

Non-discrimination

Non-discrimination prohibits a network operator from treating access seekers differently, or if the network operator supplies itself with a relevant service, from treating itself differently from other access seekers. Non-discrimination is defined in Parts 2A and 4AA of the Act.

Para 2.45–2.49

Non-discrimination in the Act

Non-discrimination, in relation to the supply of a relevant service, means that the service provider must not treat access seekers differently, or, where the service provider supplies itself with a relevant service, must not treat itself differently from other access seekers, except to the extent that a particular difference in treatment is objectively justifiable and does not harm, and is unlikely to harm, competition in any telecommunications market.

Para 2.36

Para 4.13

Non-discrimination in the deeds

The undertakings regimes for copper and fibre require network operators to achieve non-discrimination in the supply of relevant services.

Para 4.14

Non-discrimination principally concerns situations in which a network operator may distort competition between different access seekers, or between itself and access seekers.

Para 4.16

Differential treatment of access seekers

Assessing difference in treatment requires consideration of both the terms on which the offer is made and the effect of those terms on access seekers. Where a network operator makes the same offer to access seekers but this has a different effect on certain access seekers, for example because of their commercial structure or the services they offer, then in principle this could constitute a difference in treatment.

Para 4.17

While a network operator cannot be expected to tailor its offer to each individual access seeker, an offer that is structured in such a way that it could never be taken up by certain categories of (or any) access seekers could still result in a difference in treatment.

Para 4.18



Note: This summary is intended as a quick reference only. For more detailed information, or to further understand the terms and concepts discussed here, please click the link indicated under the relevant paragraph to read our equivalence and non-discrimination guidance document, or visit www.comcom.govt.nz

Difference in treatment

Price terms

Difference in treatment with regards to price will exist if there is any (non-trivial) difference in the unit price of a given service as sold to access seekers, if the services provided to access seekers are the same.

Para 4.43

When considering difference in treatment, there are three general key observations about difference in treatment with regards to price, the prices:

- have to be meaningful;
- must be functionally available; and
- have to be comparable.

Para 4.44

The price structure of a service can in itself result in a difference in treatment.

Para 4.49

Non-price terms

In relation to non-price discrimination, in many cases, if equivalence is met, non-discrimination will also be satisfied. However, there are several cases in which this will not be the case.

Para 4.52

Non-price terms might be discriminatory if they have an exclusionary effect or they have a non-trivial effect of raising an access seeker's costs relative to the costs faced by the network operator's own downstream costs.

Para 4.55

Objective justification and no harm to competition

To determine whether a breach of non-discrimination has occurred, the first questions to ask is whether the conduct involves a difference in treatment.

Once a difference of treatment is established, the next question is whether there is an objective justification for the treatment.

It is also necessary that the difference in treatment not harm, and be unlikely to harm, competition in any telecommunications market.

Para 4.24

To avoid a breach of non-discrimination, the conduct in question **must satisfy both limbs of the test:** the conduct must be objectively justifiable and not harm competition.

Para 4.23

Objective justification for given conduct (depending on the facts of the matter) might include:

- promotion of product differentiation or efficient investment;
- access seekers' requirements that affect the cost of supplying the service; or
- meeting competition (ie, 'competition on the merits').

Para 4.28

The no harm to competition limb recognises that not every disadvantage to an individual access seeker is harmful to the competitive process. Economic regulation is generally concerned with the harm to the competitive process, not protection of individual competitors.

Para 4.33–4.34