

*Representing the Communication Services Industry*



Application of a non-discrimination obligation under article 10 of the access directive (incl. functional separation under article 13a)

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## Introduction

The [Federation of Communication Services](#) represents over 300 businesses delivering products and services in the UK via wireless, copper and fibre technology. This response has been prepared on behalf of the Fixed Service Providers Group within the Federation. More than 150 FCS members consume WLR and related wholesale products to deliver services to end user customers. A list of FCS members can be found on the FCS website.

## Response

We welcome the opportunity of providing a brief response to this consultation on the application of a non-discrimination obligation under Article 10 of the Access Directive (including functional separation under Article 13A). We have restricted our response to those questions which are most relevant to the concerns of our members.

We welcome the Commission's work to clarify the application of the non-discrimination obligation in Article 10 of the Access Directive and support its use as a regulatory tool to prevent discriminatory behaviour from the outset, thereby creating conditions for proper competitive dynamics – as discussed in the consultation.

The reseller business model in the UK relies heavily on the provision of WLR by the incumbent, BT, on an 'Equivalence of Inputs' (EoI) basis, enforced through Undertakings that BT provided to Ofcom in 2005. These Undertakings did require the establishment of a functionally separate Access Division within BT, now branded "Openreach". However, there is concern that this EoI protection is not being extended into the plans for fibre roll-out into the access networks, where no follow-on wholesale product to WLR is planned. We also have concerns about discrimination in the way in which market developments are planned in the UK.

## III. MAIN ISSUES FOR CONSULTATION

### III.2 Scope of a Non-Discrimination obligation

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In order to support competition, members in this sector support a stringent interpretation of non-discrimination that seeks to eliminate any residual benefit for the incumbent in downstream markets based on its control of upstream assets and resources. We believe that a clearer separation between the regulatory obligations placed on infrastructure owners and those obligations placed on CPs who provide a retail service would help to promote a climate where the distinction between the two types of activity was better recognised. Where SMP in infrastructure provision is found – and this might be on a very small geographic scale as new fibre networks are rolled out – the non-discrimination provision should be used to ensure proper competitive dynamics in the downstream market(s).

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

In our view, the main area of potential discrimination by the UK incumbent currently is in product development discussions and plans for future wholesale products – especially in the current period of transition to fibre-based access products.

In the UK markets, there is no one inclusive forum in which all industry participants can be informed about and debate market and technology developments. Resellers are typically smaller companies that cannot attend the whole variety of ad-hoc meetings that characterise the commercial landscape in the UK communications market. Against this background, it appears to us that product development plans and trials are not adequately shared with all players who have an interest in such market developments and that larger, vertically integrated companies may have an advantage in being able to participate in trials and discussions about the characteristics and prices of future wholesale products.

We are therefore fully in agreement with the discussion in section III.3 of the document about the benefits of an independent industry body in steering and mediating the process of appropriately involving other market participants in the design process for future wholesale products.

**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?**

We believe that the concept of EoI ('equivalence of inputs'), as enshrined in the UK's WLR product, has been a very important element in enabling resellers to compete on a level playing field with BT in the copper access retail telephony market since it was introduced. Both BT and its retail competitors use the same WLR system (except for those who use the LLU products). We expect to see the same principle applied for the development of follow-on fibre wholesale access products but have concerns that the emphasis of equivalence is moving to a more passive level of the network and that the level playing field that has been established for resellers through EoI WLR will be lost.

We do believe it is important that the SMP operator shares all necessary information pertaining to relevant infrastructure characteristics to facilitate access ordering, provisioning and also to support switching between service providers. It should be possible for a potential new service provider to 'look up' the relevant characteristics of a premises to establish what products he can supply to that premises. This will be increasingly important in a "mixed economy" of both copper and fibre access networks to enable smooth transitions between them, while maintaining a good experience for the end customer.

### **III.3. Application and Monitoring of a Non-Discrimination obligation**

We are in full agreement with the Commission's proposals that there should be monitoring and reporting of the quality of service provision between the incumbent and other competing companies.

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**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?**

In the UK, the involvement of competitors in the design of relevant wholesale products appears rather ad-hoc to us. We are aware that there are ongoing discussions between the incumbent and other large, vertically integrated communications providers (who use LLU products and are looking to unbundle local fibre access in a similar way) about the characteristics of the latter wholesale products. There are also various industry meetings where day to day developments and fine-tuning of existing products are discussed. Finally, an industry body called the OTA (Office of the Telecommunications Ombudsman) has been set up by Ofcom to address specific industry-wide issues such as service level guarantees and mediate, to some extent, between the incumbent and other companies in the market.

However, as discussed in our response to question 6, there is no over-arching industry body with transparent representation of all sectors of the market, overseeing any process within the market. We are encouraged that the Commission has raised this in its consultation as we have been proposing to Ofcom the establishment of such a body, on a co-regulatory basis, in a number of contexts over the years. We believe there are a number of 'back-office' functions that industry could manage in a coordinated and co-regulatory manner to benefit the working of the market and hence also the experience of consumers – and that properly constituted industry bodies would be a valuable part of allowing the industry to take on that coordination role. Wholesale product design could also benefit from similar transparent and inclusive governance arrangements. We would therefore welcome EU guidance to National Regulatory Authorities that independent industry bodies with decision-making powers should be considered in the context of ensuring non-discrimination by incumbents on any aspect of wholesale product design and use.

**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?**

Yes, we believe there are concerns about discrimination in the context of migration from legacy wholesale products to NGA-based products. We have mentioned at the start of this response that there is no follow-on wholesale product planned in the UK for users of WLR while a great deal of effort is being made to accommodate the needs of the vertically integrated competitors to resellers with the development of wholesale products such as VULA and PIA (Passive Infrastructure Access). This appears to us to be discriminatory.

A further specific example which gives rise to discrimination and competition concerns is a recent consultation by BT Openreach about the trialling of fibre-only areas in the access network. This has led to concerns as the consultation states that, in the trial areas, existing copper access infrastructure would be converted to fibre such that all premises within that geographic footprint would be changed to a "fibre to the premises" (FTTP) connection instead of a copper-based service. The consultation also stated that WLR would not then be available in the trial areas but gave no indication about how existing suppliers of customers in the trial areas who use WLR would be able to continue to provide retail service to their customers.