Means not Ends: Deterring Discrimination through EOI and FS

WIK Conference

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Richard Cadman
Director
Strategy & Policy Consultants Network
ESRC Centre for Competition Policy, University of East Anglia
Agenda

• A Brief History of Discrimination in the UK

• The market pre and post EOI/FS
April 2004: Ofcom launches Telecoms Strategic Review

BT’s ability to discriminate became a central issue of the TSR despite ex ante obligation not to unduly discriminate

"By far the biggest issue for this review is the problem of discrimination as regulating to prevent discrimination remains the key unsolved problem of regulation." (C&W)

Oftel’s “approach embedded the concept of ‘due’ discrimination in the regulatory regime, allowing differences between the systems that BT used to supply itself, and competitors, where there were ‘objectively justifiable’ differences.” (Energis)
Legal definitions and interpretations of discrimination allow different treatment in different circumstances.

“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.”

(Section 87(6)(a): Communications Act 2003)

‘Non-discrimination’ does not necessarily mean that there should be no differences in treatment between undertakings, rather that any differences should be objectively justifiable, for example by:

a) differences in underlying costs, or
b) no material adverse effect on competition.

(Oftel 2003)
BT *could* legitimately claim difference in treatment not discrimination

- BT’s network originally set up as a fully integrated network end to end
- Had to be engineered to interconnect with 3rd parties
- Therefore BT Retail not using same wholesale products as competitors
- Therefore not discrimination as difference in treatment justifiable
- But, Ofcom still concerned about lack of effective competition at retail level
- Concluded that non-discrimination remedy by itself had proved inadequate to address the competition problems caused by economic bottlenecks and that a stronger remedy was needed.

“Real Equality of Access”
In 2005, Ofcom and BT signed a set of “Undertakings in Lieu of a Reference under the Enterprise Act 2002”

“Equivalence of Inputs” or “EOI” means that BT provides, in respect of a particular product or service, the same product or service to all Communications Providers (including BT) on the same timescales, terms and conditions (including price and service levels) by means of the same systems and processes, and includes the provision to all Communications Providers (including BT) of the same Commercial Information about such products, services, systems and processes. In particular, it includes the use by BT of such systems and processes in the same way as other Communications Providers and with the same degree of reliability and performance as experienced by other Communications Providers. “

“In this context “the same” means exactly the same”
To make price discrimination visible, BT also under Accounting Separation obligation where it had SMP

Accounting Separation only makes price discrimination visible. The problem perceived by competitors was BT’s incentive and ability to non-price discriminate.

Accounting Separation does not expose non-price discrimination.

So, new obligation needed…
BT agreed organisational changes dubbed “Functional Separation”

- Changes designed to reduce incentives for discrimination and make behaviour more transparent

- Three critical features of FS
  - Separate Access Services business unit (Openreach)
    - A Division not a subsidiary
    - Different logo and premises
    - Financial incentives on Openreach performance only
  - Employee Code of Practice
  - Equality of Access Board (EAB)
Next Generation Access

- Undertakings seek to design in EOI for Next Generation Networks
- “Whilst constructing its NGN BT shall not make any network design decisions on network architecture the effect of which would be to prevent the provision of Network Access (on terms and conditions which allow other Communications Providers to compete effectively with downstream end-to-end services which BT provides over its NGN)” (Arts 11.3 and 11.2)
- “BT shall build its NGN and associated systems in such a manner as to ensure that other Communications Providers can purchase from BT Network Access on an Equivalence of Inputs basis” (Art. 11.6)
- Ofcom Statement on Market 4 (WLA) adds Virtual Unbundled Local Access to list of EOI products
  - VULA allows competitors to deliver services over BT’s NGA network, with a degree of control that is similar to that achieved with LLU
The central purpose of the Undertakings was to change BT’s behaviour, and wholesale customers’ perception of BT’s behaviour, with regard to discrimination. EOI is the end. Organisational changes (functional separation) were a means to that end.
Market performance since Undertakings

Broadband Subscriptions: France vs UK

Lines

July 2002
January 2003
July 2003
January 2004
July 2004
January 2005
July 2005
January 2006
July 2006
January 2007
July 2007
January 2008
July 2008

Pre Undertakings
Post Undertakings

France
UK

Rigorous analysis: exceptional advice

SPC Network
Post undertakings, LLU has substantially increased in UK. Less so in France.
Summary

- EOI came about because non-discrimination obligation not seen as enough to prevent expectation of discriminatory behaviour.
- Undertakings between BT & Ofcom define EOI and organisational changes, but never mention Functional Separation.
- EOI/FS appear to have had no effect on diffusion of broadband...
- ...but does appear to have affected the nature of competition.