EUROPEAN COMMISSION
Information Society and Media Directorate-General
Electronic Communications Policy

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

Consultation
Publication date: **3 October 2011**
Closing Date for Responses: **28 November 2011**

This document does not represent an official position of the European Commission, but is intended to stimulate debate on the part of stakeholders and the public. It does not prejudge the form or content of any future proposal by the European Commission.

I. PURPOSE OF THIS DOCUMENT

This questionnaire is intended to advance the debate on the application of a non-discrimination obligation under Article 10 of the Access Directive[1] with the objective to provide EU guidance to national regulatory authorities (NRAs) on the consistent application, monitoring and enforcement of this remedy, as was announced in the Commission's Digital Agenda.

Any such guidance will also aim at addressing matters around the power for national regulators to impose functional separation on a dominant operator, as an exceptional measure under Article 13a of the Access Directive, which has recently been introduced following the revision of the regulatory framework. In this respect it is envisaged that guidance will be given concerning the necessary evidence to be provided by the national regulator to the Commission prior to the authorisation for the imposition of a functional separation obligation.

The Commission invites written comments on the questions raised in this document, to be submitted **by 28 November 2011**.

II. BACKGROUND

II.1 Articles 10 and 13a of the Access Directive

Under the regulatory framework for electronic communications, national regulatory authorities (NRAs) are entrusted with the task of reviewing electronic communication markets in order to assess whether competitive conditions warrant the imposition of *ex ante* regulation. The Access Directive provides NRAs with a list of remedies, which can be applied where one or more operators are found to have significant market power (SMP) in a defined market, i.e. where there is no effective competition. One of the key remedies to be imposed *ex ante* in order to resolve competition problems resulting from the existence of access bottlenecks in the electronic communications sector is the obligation of non-discrimination under Article 10 of the Access Directive. Under the revised regulatory framework (Article 13a of the Access Directive), NRAs have been given the additional tool to impose functional separation, that is to require a vertically integrated operator with SMP to establish a separate, independently operating business entity for activities related to the wholesale provision of key access products. This remedy should only be imposed exceptionally when obligations under Articles 9 to 13 of the Access Directive have failed to achieve effective competition and when there are important and persisting competition problems and/or market failures identified in relation to the wholesale provision of certain access product markets.

The importance of a non-discrimination remedy has also been recognised by national regulators, in a general Common Position by the European Regulators Group (ERG)[2] on

[1] Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities OJ L 108, 24.4.2002, p. 7. as amended by Directive 2009/140/EC (Better Regulation Directive), OJ L 337, 18.12.2009, p. 37, and Regulation 544/2009/EC, OJ L 167, 18.6.2009, p. 12

[2] Following adoption of Regulation (EC) No 1211/2009 of the European Parliament and the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC)

remedies, as well as more specific Common Positions on the application of *ex ante* remedies in particular markets (Local Loop Unbundling and Wholesale Broadband Access)[3]. The main aim of the ERG Common Positions, which have now become BEREC Common Positions, is to promote the cooperation and coordination between the NRAs, and therefore contribute to the development of the internal market and ensure consistent application of the regulatory framework, in particular through the imposition of appropriate remedies.

II.2 Problem drivers

When addressing discriminatory behaviour by dominant operators, national regulators have, initially, focussed their main attention on tackling price discrimination (e.g. possible margin squeezes). However, cases of non-price discriminatory behaviour (e.g. quality discrimination, access to information, delaying tactics, undue requirements, strategic design of product characteristics etc.) are often more numerous and can be equally, if not even more severe. As a result, an increasing number of national regulators have recently considered a more detailed application of a general non-discrimination obligation as part of their regular market reviews, and there is a growing number of regulatory measures notified to the Commission in this regard[4]. However, the scope and exact application as well as the compliance monitoring and enforcement of this remedy vary considerably across individual Member States[5]. Such differences result in three main problems:

(1) a lack of clarity surrounding the scope of non-discrimination obligations which can render regulation at national level ineffective;

(2) a too lenient approach (resulting in part also from a lack of clarity)[6] towards implementing and enforcing non-discrimination obligations which is not conducive to addressing the competitive concerns identified in the relevant markets; and

---

and the Office, BEREC has now replaced the ERG, a group through which NRAs exchange expertise and best practice and give opinions on the functioning of the telecoms market in the EU.

3 Revised ERG Common Position on the approach to Appropriate remedies in the ECNS regulatory framework; ERG (06) 33 and Report on ERG Best Practices on regulatory regimes in wholesale unbundled access and Bitstream access; ERG (07) 53. Please note that BEREC is currently working on up-dating these Common Positions. No date for completion of this work has yet been announced.

4 See. For example the cases notified under the following numbers: IE/2011/1185, IT/2009/0987 - 0988 - 0989, PL/2010/1152 and PL/2010/1137.

5 See BEREC monitoring report on Broadband Common Positions, BoR (11) 20 final (http://erg.eu.int/doc/berec/bor_11_20.pdf)

6 The relationship between the clarity and implementation/enforcement of non-discrimination remains problematic, despite the fact that it has been recognised by the ERG Common Position on remedies, ERG (06) 33, p. 88: "*Clarity of interpretation and vigorous enforcement go hand in hand since the latter is unlikely in the absence of the former. Therefore, NRAs should clarify, as far as possible, how the remedy will be interpreted in practice, via identification of forms of behaviour which will be considered to be discriminatory. Article 10 permits either a general formulation (e.g. "the SMP player must not discriminate") or a formulation of the rule which explicitly identifies specific forms of behaviour considered to be discriminatory.*"

(3) significant differences in regulatory approaches across the EU which have a negative impact on the internal market as such differences jeopardise investments and hamper both market integration and the development of operators that offer services across EU borders.

As set out in its Digital Agenda for Europe[7] an important aim for the Commission is the reinforcement of a single market for telecommunications services in Europe. Since the single market logic requires similar regulatory issues to be given correspondingly similar treatment, the provision of guidance on the application of a non-discrimination obligation is a priority.

II.3 Legal context

Article 19 of the revised Framework Directive[8] gives the Commission a power to ensure the consistent application of the provisions of the regulatory framework. If the Commission finds that there are divergences in the implementation by NRAs of their regulatory tasks, which may create a barrier to the internal market, the Commission may, taking utmost account of the opinion of BEREC, first issue a recommendation. After at least two years following the adoption of a recommendation a binding decision on the harmonised application of the provisions of the framework, including the remedies imposed on SMP operators may be issued.

III. MAIN ISSUES FOR CONSULTATION

III.1. Principle of Non-Discrimination

The general principle of non-discrimination seeks to ensure that undertakings with 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[9]. As is set out in Article 10 (2) of the Access Directive, a non-discrimination obligation is to ensure that the SMP operator applies equivalent conditions in equivalent circumstances to its downstream competitors as it applies to its own services. This means that the SMP operator subject to a non-discrimination obligation is to provide its services and information about those services to others under the same conditions and of the same quality as it provides such services and information to its own downstream arms. As a result, the general non-discrimination obligation requires that access seekers are treated no less favourably than the (internal) downstream divisions of the dominant access provider.

The non-discrimination obligation, as an *ex ante* remedy provided for in Article 10 of the Access Directive, has its own specificities if compared with discrimination as a possible abuse

---

7 See in particular section 2.1.4 of the Communication from the European Commission to the European Parliament, the Council, the European Economic and social Committee and the Committee of the Regions, "A Digital Agenda for Europe"; COM(2010) 245 final/2.

8 Directive 2002/21/EC, OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC (Better Regulation Directive), OJ L 337, 18.12.2009, p. 37, and Regulation 544/2009/EC, OJ L 167, 18.6.2009, p. 12 (the Framework Directive).

9 Recital (17) of Directive 2002/19/ EC, OJ L 108, 24.4.2002, p.7, as amended by the Better Regulation Directive (2009/140/EC) – the Access Directive.

in *ex post* antitrust cases. As the whole discipline of market regulation, it seeks to prevent a discriminatory behaviour from the outset, and therefore should be seen as a tool to create the conditions for proper competitive dynamics[10].

The key role of the non-discrimination principle has also been strengthened by the European legislator through the introduction, in the amended regulatory framework, of a specific legal provision concerning a functional separation remedy. Pursuant to Article 13a of the Access Directive, functional separation can be imposed, under certain circumstances, by national regulators to oblige SMP operators to separate the access division controlling the communications network from the SMP operator's downstream services entities. As a more intrusive way of ensuring non-discrimination, it is seen as an exceptional measure. Functional separation endeavours to reduce significantly the incentives for discriminatory behaviour and to make it easier for regulators to detect non-compliance and enforce compliance with non-discrimination obligations[11].

The lack of clarity regarding the application of a non-discrimination obligation resulting from the divergence in regulatory approaches across Member States has led to a situation where a number of stakeholders have asked the Commission to clarify its position and expectations in this respect. Furthermore, some national regulators are considering making use of the new powers to mandate functional separation and are seeking assistance from the Commission as to the precise circumstances in which such a remedy can be used.

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

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?

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

III.2. Scope of a Non-Discrimination obligation

It is key to the development of fair competition that the vertically integrated dominant operator does not inappropriately use information, which it holds on its regulated wholesale products. This means that the use of any such information to the advantage of its own downstream business should be prevented to avoid that downstream competitors are put at a competitive disadvantage. In order to ensure equal access to information, national regulators

[10] To that end, Article 10 of the Access Directive states that:

"(1) A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations of non-discrimination, in relation to interconnection and/or access.

(2) Obligations of non-discrimination shall ensure, in particular, that the operator applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of it subsidiaries or partners."

[11] Recital (61) of the Better Regulation Directive.

may impose open and non-discriminatory access to the information system used by the dominant operator's wholesale arm when providing wholesale access services. In addition, equality of information access can be reinforced by an obligation on the vertically integrated SMP operator to prevent information sharing between the retail and the wholesale divisions of the access provider, e.g. through the requirement to employ so-called 'Chinese walls'.

A further need for guidance seems to relate to a potential obligation to provide the wholesale access products on a strictly equivalent basis. This practice is adopted by some national regulators, but not by others. A few NRAs have refrained in the past from the use of such equivalence requirements as they were not sure whether this practice would be covered by the scope of Article 10 of the Access Directive. However, in the recently adopted NGA Recommendation[12], the Commission recommended the use of stringent non-discrimination obligations (e.g. equality of access to the civil engineering infrastructure, availability of a fibre-based wholesale offer prior to the launch of the dominant operator's retail product) on SMP operators[13]. As to the need to ensure strict equivalence of access we note that the discussion between national regulators has been marked by a comparison of the concepts of Equivalence of Output[14] and Equivalence of Input[15].

Another area of concern arises from the fact that during the course of the assessment of recent notifications under Article 7 of the Framework Directive, the Commission identified a trend of national regulators to propose measures which may favour their own national companies to the disadvantage of foreign access seekers; e.g. where an access provider can be in a position to ensure equal treatment only for certain customers (e.g. only for those operators which provide services within a given country).

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

12 Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA), OJ L 251, 25.09.2010, p. 35 (NGA Recommendation).

13 In Annex II of the NGA Recommendation the Commission asks NRAs to create a level playing field by ensuring that access is provided on a "*strictly equivalent basis*". NRAs should require the SMP operator to provide access "*under the same conditions to internal and third-party access seekers*" and to require the SMP operator to "*apply the same procedures for access ordering and provisioning*". In relation to new products and services (both regarding NGA but also on other areas) the argument that the requirement of strict equivalence of access might lead to high implementation costs (e.g. for the separation of operational support systems) is less convincing as a migration to new systems is foreseen in any case. These new systems could then be designed with strict equivalence incorporated without significant incremental compliance costs.

14 Equivalence of Output (EoO): access products offered by the SMP operator to alternative operators are comparable to the products it provides to its retail division in terms of functionality and price but they may be provided by different systems and processes.

15 Equivalence of Input (EoI): the downstream access product retailed by the SMP operator consumes exactly the same physical upstream inputs as the downstream product supplied by competitors, e.g. same tie-cables, same electronic equipment, same space exchange etc. The product development process is therefore exactly equivalent.

order to give clarity as to the exact scope of the non-discrimination obligation and what are their dis-/advantages?

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

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

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

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?

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

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?

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?

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

In order to enable alternative operators to compete with the SMP operator's new retail offers, it may be necessary to oblige the access provider to make available the relevant wholesale input in sufficient time prior to the launch of their own respective retail offer in order to avoid any undue first-mover advantage for the retail arm of the SMP operator. One could also argue that it may be necessary to ensure that new retail offers by the dominant access provider are notified to the regulatory authority prior to their launch. In such cases the regulator would then explore with access seekers whether a comparable retail service can be provided in the market without the need to adjust regulated wholesale inputs. With regard to the provision of next generation wholesale broadband access services, for example, the Commission has recommended that a six month period would be a reasonable lead-time for the wholesale input[16].

[16] See Recommend 32 of the NGA Recommendation, which states that SMP operators should be obliged to make the new wholesale broadband access product available in principle at least six months before the SMP operator or its retail subsidiary markets its own corresponding NGA retail services, unless there are other effective safeguards to guarantee non-discrimination.

Another area, which offers the potential for discriminatory behaviour is the quality of the wholesale input product. A dominant operator might try to provide itself with a qualitatively higher input than the dominant operator provides to its downstream competitors. Such behaviour would raise the costs of the competitor to offset the quality-disadvantage or might simply restrict its retail sales where the disadvantage cannot be offset. For the development and maintenance of a level playing field, it is therefore important to ensure equivalence by requiring the SMP operator to provide its wholesale services under the same conditions and of the same quality.

In addition, it may also be necessary to introduce mechanisms which prevent the SMP operators from providing services with an unacceptably low quality, even if this occurs on an equivalent basis to their retail arms and competitors. Whilst it could be said that the provision of equally poor quality of service should not raise any non-discrimination issues, the counter argument brought forward is that a poor quality of service on all retail products tends to discourage switching and, thus, usually favours the SMP operator by dampening the development of competition. Some NRAs have tried to address this concern in the past by introducing certain prescribed service quality levels through the use of key performance objectives (KPOs). Others have been using service level agreements (SLAs) and service level guarantees (SLGs) as part of a regulatory Reference Offer[17].

One of the main concerns regarding non-price discriminatory behaviour, such as the above mentioned quality discrimination, is the difficulty to detect them. Therefore, in order to ensure the effectiveness of a non-discrimination obligation, it is equally important to ensure that both the national regulator and access seekers can monitor the SMP operator's performance when supplying wholesale inputs in order to see whether it supplies any such wholesale services to its competitors with the same quality as it provides to itself. Otherwise the desired results in the downstream markets are unlikely to be achieved. It could be advisable that regulators create and oversee a transparent system to monitor the efficiency and quality of the provision of access services. In this respect it appears to be practice among the majority of national regulators to use key performance indicators (KPIs), measured separately for the access provider's retail arm and alternative operators. Such KPIs should measure the quality of the provision of key wholesale services in at least the following areas:

(i) ordering of the relevant service;

(ii) the supply of the relevant service; and

(iii) the repair of the relevant services.

With regard to each area there may be various sub-categories, which could warrant measurement through KPIs. In addition, as is recognised by BEREC[18], it could be argued that for KPIs to be effective, they should be made publicly available and easily accessible for

---

17 Through KPOs the national regulator sets a certain quality level as a minimum for the provision of the relevant service. SLAs and SLGs, on the other hand, are usually incorporated in the contractual agreement between the access provider and the access seeker as a result of their inclusion in the standard Reference Offer. Through the SLA the access seeker and access provider agree that the service provided should at least meet a certain quality level. The SLG is put in place to guarantee the access seeker automatic monetary compensation should the service levels fall below the agreed standard.

18 See the "ERG Common Position on Best Practice in remedies imposed as a consequence of a position of SMP in the relevant markets for Wholesale Leased Lines"; ERG (07) 54 which is now taken over as a BEREC Common Position.

verification purposes in order to enhance transparency and, ultimately, promote competition. When considering an obligation to use KPIs and, of course, the number and type of KPIs to be used, one would carefully balance the potential benefits of their use against any implementation costs, both for the SMP operator and the monitoring authority, and it should be avoided that the introduction and use of such KPIs result in unjustified costs to be borne by the industry.

Furthermore, vertically integrated SMP operators may be incentivised to design their wholesale products in a way that favours their own downstream retail arms, i.e. by using particular technical standards or other product characteristics which their own retail arm can use as a wholesale input without further costly adjustments, whereas the downstream competitors may incur additional costs in order to be able to make use of such an input. It may, therefore, be argued that it would be important, under non-discrimination aspects, to ensure that alternative operators are appropriately involved in the design process of future wholesale products and have a sufficient ability to influence the decisions regarding particular product characteristics. In this respect, the question arises whether either the national regulatory authority or an independent industry body should be involved in order to steer and mediate this process.

A further area of concern centres around issues related to the migration from old to new wholesale products. This issue is becoming more and more acute with the envisaged switch from old PTSN-based to NGA-based wholesale products. In order to provide regulatory certainty and a basic level of consistency amongst national approaches it may be necessary to specify migration rules for the switch from the legacy infrastructure to an NGA infrastructure. Indeed, the Commission's NGA Recommendation stipulates that it is essential that NRAs ensure that there is an appropriate and transparent migration path put in place. As a result, some but by no means all NRAs, have recently imposed additional measures in this respect. It may be appropriate in this regard that NRAs ensure that any such migration rules also facilitate the switching to NGA-based access products by alternative operators in a non-discriminatory manner.

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?

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?

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?

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

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?

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?

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

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

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

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

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

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

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?

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

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?

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?

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.

III.4. Enforcement of a Non-Discrimination obligation

A further area for which guidance seems appropriate is the effective enforcement of non-discrimination obligations. This includes the publication of KPIs (and possibly related audit reports) to ensure end-users' confidence in retail products by alternative operators. Guidance may also be given on the use of sanctioning powers in case of non-compliance. The introduction of accurate and comparable metrics measuring the service quality, throughout all stages of the process for the provision of services to both the SMP operator's own downstream business and its competitors, may be the appropriate tool to monitor such compliance.

A possibility to impose fines for lack of compliance is, of course, an obvious tool for national regulators to use. However, even if sanctioning mechanisms can be efficient in a long term perspective, they may not be immediately enforceable or may not promptly redress behaviours by SMP operators, which have been identified as competitive concerns. Therefore, national regulators' readiness to impose stricter forms of non-discrimination (ultimately even functional separation) could further discipline non-compliant dominant operators.

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?

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?

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?

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

III.5. Functional Separation

The revised regulatory framework now also grants NRAs with the power to, ultimately, ensure non-discrimination through application of a more intrusive remedy, i.e. the application of functional separation. In light of the fact that the wording of Articles 13a and 13b of the Access Directive clearly sets out the procedural steps[19] the Commission's services would propose to focus mainly on those elements of this new regulatory tool which are important in view of future notifications under Article 7 of the Framework Directive and requests under Article 8 (3) of the Access Directive.

With regard to the exceptional nature of this remedy, guidance is needed concerning the evidence to be provided to the Commission under Article 13a of the Access Directive. A certain degree of robust data and other evidence is necessary in order to assess meaningfully whether a draft regulatory measure imposing the remedy of functional separation could be accepted by the Commission. Any guidance given on the non-discrimination obligation as such would serve as a benchmark for any future Commission assessment of a national regulator's claim that the application of a non-discrimination remedy has not worked and that this adds to the need to impose a functional separation remedy. In any event, the guidance on functional separation should add legal certainty for those national regulators that are currently looking into different forms of separation.

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

[19] In addition, BEREC recently prepared and published a report on guidance regarding the procedural aspects of this complex issue; BoR (10) 44 Rev 1 BEREC Report on guidance on functional separation (February 2011).

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?

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?

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?

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?

III.6. Any other issues

Respondents are invited to raise any other issues relating to non-discrimination obligation that they might wish to address in this consultation.

III.7. Responses

Responses to this public consultation should reach the European Commission **by 28 November 2011** at INFSO-nondiscrimination@ec.europa.eu. See Annex I for further information on submitting your response.

ANNEX I

Responding to the consultation

The Commission invites written views and comments on the issues raised in this document, to be submitted **by 28 November 2011**.

Contributions, together with the identity of the contributor, may be published on the website of the Directorate-General for Information Society and Media, unless the contributor objects to publication of personal or confidential data on the grounds that such publication would harm his or her legitimate interest. For more details, please see the Commission's general statement on personal data protection[20] as well as the specific privacy statement for this consultation[21].

Please give the name of a contact person in your organisation for any questions on your contribution. Please note that there is no need to provide a hard copy in addition to your contribution provided electronically.

Contact address:

Procedures related to National Regulatory Measures
Unit (B5), BU33 6/26
DG Information Society and Media
European Commission
B-1049 Brussels
Belgium
Tel: +32 2 298 4825 or +32 2 296 4229

Email: INFSO-nondiscrimination@ec.europa.eu

[20] http://ec.europa.eu/geninfo/legal_notices_en.htm#personaldata

[21] http://ec.europa.eu/information_society/policy/ecomm/library/public_consult/index_en.htm