 12 above.

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?

Not answered.

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

Not answered.

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?

Not answered.

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?

Not answered.

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

Not answered.

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

Not answered.

Question 20: Which are the KPIs you consider most important? Could you please set out the reasons for your view?

Not answered.

Question 21: Which practical complications or disadvantages do you see with regard to the use of KPIs?

Not answered.

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

Not answered.

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

Not answered.

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?

Not answered.

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

Not answered.

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?

Not answered.

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?

The FTTH Council believes that migration issues are going to be very important in achieving a transition to NGA which does not remove competitors and choice from the market but still preserves firms' incentives to make the necessary investments. Ensuring non-discrimination in such a context is crucial. The FTTH Council believe that the European Commission should give real and concrete guidance on how to manage these transition issues and calls on the

Commission to give far more clarification on what needs to be done in specific circumstances.

In particular, the FTTH Council is concerned that very little has been done to create concrete guidance with regard to legacy obligations such as Carrier Pre-Selection (CPS) or wholesale line rental (WLR) and what their successors will be. While individual NRAs have been more active (e.g. Ofcom) on specifying remedies, the FTTH Council notes that uncertainty or a lack of clarity about regulatory obligations opens the door to discriminatory practices.

The FTTH Council sees that certain NRAs have adopted a more pragmatic approach where the basic problem is considered and a sensible, fibre based solution, are being identified. The Commission needs to give clarity on how these sensitive issues can be dealt with in a way which does not impede fibre deployments wherever new build is taking place.

Co-ordination issues are likely to be very important for operators deploying NGA. The very act of sharing duct creates enormous co-ordination issues between operators who may wish to roll-out their networks either simultaneously or successively. The Commission should give advice on how NRAs should manage these processes or at a minimum, indicate a path to the creation of useable practical processes perhaps through the identification of best practice. Without being clear on co-ordination and migration/transition issues NRAs cannot be credible in seeking to enforce non-discrimination obligations

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.

Not answered

Question 29: 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?

Not answered.

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?

The FTTH Council believes effective monitoring is crucial and believes additional support is necessary.

Question 31: 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?

Not answered.

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

Competition law can be effective but the problem remains that it is very slow to be implemented and faces a far more difficult implementation and appeals mechanism (than even ex-ante regulation). The FTTH Council would also note that discriminatory behaviours sanctioned in certain Member States under competition law reoccurred and continue to reoccur in other Member States today. Therefore the 'deterrent effect' of competition law interventions looks to be greatly overstated.

Therefore the most effective way of enforcing non-discrimination would appear to be a proper enforcement of the ex-ante rules set out in the Regulatory Framework.

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

The advantage of functional separation over the existing instruments is that it removes the incentives for discrimination. Once functionally separated from the incumbent, the Access Entity behaves as an independent company which aims at maximizing its revenues and profit by selling its products to all market players, not just one the incumbent's service division. In addition, the implementation of functional separation allows new entrants to interact with the functionally separated Access Entity on the same and equal conditions as the incumbent's service division, so they can get access products better adapted to their needs

Question 34: 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?

If a well functioning NRA imposes the appropriate obligations imposed under Articles 9 to 13 of the access directive and effective competition or its simulated outcomes do not transpire as a result and where there are important and persisting competition problems and/or market failures identified in relation to the wholesale provision of certain access product markets, it may be that functional separation should be considered.

This may be particularly the case where there has been persistent failure to achieve effective non-discrimination in the markets concerned, and where there is little or no prospect of infrastructure competition within a reasonable time-frame after recourse to one or more remedies previously considered to be appropriate

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 a functional separation obligation?

The Council would suggest that the requirements set out in the legislation are sufficiently exhaustive. Since the legislation is clear on the evidence that needs to be furnished, the Commission might more usefully concentrate on describing the level of detail and specifying the types of evidence that might be adduced.

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?

Seems a counter-intuitive approach since it suggests poor enforcement of the existing rules will be followed with good-enforcement of more difficult measures. If the problem is not one of enforcement (which goes to the resources and competences of the authority concerned) but other factors (such as the ability to sanction detected offences) then a justification could be envisaged.

Question 37: 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?

Yours sincerely,

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