

Undue discrimination by SMP providers

How Ofcom will investigate potential contraventions
on competition grounds of *Requirements not to unduly
discriminate imposed on SMP providers*

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Section 1

Summary

Introduction

- 1.1 Ofcom (the Office of Communications) has imposed regulation on some companies it has found to be dominant, requiring them not to unduly discriminate, to prevent them from using their dominance to the detriment of competition and consumers.
- 1.2 These guidelines illustrate how Ofcom will investigate potential contraventions of these requirements.
- 1.3 These guidelines will be of interest to:
 - SMP Providers¹ that are subject to a *Requirement not to unduly discriminate*;
 - the customers and competitors of those providers within the markets affected; and
 - other stakeholders who are interested in the effectiveness of competition within communications markets.
- 1.4 These guidelines do not cover Ofcom's approach to investigating potential exploitation of customers on equality or fairness grounds that may be prohibited by the same requirements; or other discrimination prohibitions imposed under the Communications Act 2003 (the Act)²; or investigations of compliance with the Competition Act 1998.

Summary

- 1.5 These guidelines consider *Requirements not to unduly discriminate* between customers, on competition grounds, imposed on providers that Ofcom considers to have significant market power (SMP providers).
- 1.6 A typical *Requirement not to unduly discriminate*, imposed on SMP providers under section 45 of the Act reads:

The Dominant Provider shall not unduly discriminate against particular persons or against a particular description of persons, in relation to [Network Access].

Section 4 sets out the legal basis for *Requirements not to unduly discriminate*.

¹ *SMP providers* mean providers Ofcom has notified as having significant market power.

² Throughout this document *the Act* refers to the Communications Act 2003.

- 1.7 The approach to investigating compliance with these requirements, which is illustrated in these guidelines, has two parts.
- 1.8 Firstly, in all cases, the guidelines set out the questions that may be considered during an investigation. This would not prevent Ofcom from considering each potential contravention on the facts of the case.
- To begin with Ofcom will consider whether any differences in transaction conditions (e.g. the product, its reliability, timing of provision, information about the product) offered to two customers reflect relevant differences in the customers' circumstances; or
 - Ofcom will consider whether any relevant similarities in customer's circumstances are reflected in transaction conditions offered to two customers.
 - Following either of these questions, Ofcom will consider the capability of any differences (or similarities) in transaction conditions that are not objectively justified by relevant differences (or similarities) in the customers' circumstances to harm competition.
- 1.9 In determining the capability of any differences (or similarities) identified to harm competition Ofcom will consider:
- the capability that the behaviour had to harm competition;
 - the capability that the behaviour has to harm competition; and
 - the capability that the behaviour will have to harm competition if it is allowed to continue.
- 1.10 Secondly, Ofcom will treat as a special case, differences in non-price transaction conditions³ offered by an SMP provider in favour of its own downstream business (a vertically integrated SMP provider).
- 1.11 That is, Ofcom may presume undue discrimination when a vertically integrated SMP provider offers similar price, but different non-price transaction conditions to an external wholesale customer, when compared to a downstream business owned by the SMP provider.
- 1.12 The SMP provider will then have the opportunity to provide evidence demonstrating that differences are objectively justified, and Ofcom will consider any evidence provided in light of the questions above.
- 1.13 The benefits of guidelines are addressed in section 2. The meaning of undue discrimination and the reasons why non-price differences offered by vertically

³ *Non-price transaction conditions* mean features of a product other than price (see glossary).

integrated providers are considered a special case are covered in section 3. The approach to investigations is contained in section 5. A description of some non-price transaction conditions that may lead to undue discrimination are given in annex 1.

1.14 The approach contained in these guidelines replaces the approach described in the following documents, to the extent that these documents apply to *Requirements not to unduly discriminate* placed on SMP providers:

- sections 3.4 to 3.14 and A3.6 to A3.7 of Oftel's Access Guidelines⁴,
- Oftel's statement on BT's internet services⁵, and
- any other guidance given by Oftel on the interpretation of undue discrimination.

1.15 Although the guidelines set out the approach Ofcom expects to take, they do not have binding legal effect. Ofcom will consider each case on its own merits. We will only apply the approach where it is appropriate to do so and in the event that Ofcom decides to depart from the guidelines, we will set out our reasons for doing so.

⁴ *Imposing access obligations under the new EU Directives*, September 2002.

⁵ *Oftel statement on BT's marketing of Internet services and use of joint billing*, May 2002.

Section 2

Introduction

2.1 This section explains the benefit of guidelines.

The role of guidance

2.2 Guidelines contribute to effective regulation by providing transparency and generating understanding.

- Guidelines encourage compliance by explaining conditions imposed, thereby ensuring that SMP providers understand their obligations and enabling potential customers to identify contraventions.
- Guidelines promote effective competition by reducing any difficulty SMP providers have distinguishing between conduct that might result in penalties and conduct that would not. If SMP providers are unable to make such distinctions, there is a risk that they will be deterred from normal competitive behaviour.
- They also help to frame an effective complaint, or an effective defence, in the event that an SMP provider is suspected of contravening a condition.

2.3 One of Ofcom's regulatory principles is that Ofcom will regulate in a transparent manner⁶. Guidelines are an important means to achieving this principle and to increasing understanding of Ofcom's policy objectives and approach to regulation.

⁶ *Statutory duties and regulatory principles*, <http://www.ofcom.org.uk/about/sdrp/>.

Section 3

The meaning of undue discrimination

- 3.1 In this section, we address the definition of undue discrimination in a competition context and explain how it relates to differences in transaction conditions and circumstances of customers.
- 3.2 We also consider particular concerns about non-price differences in transaction conditions offered by vertically integrated SMP providers.

Meaning of undue discrimination for the purpose of the guidelines

- 3.3 These guidelines are concerned solely with undue discrimination that is
- on competition grounds,
 - between customers,
 - by SMP providers,
 - which are subject to a Requirement not to unduly discriminate.
- 3.4 Ofcom has wider responsibilities with regard to other forms of discrimination, which are not addressed by these guidelines. For example, the Act prohibits discrimination on religious grounds in the sale of advertising opportunities by broadcasters, which is not covered. In particular, the guidelines do not cover exploitation on fairness or equality grounds, although exploitation may be prohibited by the same *requirement not to unduly discriminate*⁷.
- 3.5 So, in the context set out in 3.3 above, undue discrimination describes when an SMP provider *does not reflect relevant differences* between (or does not reflect relevant similarities in) the circumstances of customers in the transaction conditions it offers, and where such behaviour could harm competition.
- 3.6 An example of when an SMP provider would be unduly discriminating, would include if it offered different levels of reliability (a transaction condition) to two customers in similar circumstances for the same product⁸ at the same price (otherwise similar transaction conditions) and this was capable of harming competition between the two customers.
- 3.7 The first part of this description introduces a dependency on customers' circumstances. In most cases, differences in customers' circumstances will be relevant, if they influence the costs of supplying to those customers. For example,

⁷ Throughout the remainder of this document, references to undue discrimination will mean undue discrimination on competition grounds.

⁸ Throughout this document product is taken to mean goods and / or services.

a customer's financial status may affect the cost associated with different payment terms. The timing and duration of a contract may be relevant if the degree of risk incorporated varies, or the costs of supply vary over time. Therefore, differences between customers' circumstances may be an objective justification for offering differing transaction conditions.

- 3.8 Ofcom does not consider that the fact that one customer is part of the same company as the SMP provider, will generally constitute an objective justification for a difference in transactions conditions offered.
- 3.9 The second half of the description considers harm to competition. In most cases, competition tends to be restricted by differences in transaction conditions that do not reflect differences in customers' circumstances, unless those differences lead to a substantial expansion of demand or open up new market segments. Harm may be caused by limiting one customer's ability to compete in a downstream market or by excluding a competitor from a substantial part of a market. Thus, a substantial increase in overall demand in a market or a new market segment (relative to the position in the absence of differences) may be an objective justification for offering differing prices, for example.
- 3.10 Ofcom considers that objective justification for offering two customers different (or similar) transaction conditions can only be assessed on a case-by-case basis, by considering the circumstances of the customers and the capability of harming competition.

Non-price differences in transaction conditions offered by a vertically integrated SMP provider

- 3.11 In the case of non-price differences in transaction conditions, offered by a vertically integrated SMP provider in wholesale communications markets, Ofcom may take an alternative approach. Ofcom will begin the investigation with a presumption that these differences amount to undue discrimination. This is due to the particular features of this type of behaviour and the features of communications markets.
- 3.12 Firstly, in communications markets the incentives for an SMP provider to unduly discriminate to gain commercial advantage are significant:
- There are increasing returns and economies of scope achieved from a large customer base, meaning that firms need to achieve scale in order to maximise their chances of becoming profitable overall or in particular products.
 - There are significant network effects; new customers are attracted to a provider that already has a large customer base. So a provider is motivated to drive product take-up and to achieve first-mover advantage for new products (particularly where products do not work with competitors' products).
 - Technology changes quickly and can deliver a decisive advantage, requiring significant risks to be taken on investments.
- 3.13 Secondly, the incentives are greater still for a vertically integrated SMP provider to engage in undue discrimination in communications markets, which is reflected in the focus of the Directives (see section 4). Vertically integrated SMP providers

have a particular incentive to favour an internal customer over an external customer where the customers compete in a downstream market. A vertically integrated provider with upstream SMP will be motivated to lever this market power downstream to maximise profits.

- 3.14 Thirdly, these vertically integrated SMP providers in communications markets have incentives to unduly discriminate using differences in non-price transaction conditions instead of differences in prices. Excessive prices offered to external customers can be largely controlled by setting price controls; and predatory pricing (pricing below cost) comes at a cost. In contrast, non-price differences in transaction conditions are often not costly to the SMP provider.
- 3.15 Non-price differences in transaction conditions could be differences in:
- the functionality of the product supplied,
 - timing of provision,
 - the reliability and efficiency of transactional processes; or
 - availability of information that supports the purchase or supports the use of the product.

Examples of non-price differences that may harm competition are described in annex 1.

- 3.16 The incentives for a vertically integrated SMP provider to offer differences in non-price transaction conditions in communications markets are further increased by the relative difficulty of identifying differences. An external customer may find it difficult to identify the transaction conditions that an SMP provider offers to an internal customer - its own downstream business.
- 3.17 These incentives that deriving from the nature of communications markets, the relationship between a vertically integrated SMP provider and an internal customer, and from the advantages of non-price differences over price differences, do not require or imply a deliberate effort.
- 3.18 In addition, in many cases, the cost of supplying non-price transaction conditions need not vary substantially between customers to reflect their circumstances. Therefore, in many cases, differences between customers' circumstances are unlikely to provide objective justification for offering differing non-price transaction conditions.
- 3.19 Further, differences in non-price transaction conditions carried out by vertically integrated SMP providers rarely benefit competition. This is because the differences put the external customer at a competitive disadvantage, and they are unlikely to open new market segments or to increase demand substantially. So it is also unlikely that differing non-price transaction conditions will be objectively justified by lack of capability to harm to competition.
- 3.20 Accordingly, Ofcom considers that non-price differences in transaction conditions offered by a vertically integrated SMP provider favouring an internal customer can be presumed to harm competition given:
- the incentives for such behaviour,

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- the lack of benefits that may accrue, and
- the potential harm to the external customer's ability to compete in a downstream market

Section 4

Requirements imposed on SMP providers not to unduly discriminate

4.1 *Requirements not to unduly discriminate* derive from European Directives, which, in the UK, are transposed into the Act. This section describes this legal basis for the requirements imposed on SMP providers.

4.2 It sets out:

- principles and non-discrimination obligations in the Directives;
- transposition of the Directives into the Act in wholesale markets, leased line⁹ markets and retail markets;
- *Requirements not to unduly discriminate*; and
- providers and markets where requirements are currently imposed.

The current regulatory framework

4.3 SMP providers are regulated by Ofcom under the Act, which implements the EC Directives¹⁰. The basis and derivation of *Requirements not to unduly discriminate* differ between wholesale markets, leased line markets and other retail markets.

4.4 SMP has been defined so that it is equivalent to the competition law concept of dominance. The Framework Directive¹¹ states that:

An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.

4.5 Ofcom is required to impose conditions where appropriate on all SMP providers, where those conditions are objectively justifiable, not unduly discriminatory, proportionate and transparent¹².

⁹ Leased lines are dedicated telephone lines, often used by businesses for data transfer.

¹⁰ The Framework Directive (2002/21/EC), the Authorisation Directive (2002/20/EC), the Access Directive (2002/19/EC) and the Universal Service Directive (2002/22/EC).

¹¹ Article 14 of the Framework Directive.

¹² Section 47 of the Act.

Wholesale markets

- 4.6 Ex ante remedies available to Ofcom in respect of wholesale markets are set out in the Access Directive. One of these is an obligation of non-discrimination¹³ as set out below:

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 its subsidiaries or partners.

- 4.7 This obligation is focused on vertically integrated providers since it highlights the need to offer customers equivalent conditions to those it “provides for its own services, or those of its subsidiaries or partners”. This observation does not limit the application of non-discrimination under the Directives since it exemplifies one form “in particular”.

- 4.8 The preamble to the Access Directive¹⁴ describes the need to prohibit undue discrimination that harms competition in the following terms:

The principle of non-discrimination ensures that undertakings with market power do not distort competition, in particular where they are vertically integrated undertakings that supply services to undertakings with whom they compete in downstream markets.

- 4.9 The provisions of the Access Directive allowing for non-discrimination obligations are implemented in the UK by section 87 of the Act¹⁵, which states:

The SMP conditions authorised by this section also include one or more of the following –

(a) a condition requiring the dominant provider not to discriminate unduly against particular persons, or against a particular description of persons, in relation to matters connected with network access to the relevant network or with the availability of the relevant facilities;

- 4.10 The term 'non-discrimination' is transposed into the Act by the term 'undue discrimination' reflecting previous telecoms regulation in the UK.

¹³ Article 10 (2).

¹⁴ Recital 17, Access Directive (2002/19/EC).

¹⁵ Article 10 in particular has been implemented in the UK by section 87(6)(a) of the Act.

Leased lines

- 4.11 SMP conditions imposed on leased lines providers derive instead from the Universal Service Directive¹⁶:

[Ofcom is] to ensure that the organisations identified as having significant market power pursuant Article 18(1) adhere to the principle of non-discrimination when providing leased lines referred to in Article 18. Those organisations are to apply similar conditions in similar circumstances to organisations providing similar services, and are to provide leased lines to others under the same conditions and of the same quality as they provide for their own services, or those of their subsidiaries or partners, where applicable.

- 4.12 Section 92(3) of the Act implements this part of the Universal Service Directive and is set out below:

The SMP conditions authorised by this section are conditions for applying, so far as required by the provisions for the time being contained in Annex VII to the Universal Service Directive, the principles of non-discrimination, cost orientation and transparency in relation to the leased lines identified as mentioned in subsection (1).

Retail markets

- 4.13 Requirements imposed on SMP providers in retail markets also derive from the Universal Service Directive. Recital 26 of the Directive sets out the principles that apply in retail markets:

In general for reasons of efficiency and to encourage effective competition, it is important that the services provided by an undertaking with significant market power reflect costs. For reasons of efficiency and social reasons, end-user tariffs should reflect demand conditions as well as cost conditions, provided that this does not result in distortions of competition. There is a risk that an undertaking with significant market power may act in various ways to inhibit entry or distort competition, for example by charging excessive prices, setting predatory prices, compulsory bundling of retail services or showing undue preference to certain customers. Therefore, [Ofcom] should have powers to impose, as a last resort and after due consideration, retail regulation on an undertaking with significant market power.

- 4.14 Requirements in retail markets have more than just a competition purpose; efficiency and social reasons are other purposes highlighted by the recital. Therefore, *Requirements not to unduly discriminate* may also be imposed to discourage exploitation of customers on fairness or equality grounds.
- 4.15 Article 17(2) of the Directive sets out the regulatory controls available to Ofcom for retail products where the provider has been notified as having SMP:

¹⁶ Annex VII.

The obligations imposed may include requirements that the identified undertakings do not charge excessive prices, inhibit market entry or restrict competition by setting predatory prices, show undue preference to specific end-users or unreasonably bundle services.

4.16 This is implemented by section 91(5) of the Act:

The SMP conditions authorised by this section are conditions imposing on the dominant provider such regulatory controls as OFCOM may from time to time direct in relation to the provision by that provider of any public electronic communications service to the end-users of that service.

Requirements not to unduly discriminate

4.17 The SMP conditions prohibiting undue discrimination generally follow a standard format, whether in wholesale, retail or leased lines markets.

4.18 For example, the requirement on BT not to unduly discriminate in the supply of partial private circuits (PPCs)¹⁷ is set out below:

The Dominant Provider shall not unduly discriminate against particular persons or against a particular description of persons, in relation to matters connected with Network Access.

In this Condition, the Dominant Provider may be deemed to have shown undue discrimination if it unfairly favours to a material extent an activity carried on by it so as to place at a competitive disadvantage persons competing with the Dominant Provider.

4.19 The second paragraph of this requirement is an example and does not illustrate the extent of the obligation described in the first paragraph.

4.20 An example¹⁸ requirement imposed on Kingston from a retail market (fixed narrowband, or ordinary telephone lines) goes as follows:

The Dominant Provider shall not unduly discriminate against particular persons or a particular description of persons in relation to services offered.

Nothing done in any manner by the Dominant Provider shall be regarded as undue discrimination under this condition if and to the extent that the Dominant Provider is required or expressly permitted to do such thing in that manner by or under any condition set under section 45 of the Act which applies to the Dominant Provider.

¹⁷ Condition G2 - *Requirement not to unduly discriminate* in traditional interface symmetric broadband origination markets (capacity up to 8Mb/s).

¹⁸ Condition DA1 – *Requirement not to unduly discriminate*.

- 4.21 The second paragraph of this form reflects that this requirement coexists with an obligation to provide a universal service, available to everyone across the Hull area.

Section 5

Ofcom's approach

- 5.1 This section sets out Ofcom's approach to investigating potential contraventions, of a *requirement not to unduly discriminate* imposed on an SMP provider under section 45 of the Act.
- 5.2 The approach applies to investigations resulting from a complaint made to Ofcom; as part of a dispute that it has been requested to resolve; or investigations made on Ofcom's own initiative. Ofcom's guidelines governing the handling of complaints and disputes¹⁹ will continue to apply, alongside these guidelines.
- 5.3 These guidelines will not apply to the exercise of Ofcom's powers or functions under the Competition Act 1998.
- 5.4 Our approach is in two parts. Firstly, we outline the questions that may be considered in all cases. Secondly, we set out a presumption that Ofcom may make in special cases, which may be rebutted by the SMP provider.
- 5.5 Although the guidelines set out the approach Ofcom expects to take, they do not have binding legal effect. Ofcom will consider each case on its own merits. We will only apply the approach where it is appropriate to do so and in the event that Ofcom decides to depart from the guidelines, we will set out our reasons for doing so.
- 5.6 Guidelines are not a substitute for the Act or conditions made under it. They should be read in conjunction with these legal instruments and relevant Community and UK case law. Anyone in doubt about how they might be affected should seek their own legal advice.
- 5.7 Ofcom expects to review its approach from time to time as its experience of regulation in the relevant markets grows and as competition in the relevant markets develops. The approach contained in these guidelines replaces the approach described in the following documents, to the extent that they apply to *Requirements not to unduly discriminate* placed on SMP providers:
- sections 3.4 to 3.14 and A3.6 to A3.7 of Oftel's Access Guidelines²⁰,
 - Oftel's statement on BT's internet services²¹, and

¹⁹ *Guidelines for the handling of competition complaints, and complaints and disputes about breaches of conditions imposed under the EU Directives*, July 2004.

²⁰ *Imposing access obligations under the new EU Directives*, September 2002.

²¹ *Oftel statement on BT's marketing of Internet services and use of joint billing*, May 2002.

- any other guidance given by Oftel on the interpretation of undue discrimination.

Questions Ofcom will consider before finding a contravention

- 5.8 The first part of Ofcom's approach sets out the questions that will be considered. This will enable parties to an investigation to engage effectively and efficiently with our investigation process.
- 5.9 Before finding a contravention has occurred or is occurring Ofcom will consider two questions to determine whether there is any objective justification for the behaviour under investigation. These questions will be considered in cases based on price or based on non-price differences in transaction conditions.
- 5.10 Firstly, Ofcom will consider whether any differences in transaction conditions offered to two customers reflect relevant differences in the customers' circumstances; or whether any relevant similarities in customer's circumstances are reflected in transaction conditions offered to the two customers.
- 5.11 In most cases, customers' circumstances will be relevant if they affect the costs of supplying to them.
- 5.12 Secondly, Ofcom will consider the capability of any differences (or similarities) in transaction conditions not objectively justified by relevant differences (or similarities) in the customers' circumstances to harm competition.
- 5.13 In determining the capability of any differences (or similarities) identified to harm competition Ofcom will consider:
- the capability that the behaviour had to harm competition;
 - the capability that the behaviour has to harm competition; and
 - the capability that the behaviour will have to harm competition if it is allowed to continue.
- 5.14 Therefore, Ofcom will consider the impact of behaviour that has occurred, but has since ceased and of behaviour that has the capability to cause harm to competition in the future, reflecting our responsibilities to promote competition²².
- 5.15 As noted in section 3, in most cases competition tends to be restricted by differences in transaction conditions that do not reflect differences in customers' circumstances, unless those differences lead to a substantial expansion of overall demand in a market or open up new market segments, relative to the position in the absence of such differences.
- 5.16 Differences in transaction conditions required or expressly permitted by the Act or by Ofcom would not be considered a contravention.

²² S3(1)(b) and S4(3) of the Act.

Special cases

- 5.17 The second part of Ofcom's approach considers that differences in non-price transaction conditions favouring the internal customer of a vertically integrated provider should be considered a special case.
- 5.18 In the case of non-price differences in transaction conditions (and similar prices) offered by a vertically integrated SMP provider between an internal and external wholesale customer, Ofcom may presume undue discrimination. That is, Ofcom may presume that such differences are not reflective of differences between customers' circumstances and may presume that such differences have been, are, or will be capable of harming competition. However, Ofcom will provide the SMP provider with the opportunity to tender evidence to rebut these presumptions.
- 5.19 To rebut the presumption of undue discrimination, the SMP provider may demonstrate some objective justification for the differences. This may be relevant differences in the circumstances of the customers, or demonstration that there is no capability of harm to competition, was no capability of harm to competition and will be no capability of harm to competition.

Process

- 5.20 Finally, there are a number of points to note about the process.
- Usually the first step will be to verify the facts presented to Ofcom.
 - It may not be necessary to consider the questions in order. For example, it may be possible to show there is no impact on competition if the two customers are not competing in any market, before Ofcom considers the circumstances of customers.
 - If either the conditions or the circumstances of the two customers are identical then determining whether differences (or similarities) in conditions reflect differences (or similarities) in circumstances may not require a detailed analysis.

Annex 1

Examples of non-price transaction conditions

Purpose of section

- 1.1 This section outlines examples of non-price transaction conditions that may be the basis of undue discrimination. We believe that increasing understanding of undue discrimination may encourage compliance.
- 1.2 We consider below a selection of transaction conditions including information, product functionality, performance and availability, and access to marketing opportunities and brands. It is not intended to be comprehensive.
- 1.3 In many cases, the costs of supplying these non-price transaction conditions may not vary significantly between customers. Therefore, there may be no relevant differences in customers' circumstances that would objectively justify offering each customer different transaction conditions.

Information availability

- 1.4 Information transaction conditions cover the availability, timing of availability or accuracy of information. Relevant information will include information that customers would reasonably require in the course of their business such as:
 - product information including knowledge of new product development, changes to existing products, pricing packages or investment plans;
 - information about a process surrounding a product upon which the customers are dependent to order, supply or manage a product; or to develop a downstream product efficiently and effectively;
 - information about the technical features of a product such as technical standards; or
 - information about product performance and reliability.
- 1.5 Often, sharing information with a second customer could be a low cost activity and there may be few cases where there is objective justification for giving two customers different levels of access to information. This means that an internal customer of a vertically integrated SMP provider may only have access to the types of information noted above to the extent that similar information is available to external customers.

Product functionality, performance or availability

- 1.6 Product transaction conditions include product features, functionality and reliability, processes for ordering, provisioning and fault repair of the product, as well as the systems they depend upon.
- 1.7 Particular differences that may be unduly discriminatory include:

- differences in lead times or the time taken to repair faults;
 - differences in the number and frequency of faults;
 - earlier provision of a product to one customer before other customers; or
 - a vertically integrated SMP provider selling a retail product (that is built on a wholesale product) before the wholesale product is available externally, or so soon after the wholesale product becomes available, that there is insufficient time for a competitor to create a competing retail product.
- 1.8 Once a product attribute, such as a level of service, has been made available to one customer, there is unlikely to be any objective justification for denying the same attribute to other customers.
- 1.9 An undue discrimination requirement means customers should be granted similar access to products, including the opportunity to trial products and work towards the launch of products on similar timescales.

Marketing opportunities

- 1.10 Marketing opportunities include use of promotional activities and advertising space. There may be no objective justification for restricting access to these opportunities between customers.

Annex 2

Glossary

the Act	the Communications Act 2003
customer's circumstances	the position of a customer that it is relevant to the purchase of a product
Directives	Directives of the European Parliament and of the Council covering electronic communications networks and services and consisting of the Framework Directive (2002/21/EC), the Authorisation Directive (2002/20/EC), the Access Directive (2002/19/EC) and the Universal Service Directive (2002/22/EC)
non-price transaction conditions	features of a product such as the functionality and reliability of the product, the timing of provision, the transactional processes and information that supports the purchase and use of the product etc.
Ofcom	The Office of Communications
products	product is taken to mean goods and/or services throughout this document
SMP	significant market power - a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.
SMP providers	communications providers that Ofcom has notified as having significant market power, following a market review
transaction conditions	features of a product including price
vertically integrated SMP providers	an SMP provider that owns a downstream business, such that the SMP providers' customers are also its competitors