

Procedures related to National Regulatory Measures
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Vienna, November 28th, 2011

ISPA CONTRIBUTION REGARDING THE PUBLIC CONSULTATION ON THE APPLICATION OF A NON-DISCRIMINATION OBLIGATION UNDER ARTICLE 10 OF THE ACCESS DIRECTIVE (INCLUDING FUNCTIONAL SEPARATION UNDER ARTICLE 13A)

ISPA (Internet Service Providers Austria; Identification Number: 56028372438-43) welcomes that the Commission has launched this public consultation on the application of a non-discrimination obligation under article 10 of the Access Directive.

ISPA would like to stress that it sees the obligation of non-discrimination as an indisputable requirement to guarantee competition and on the long run consumers' freedom of choice. ISPA therefore calls upon the European Commission to assure that Key Performance Indicators (KPIs) should be defined broad enough to cover most discriminatory practices. ISPA calls for a recommendation by the European Commission on the scope of KPIs which are to be reported to the NRA and BEREC. ISPA furthermore calls for the publication of the KPIs together with an effective enforcement regime for non-discrimination.

I. ISPA calls for a recommendation by the EU-Commission on the scope of KPIs to be reported to NRA and BEREC

ISPA is convinced that it is necessary to use KPIs in order to effectively tackle undue discrimination by dominant operators.

Any "express installations" (installation within shorter time for which the wholesale customer has to pay a premium) have to be clearly marked in the relevant KPIs not to distort the average KPI. If such premium installations are not clearly marked in the relevant KPIs this could lead to a *de facto* obligation for the wholesale customer to pay the premium to receive the installation on time for their customers.

ISPA members repeatedly reported cases in which the Austrian incumbent A1 Telekom Austria failed to complete an installation on time but subsequently indicated the installation could be completed within a shorter time if the wholesale customer opted to pay the premium for an express installation ["*Projekt Setup/ Express Herstellung*"]. As wholesale customers who are dependent on the incumbent can't risk sacrificing their good relations with the incumbent such cases are usually not reported to the NRA. The introduction of a *de facto* obligation to pay a premium can thus only be prevented by a rigid monitoring system of KPIs in which express installations are clearly marked and monitored, not to distort the average installation KPIs.

ISPA points out that BEREC¹ itself recognised that it is best practice to have in place at least the following minimum set of KPIs:

- Ordering process

- Number of orders completed;
- Percentage of orders rejected after having successfully passed the administrative validation phase.

- Provisioning process

- Average provisioning time;
- Percentage of lines provisioned at or before the committed date;
- Delivery provision e.g. percentage of fault reported in the 30 days following service delivery.

- Fault repair process

- Percentage of fault under SMP player responsibility reported per line and per year;
- Average laps of time for fault clearance;
- Percentage of fault cleared at or before the committed date;

- Availability

- Average availability of the service including the calculation method.

ISPA therefore calls upon the European Commission to consider the minimum set of KPIs recommended by BEREC and to issue a recommendation prescribing them to all NRAs. If an NRA opts to implement no reporting system for such KPIs or to report fewer KPIs, the NRA should be bound to provide the respective arguments to the European Commission.

ISPA however would welcome the decision by the NRA to issue a public consultation on the scope of KPIs the SMP operator is bound to report.

II. ISPA calls for an effective enforcement of a non-discrimination obligation

ISPA suggests that NRAs should require dominant operators to submit the set of recommended KPIs collected from their systems.

The publication of KPIs serves as an **ex ante** measure to prevent discrimination and thus economical harm, while the possibility for wholesale customers to subsequently file an complaint with the NRA poses only a **ex post** measure which can only be applied once the economical implication has already occurred.

NRAs should be bound to monitor the KPIs on a monthly basis and in the case of anomalies or individual complaints by wholesale customers, without undue delay, investigate the matter and publish a report on a quarterly basis.

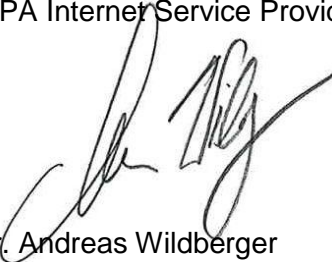
¹ ERG (07) 53WLA WBA BP final 080604 Report on ERG Best Practices on Regulatory Regimes in Wholesale unbundled Access and Bitstream Access
http://erg.eu.int/doc/publications/erg_07_53_wla_wba_bp_final_080604.pdf (28.11.2011).

At this point ISPA would like to stress that especially small wholesale customers face severe economical risk if the orders of one or of a group of wholesale customers, by accident, negligence, or as a consequence of systematic discrimination, are e.g. not processed within the prescribed time. Under the current Austrian regime of KPIs being reported to the NRA "hardship cases" (cases in which an installation process takes exceptionally long) can hardly be spotted while e.g. small wholesale customers who, due to such discrimination, struggle for the economical existence and lack a legal department are highly unlikely to call upon the NRA *ex ante* to have their case investigated.

For further information or any questions please do not hesitate to contact us.

Sincerely,

ISPA Internet Service Providers Austria



Dr. Andreas Wildberger
Secretary General

About ISPA: ISPA is the Austrian association of Internet Service Providers (Identification Number: 56028372438-43), representing approximately 200 ISPs. ISPA is a major voice of the Austrian Internet industry. Our goal is to shape the economic and legal framework supporting optimal growth of the Internet and Internet services. We regard the use of the Internet as an important cultural skill and acknowledge the resulting socio-political responsibilities.