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Equivalence and non-discrimination – guidance on the Commission's approach for telecommunications regulation

The Commission: Dr Stephen Gale

Dr Jill Walker

Elisabeth Welson

John Crawford

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Associated documents

Publication date	Title
18 October 2019	Equivalence and non-discrimination in New Zealand telecommunications markets – Ingo Vogelsang report – 16 October 2019
18 October 2019	Commerce Commission seeking views on Telco application of equivalence and non-discrimination obligations

Commerce Commission

Wellington, New Zealand

Table of abbreviations

Acronym	Title
ACCC	Australian Competition and Consumer Commission
BBM	Building blocks model. Methodology used for regulating monopoly utilities. Under BBM, a regulated supplier's allowed revenue is equal to the sum of underlying components or 'building blocks', consisting of the return on capital, return of capital (or depreciation), operating expenditure, and various other components such as taxes and incentive amounts. The initial asset valuation is carried out and is then updated over time based on actual prudent/efficient capital expenditure and depreciation.
CIP	Crown Infrastructure Partners, formerly called Crown Fibre Holdings (CFH). Crown-owned company, listed under Schedule 4A of the Public Finance Act 1989.
DFAS	Direct Fibre Access Service. Defined in s 164 of the Act as a fibre fixed line access service declared in regulations made under s 228 to be a direct fibre access service. Typically used to provide dedicated backhaul for fixed and mobile networks and in other business applications.
EC	European Commission
ECPR	Efficient component pricing rule
EEO	Equally efficient operator
EOI	Equivalence of inputs
EOO	Equivalence of output
EOP	Equivalence of price
ERT	Economic replicability test
FFLAS	Fibre fixed line access services, as defined in s 5 of the Act. This means a telecommunications service that enables access to, and interconnection with, a regulated fibre service provider's fibre network.
ID	Information disclosure. Requirement under the Act and the deeds on regulated suppliers to disclosure of financial and other network-related information.
L1	Layer 1, means layer 1 of the Open Systems Interconnection (OSI) model.
L2	Layer 2, means layer 2 of the Open Systems Interconnection (OSI) model.

LFC	Local fibre company, as defined in s 156AB of the Act. LFCs are the government's partners in the Ultra-Fast Broadband initiative to deliver wholesale fibre services in certain areas.
LRAIC	Long-run average incremental costs
LRIC	Long-run incremental costs
MBIE	Ministry of Business, Innovation and Employment
MBSF	Mobile Black Spot Fund. A government programme, grant-funded from an industry levy, to provide by the end of 2022 greater mobile coverage on state highways and in tourism locations where no coverage currently exists.
NGA	Next generation access
NRA	National regulatory authority
OSI	Open systems interconnection
POI	Point of interconnection
PON	Passive optical network
PONFAS	PON Fibre access service. Defined in the Fibre Deeds as a point-to-multipoint L1 fibre access service. The Fibre Deeds require the LFCs to offer PONFAS on an equivalent basis from 1 January 2020
PQ	Price-quality regulation under Part 6 of the Act
RBI	Rural Broadband Initiative, as defined in s 156AB of the Act. Crown grant funded programme in which the government has partnered with private sector telecommunications providers to develop enhanced broadband infrastructure in non-urban areas of New Zealand. Contains several phases known as RBI1 and RBI2.
RCG	Rural Connectivity Group. A joint venture of some telecommunications providers, which has partnered with the government under RBI2 and the MBSF.
REO	Reasonably efficient operator
SMP	Significant market power
STD	Standard terms determination. The Commerce Commission's primary mechanism for regulating non-fibre telecommunications services under s 30 of the Act, by determining the terms on which a designated access service or specified service must be supplied.
TSO	Telecommunications service obligations, as defined in s 5 of the Act. Set of obligations established under the Act to ensure certain telecommunications services are available and affordable.

UBA	Unbundled Bitstream Access, as described in Schedule 1 of the Act. Digital subscriber line enabled service that enables access to, and interconnection with, part of Chorus' fixed Public Data Network.
UCLL	Unbundled Copper Local Loop, as described in Schedule 1 of the Act. L1 unbundled copper local loop service. It enables access to, and interconnection with, Chorus' copper local loop network.
UFB	Ultra-fast Broadband

Glossary

Acronym	Title
2006 Amendment Act	Telecommunications Amendment Act (No 2) 2006
2011 Amendment Act	Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2011
2018 Amendment Act	Telecommunications (New Regulatory Framework) Amendment Act 2018
Act	Telecommunications Act 2001
anchor service	Means a fibre fixed line access service declared in regulations made under s 227 to be an anchor service.
backhaul	In a telecommunications network, backhaul is the capacity between the core backbone network and the local edge networks.
Central Office and POI Co-location Service	As included in the definition of Input Services in clause 1.1 of the Fibre Deeds.
Commerce Act	Commerce Act 1986
Commission	The Commerce Commission, established under s 8 of the Commerce Act.
Copper Deed	Undertakings, given by Chorus under s 69X of the Act, relating to the supply of wholesale services using its copper access network on an equivalence and non-discrimination basis.
Copper undertakings regime	Regime under which Chorus is required to give equivalence and non-discrimination undertakings for the supply of wholesale services using its copper access network. The undertakings are provided for in the Copper Deed.
deed	An undertaking given under Part 2A or Part 4AA of the Act.
designated access service	Means a service described in subpart 1 of Part 2 of Schedule 1 of the Act. Designated access services must be offered by their providers following the access principles set out in clause 5 of Schedule 1 of the Act.
EOI Input Services	As defined and listed in clause 1.1 of the Copper Deed. List of services for which we have determined price and non-price terms under STDs, and which must be provided on an equivalent basis under the Copper Deed.
equivalence	As defined in ss 69XA and 156AB of the Act. Includes EOI and EOP.

Expert Economist Report	Independent expert advice from Ingo Vogelsang on equivalence and non-discrimination in New Zealand telecommunications markets.
Fibre Deeds	Undertakings, given by LFCs under s 156D of the Act, relating to the supply of wholesale services using their fibre access networks on an equivalence and non-discrimination basis.
Fibre undertakings regime	Regime under which LFCs and other network operators are required to give undertakings relating to the provision of certain services. The LFCs are required to give equivalence and non-discrimination undertakings for the supply of wholesale services using their fibre access networks, and other network operators to give non-discrimination undertakings relating to the provision of a co-location service.
Input Services	As described in clause 1 of the Fibre deeds. The Input Services must be offered by the LFCs on an equivalent basis on and from 1 January 2020.
L1 service	A L1 service provides wholesale access to the physical/passive layer of a digital communications network, based on the OSI model of computer networking. The service is supplied without any optical or electronic signalling and includes UCLL and PONFAS.
L2 service	A L2 service provides wholesale access to the data link layer of the OSI model of computer networking. The service includes UBA and Ultra-Fast Broadband bitstream services.
Minister	Has the same meaning as in s 5 of the Act.
Minister's Determination	Telecommunications (Operational Separation) Determination 2007. Provides for requirements with which the Separation Deed must comply.
Ofcom	Office of Communications – the regulatory and competition authority for broadcasting, telecommunications and postal industries in the United Kingdom.
regulated provider	Means a regulated fibre service provider subject to regulation under s 226 of the Act. This is defined in s 5 of the Act.
RBI Deeds	Undertakings given by some network operators under s 156AY of the Act, relating to the provision of a co-location service on a non-discrimination basis.

regulatory framework review	Review of the policy framework for regulating telecommunications services in New Zealand undertaken by the Minister in 2016.
Separation Deed	Documents providing for the operational separation of Telecom. The Act (as amended by the 2006 Amendment Act) provided for the operational separation of Telecom and required a separation plan and a separation undertaking to be put in place. Together these documents are referred to as the Separation Deed.
specified service	Means a service described in Part 3 of Schedule 1 of the Act. Specified services must be offered by providers following the access principles set out in clause 5 of Schedule 1 of the Act.
Telecom	Has the same meaning as in s 5 of the Act. In 2011, Telecom divested its fixed-line infrastructure division, Chorus. Telecom subsequently renamed itself Spark New Zealand Limited.
UFB contract	Has the same meaning as in clause 7 of Schedule 1AA of the Act. Contract between CIP and a UFB Partner as part of UFB.
UFB initiative	As defined in s 5 of the Act. Government-funded initiative to develop fibre-to-the-premises broadband networks connecting most New Zealand households and all priority users (such as schools and businesses). Contains several phases known as UFB1 and UFB2. UFB2 includes the extension known as UFB2+.
UFB Partner	Has the same meaning as in s 156AB of the Act. A successful tenderer in the UFB initiative.

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Chapter 1 Introduction

Structure of this chapter

1.1 This chapter introduces our guidance on equivalence and non-discrimination and is structured as follows:

1.1.1 purpose, background and scope of the guidance;

1.1.2 structure of the guidance; and

1.1.3 external advice.

Purpose, background and scope of the guidance

1.2 The Telecommunications Act 2001 (**Act**) provides for individual network operators to give undertakings in relation to the supply of various services on an equivalent and/or non-discriminatory basis.[1] The undertakings take effect as properly executed and binding deeds given in favour of the Crown. In this guidance, the undertakings are referred to as the '**deeds'**.[2, 3]

1.3 The Commerce Commission (**Commission**) has certain monitoring and enforcement powers in relation to the deeds, including powers in relation to the equivalence and non-discrimination obligations.[4]

1.4 Equivalence and non-discrimination are technology neutral, regulatory tools used under the Act and the deeds to encourage competition in telecommunications markets by regulating the supply of services between network operators and access seekers.

1.5 Non-discrimination concerns differences in the treatment of access seekers, including where a network operator treats itself (when self-supplying) differently to other access seekers.

1.6 Equivalence requires that network operators treat access seekers in the same way as their own business operations, including in relation to pricing, procedures, operational support, supply of information, and other relevant matters.

1 Telecommunications Act 2001, ss 69X, 156AD and 156AY.

2 Telecommunications Act 2001, ss 69XC, 156AJ and 156AZ.

3 https://comcom.govt.nz/regulated-industries/telecommunications/industry-levy-and-service-obligations/telecommunication-deeds.

4 Telecommunications Act 2001, Part 4A.

1.7 We believe there is public benefit in providing guidance that sets out our view of what the equivalence and non-discrimination obligations require. This guidance is therefore intended to assist interested parties to understand our approach to equivalence and non-discrimination obligations when exercising our monitoring and enforcement powers under the Act.

1.8 The deeds are a set of regulatory instruments specific to certain services provided in telecommunications markets. This guidance is provided with reference to those services, and is specific to the Act and the deeds. This guidance therefore does not apply to the Commission's enforcement activities outside telecommunications markets, or in relation to enforcing provisions of the Commerce Act which contains its own set of regulatory provisions. References to equivalence and non-discrimination in this guidance are references to those terms as set out in the Act.[5]

1.9 This guidance should not be used as a substitute for, or relied on as, legal advice on any matter. Any decision by the Commission to take enforcement action will be made on a case-by-case basis in accordance with the Act, and the Commission's enforcement criteria and enforcement response guidelines. Only the courts can decide whether obligations in the deeds have been breached.

1.10 We may revise or update this guidance from time to time, if required, and at our discretion.

1.11 All statutory references in this guidance are to the Act unless otherwise specified.

Structure of the guidance

1.12 Chapter 1 is the introduction.

1.13 Chapter 2 explains telecommunications networks and services, the concepts of equivalence and non-discrimination, and the relevant regulatory regimes.

1.14 Chapter 3 discusses equivalence.

1.15 Chapter 4 discusses non-discrimination.

1.16 Chapter 5 discusses the interaction between equivalence and non-discrimination.

1.17 Chapter 6 discusses compliance and enforcement.

1.18 Appendix A sets out the history of equivalence and non-discrimination in New Zealand.

[5] Where relevant, we will have regard to applicable precedent relating to other markets or countries.

1.19 Appendix B discusses investigations and proceedings we have brought under the deeds in the past, and relevant guidance that we have published.

External advice

1.20 In preparing this guidance, we sought independent expert advice from Ingo Vogelsang on equivalence and non-discrimination in New Zealand telecommunications markets (**Expert Economist Report**).[6] We published and sought feedback from stakeholders on the Expert Economist Report. We received nine submissions from stakeholders on the Expert Economist Report, including two reports from economics consultancies, on behalf of Enable and Ultrafast Fibre (WIK), and Chorus (NERA), respectively. Our consultation and stakeholder submissions can be viewed on our website.[7]

1.21 We have considered the advice and submissions in preparing this guidance. Several submitters focussed heavily on the characteristics of services under the Fibre Deeds. We have considered these submissions, but do not directly address specific services in this guidance. We will respond to the arguments made in submissions in a separate document published shortly after this guidance.

6 Ingo Vogelsang "Equivalence and non-discrimination in New Zealand telecommunications markets: The case of Layer 1 unbundled access to fibre networks" (16 October 2019).

7 https://comcom.govt.nz/regulated-industries/telecommunications/projects/unbundled-layer-1-fibre-service?target=documents&root=182759.

Chapter 2 Introduction to equivalence and non-discrimination in the Act and the deeds

Purpose and structure of this chapter

2.1 We begin this chapter by explaining the copper and fibre networks, including the services provided over these networks, to which the equivalence and non-discrimination obligations in the Act and the deeds apply.

2.2 We then discuss the concepts of equivalence and non-discrimination, the statutory requirements, and the provisions in the deeds.

2.3 Finally, we discuss the existing copper and fibre regulatory regimes.

The Copper and Fibre networks

2.4 This section introduces the copper and fibre networks, including the services provided over these networks, to which the equivalence and non-discrimination obligations in the Act and the deeds apply.

2.5 This is followed by a technical and illustrative description of these networks and the relevant services.

The fibre and other government-funded networks

2.6 The fibre networks to which equivalence and/or non-discrimination obligations apply were largely funded and built under Government initiatives, discussed in more detail below.

The UFB initiative

2.7 The Ultra-fast Broadband initiative (**UFB initiative**) is a government-funded initiative, launched in 2009, to build fibre-to-the-home networks in major towns and cities throughout New Zealand.[8]

2.8 In 2011, Telecom divested its fixed-line infrastructure division, Chorus, to enable Chorus to participate in the UFB initiative. Telecom subsequently renamed itself Spark New Zealand Limited (**Spark**).

[8] Further information on the UFB programme is available on the Ministry of Business, Innovation & Employment's website: https://www.mbie.govt.nz/science-and-technology/it-communications-and-broadband/fast-broadband/broadband-and-mobile-programmes/.

2.9 The Government appointed its UFB Partners through a competitive tender process, selecting Chorus, Enable Networks (**Enable**), Northpower Fibre Limited[9] (**Northpower**) and Ultrafast Fibre Limited (**Ultrafast**), collectively known as local fibre companies (or **LFCs**) to build the UFB fibre networks.

2.10 Chorus is the largest LFC, operating both copper and fibre networks. The other LFCs do not operate copper or mobile networks and are part of separate corporate groups that have existing investments in regulated electricity distribution networks.

2.11 The UFB initiative requires the UFB Partners to operate a wholesale-only business model under which they supply fibre services to access seekers.

Rural Broadband Initiative

2.12 The Rural Broadband Initiative (**RBI**) and the Mobile Black Spot Fund (**MBSF**) aim to improve rural broadband coverage in areas the UFB initiative does not cover.

2.13 The Government awarded contracts to build and operate fibre networks (for both retail and wholesale services) to various companies, including Chorus, Vodafone New Zealand, Wireless Internet Service Providers (WISPs) and a consortium of mobile network operators known as the Rural Connectivity Group (**RCG**).

The copper network

2.14 The copper network to which equivalence and/or non-discrimination obligations apply is a legacy national copper network, transferred to Chorus at the time of Telecom's structural separation, discussed at paragraph 2.8 above.

Illustrative telecommunications network

2.15 Both the Act and the deeds concern products at different layers of telecommunications networks. Before we explain the obligations imposed by the Act and the deeds with respect to certain telecommunications services, we provide a high-level illustration of how these services relate to each other within the telecommunications network. For this illustration, we rely on the conceptual Open Systems Interconnection (**OSI**) model[10] – see Figure 2.1 below.

[9] Alongside Northpower LFC2. Northpower Fibre Limited was formerly known as Whangarei Local Fibre Company Limited.

[10] The OSI model is a conceptual model that characterises and standardises the communication functions of a telecommunications network into conceptual 'layers' without regard to the network's underlying internal structure or technology.

2.16 Layers 1 and 2 of the OSI 7-layer model are referred to in the Act and the deeds.[11] The layers above layer 2 (**L2**) of the model are not currently subject to the equivalence and non-discrimination obligations discussed in this guidance.

2.17 Figure 2.1 below depicts the layers in the OSI 7-layer model. The civil layer and the applications (eg, the internet) are not part of the OSI model, they are added for illustrative purposes.

2.18 The physical layer (layer 1 or **L1**) encompasses 'dark fibre' as well as wavelengths and timeslots for optical fibre networks. DFAS, PONFAS and wavelengths are all L1 services.

2.19 L2 is known as the 'data link layer' or 'link layer' and provides node-to-node data transfer.

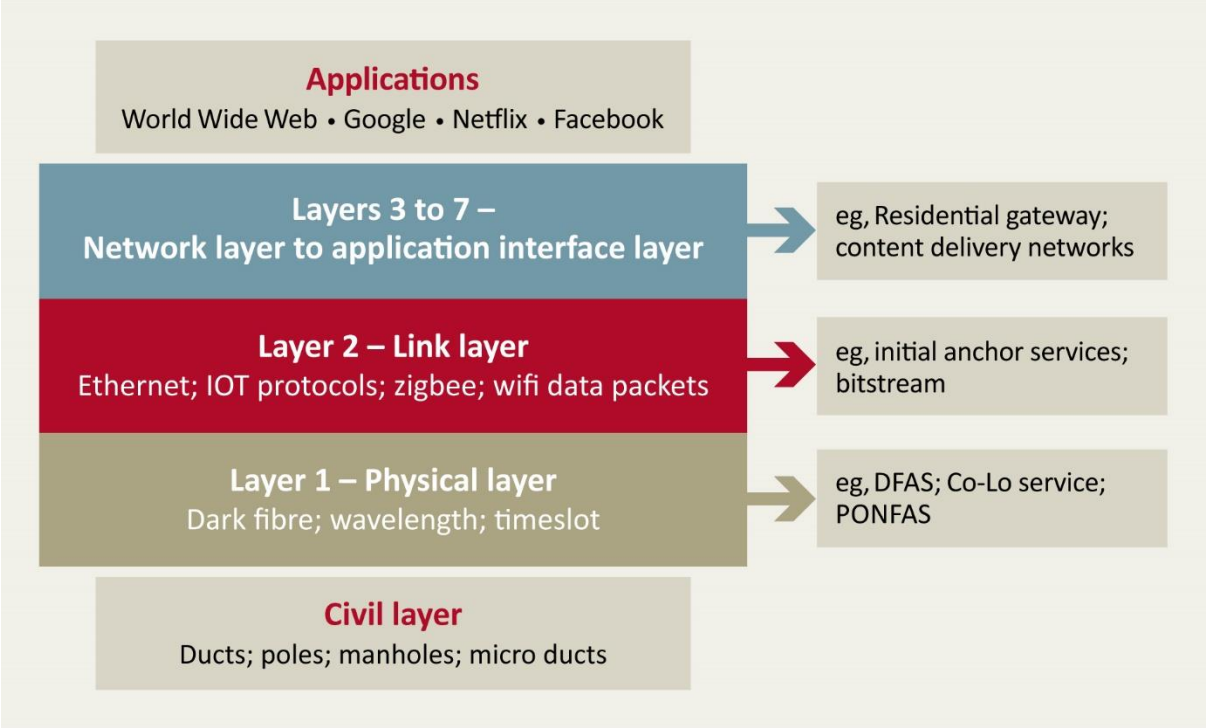
2.20 Buying a L2 service involves also buying a L1 service since L2 cannot exist without L1 (there can be no data link without a physical connection).[12] Whilst the layers can be referred to individually, the operation of each layer depends on the layers below it.

2.21 The seven layers do not encompass applications themselves. The model defines a telecommunications stack of protocols. Layer 7 is an applications programming interface, commonly referred to as an 'API'. This enables applications (eg, Netflix) to access the telecommunications network.

[11] The Chorus Fibre Deed also refers to 'layer 3 or above'.

[12] See more explanation of the OSI 7-layer model below.

Figure 2.1 Adapted OSI 7 Layer model



2.22 In this guidance, we use the term 'downstream' to refer to a level in the supply chain that lies closer to the end-user. This can include downstream wholesale levels (for example, fibre L2 services are downstream from L1 services – see Figure 2.1 above), as well as the retail level. To supply a downstream service, a service provider uses the upstream service(s) as inputs (either supplying them internally at the 'upstream cost' or purchasing these from an upstream network operator at the 'upstream price') and has to cover the 'downstream costs' of supplying the downstream service. References to 'downstream costs' or the 'costs of the downstream service' in this guidance are to the costs over and above the costs of self-supplying or purchasing the upstream service. For example, for fibre L2 services, the downstream costs would be those that an access seeker will have to incur to supply L2 services after purchasing the L1 services.

The undertakings regimes

2.23 This section discusses the equivalence and non-discrimination requirements in the Act and the deeds.

The Act

2.24 There are two undertakings regimes in the Act that set out the relevant equivalence and non-discrimination obligations for copper and fibre:

2.24.1 Subpart 4 of Part 2A provides for Chorus to give equivalence and non-discrimination undertakings in respect of its copper network (**copper undertakings regime**); and

2.24.2 Part 4AA provides for the LFCs to give equivalence and/or non-discrimination undertakings in respect of their fibre networks (**fibre undertakings regime**).

The deeds

2.25 The undertakings discussed above are given in favour of the Crown as properly executed and binding deeds. Copies of these deeds can be found on the Commission's website.[13] We have the power to monitor and enforce compliance with the deeds, including powers in relation to variations, clarifications and termination,[14] and the disclosure of information.[15]

2.26 We briefly introduce each of the deeds below before we discuss the general equivalence and non-discrimination requirements in the Act and the deeds.

The Copper Deed

2.27 Subpart 4 of the Act requires Chorus Limited (**Chorus**) to give undertakings (among other things) to supply wholesale services using its copper access network on an equivalent and/or non-discriminatory basis (**Copper Deed**).

2.28 There is one Copper Deed with Chorus.

[13] https://comcom.govt.nz/regulated-industries/telecommunications/industry-levy-and-service-obligations/telecommunication-deeds.

[14] Telecommunications Act 2001, ss 69XE to 69XF, 156AL to 156AN, 156AO and 156AZ.

[15] Telecommunications Act 2001, s 69XB(k) and ss 156AU to 156AW.

The Fibre Deeds

2.29 Section 156AD requires LFCs to give undertakings (**Fibre Deeds**) (among other things) to:

2.29.1 achieve non-discrimination in supplying relevant services, which are defined by s 156AB as wholesale telecommunications services provided using, or that provide access to unbundled elements of, an LFC fibre network;

2.29.2 design and build the LFC fibre network in a way that enables equivalence in supplying unbundled L1 services on or after the specified date;[16] and

2.29.3 achieve equivalence in supplying unbundled L1 services on or after the specified date.

2.30 There are seven Fibre Deeds. Chorus, Ultrafast and Northpower each have two Fibre Deeds for UFB1 and UFB2, respectively. Enable has one Fibre Deed for UFB1.

The RBI Deeds

2.31 Section 156AY requires service providers of relevant services, defined by s 156AX as those provided using, or that provide access to the unbundled elements of, networks constructed with government funding as part of the RBI, to give undertakings to achieve non-discrimination in relation to the supply of those services (**RBI Deeds**).

2.32 There are three RBI Deeds: one with each of Chorus, Vodafone and the RCG.

[16] Defined for UFB1 as 1 January 2020 and for UFB2 as 1 January 2026.

The purpose statements

2.33 The undertakings regimes contain identical purpose statements, as follows:[17]

> **Purposes of this subpart**
>
> The purposes of this subpart are to—
>
> (a) promote competition in telecommunications markets for the long-term benefit of end-users of telecommunications services in New Zealand; and
>
> (b) require transparency, non-discrimination, and equivalence of supply in relation to certain telecommunications services; and
>
> (c) facilitate efficient investment in telecommunications infrastructure and services.

2.34 Certain provisions of the Act direct the Commission to expressly take into account the purposes of the undertakings regimes when making decisions, including:[18]

2.34.1 section 156AL in respect of variations to the deeds;

2.34.2 section 156ANA in respect of amending or consolidating the deeds;

2.34.3 section 156AO in respect of terminating the deeds; and

2.34.4 section 156O in respect of complaints under the deeds.

2.35 The purposes are relevant and we interpret the requirements of the legislation (and thus the deeds executed in line with the legislative requirements) in accordance with the purpose statements.

2.36 We will take the purposes into consideration when exercising our monitoring and enforcement powers in relation to the undertakings regimes. However, the purposes do not create a separate or independent test for compliance with the deeds and the Act.

[17] Telecommunications Act 2001, s 69W in relation to Part 2A, and s 156AC in relation to Part 4AA.

[18] Sections 69XE and 69XF apply ss 156AL to 156AN and 156O in respect of the copper undertakings regime.

Definition of equivalence and non-discrimination

2.37 The Act uses the same definition of equivalence and non-discrimination for each of the undertakings regimes, as follows: [19]

> **equivalence,** in relation to the supply of a relevant service, means equivalence of supply of the service and access to the service provider's network so that third-party access seekers are treated in the same way to the service provider's own business operations, including in relation to pricing, procedures, operational support, and supply of information and other relevant matters
>
> **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

2.38 Consistent with the provisions of the Act, the deeds prescribe the requirement to achieve equivalence and/or non-discrimination in the supply of certain services.

2.39 Each of the deeds defines equivalence and non-discrimination in substantially the same way, consistent with the definitions in the Act.

2.40 It follows that the concepts have the same meaning in the deeds and in the Act, and should be implemented in the same way, subject to their statutory and factual context.

Services subject to equivalence obligations

2.41 The undertakings regimes for copper and fibre networks require network operators to achieve equivalence in supplying certain services.[20]

2.42 Equivalence is defined in clause 6 of both the Fibre Deeds and Copper Deed and is discussed in more detail in Chapter 3.

[19] Telecommunications Act 2001, ss 69XA and 156AB. The only material difference is that s 69XA refers to 'relevant regulated service'.

[20] Telecommunications Act 2001, ss 69XB and 156AD.

Copper services

2.43 The Copper Deed requires Chorus achieve equivalence in the supply of the following services (known as EOI Input Services): [21]

2.43.1 the UCLL Service;

2.43.2 the UCLL Co-location Service;

2.43.3 the UCLL Backhaul Service;

2.43.4 the Sub-loop UCLL Service;

2.43.5 the Sub-loop Co-location Service; and

2.43.6 the Sub-loop Backhaul Service.

Fibre services

2.44 The Fibre Deeds require the LFCs to make available, and achieve equivalence in the supply of, the following services (known as Input Services) from 1 January 2020 for UFB1 and 1 January 2026 for UFB2:[22]

2.44.1 the Direct Fibre Access Service (a point-to-point L1 fibre access service) (**DFAS**);

2.44.2 the PON Fibre Access Service (a point-to-multipoint L1 fibre access service) (**PONFAS**); and

2.44.3 the Central Office and POI Co-location Service.

2.45 The Chorus RBI Deed requires Chorus to provide services on an equivalent basis if it is required to provide the services on an equivalent basis under the Copper Deed or the Fibre Deed.[23]

Services subject to non-discrimination obligations

2.46 The undertakings regimes for copper and fibre require network operators to achieve non-discrimination in supplying relevant services.[24]

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21 Clauses 1.1 and 6.1 of the Copper Deed.

22 Clauses 1.1 and 6.2 of the Fibre Deeds.

23 Clause 6.1 of the Chorus RBI Deed.

24 Telecommunications Act 2001, ss 69XB, 156AD, and 156AY.

2.47 Non-discrimination is defined in clause 5 of the Fibre Deeds, the Copper Deed and the Chorus RBI Deed, and is discussed in more detail in Chapter 4.[25]

Copper services

2.48 The Copper Deed requires Chorus to offer the following services on a non-discriminatory basis:

2.48.1 wholesale telecommunications services that Chorus provides using, or that Chorus provides access to the unbundled elements of, the legacy access network; and

2.48.2 the designated access services described as Chorus' Unbundled Bitstream Access (**UBA**) backhaul.[26]

Fibre Services

2.49 The Fibre Deeds require LFCs to offer wholesale telecommunication services that are provided using, or that provide access to unbundled elements of, a network on a non-discriminatory basis.

RBI Services

2.50 In relation to the RBI:

2.50.1 The Chorus RBI Deed prohibits Chorus from discriminating in providing RBI Services (as defined in the Deed).

2.50.2 The Vodafone RBI Deed prohibits Vodafone from discriminating in supplying the Co-location Service or Broadband Services (as defined in the Deed), until such time as Vodafone ceases to provide those services under an agreement with the MBIE.[27]

2.50.3 The RCG's RBI Deed prohibits it from discriminating in supplying any Wholesale Tower Co-location Services and/or Wholesale Backhaul Services (as defined under agreement between RCG and CIP).

Regulated services – price and non-price terms

2.51 Specified price and non-price terms are treated differently under the copper and fibre undertakings regimes, as discussed in more detail below.

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[25] Non-discrimination is defined in clause 1 of the Vodafone and RCG RBI Deeds.

[26] Certain services are excluded such as Legacy Input Services defined in clause 1.1 of the Copper Deed.

[27] The undertakings for Broadband Services expired on 10 November 2019. The expiry date of the undertakings for the Co-location Service is 10 November 2036.

Copper undertakings regime

2.52 Price and non-price terms for services subject to the copper undertakings regime are prescribed in Parts 2 and 2AA of the Act, as discussed in more detail below.

2.53 Under Part 2 of the Act, copper services may be designated access services or specified services for which we can prescribe Standard Terms Determinations (**STDs**).[28] This means that the Commission will determine the price and non-price terms for such services.

2.54 Therefore, any services that are subject to equivalence or non-discrimination obligations under the Copper Deed could become designated access services or specified services and then made subject to an STD under Part 2.

Fibre undertakings regime

2.55 Price and non-price terms for the fibre undertakings regime are governed by Part 6 of the Act, including a regulation-making power to determine price and non-price terms for particular services, as also discussed in more detail below.

2.56 Section 156AD(5) of the Act specifically provides that the Fibre Deeds may not specify the price or non-price terms of supply for any telecommunications service. Accordingly, the Commission may not directly control the LFCs' service prices or other terms of supply under the Fibre Deeds.

2.57 Further, s 211 makes it clear that fibre services under the Fibre Deeds cannot become designated access or specified services under Part 2 of the Act.[29]

2.58 The Part 6 regulatory regime will come into effect on 1 January 2022, after which point certain services under the Fibre Deeds may become subject to regulated price controls, along with regulated non-price terms. Until then, the services under the Fibre Deeds are subject to commercial UFB contracts in place between the LFCs and a Crown-owned company called Crown Infrastructure Partners (**CIP**), formerly Crown Fibre Holdings.

[28] https://comcom.govt.nz/regulated-industries/telecommunications/regulated-services/copper-services.

[29] In paragraph 2.72 we explain that FFLAS is broad enough to cover all services supplied under the Fibre Deeds.

2.59 The UFB contracts require the LFCs to:

2.59.1 design and build their networks in a way that enables equivalence in relation to the supply of unbundled L1 services to be achieved on and after 1 January 2020;[30]

2.59.2 supply specified L2 services on the terms set out in a reference offer[31] approved by CIP; and

2.59.3 supply subsequent L1 services from 1 January 2020 on the terms set out in a reference offer[32] approved by CIP.[33]

2.60 The relevant provisions of the UFB contracts will largely expire before 1 January 2022 when the Part 6 regulatory regime comes into effect.[34]

RBI Deeds

2.61 Section 156AD does not apply to the RBI Deeds. However, with the exception of the Vodafone RBI Deed, the Chorus RBI Deed and RCG RBI Deed do not prescribe price or non-price terms.

2.62 There are also similar commercial contracts in place between the RBI network operators and the Crown.

The regulatory regimes for copper and fibre

2.63 This section sets out the regulatory regimes for fibre and copper under the Act and discusses their relationship with the undertakings regimes.

Copper regulatory regime: Parts 2 and 2AA of the Act

2.64 Wholesale copper services are regulated under Parts 2 and 2AA of the Act (**copper regulatory regime**).

2.65 We set the price and non-price terms for the designated access services listed in paragraph 2.43 above via STDs under subpart 2A of Part 2 of the Act.

30 For UFB2 the date is 1 January 2026.

31 All reference offers can be viewed on the LFCs' websites.

32 Ibid.

33 For UFB2 subsequent services the date is 1 January 2026.

34 The relevant provisions of the UFB contracts were to expire on 1 January 2020 but are extended to 1 January 2022 by virtue of clause 9 of Schedule 1AA.

2.66 Part 2AA provides for the deregulation of copper services where fibre services are available. Copper services can be withdrawn in specified fibre areas, which we determine under s 69AB.[35]

Fibre regulatory regime: Part 6 of the Act

2.67 Wholesale fibre services are regulated under Part 6 of the Act (**fibre regulatory regime**).[36]

2.68 Part 6 contains powers to regulate FFLAS. FFLAS are services enabling access to and interconnection with the fibre network of a regulated fibre service provider (**regulated provider**), being a person subject to regulation under s 226.[37]

2.69 Under s 226, the Governor-General may make regulations prescribing a person who provides FFLAS as being subject to ID regulation, PQ regulation, or both. Regulations under s 226 must also describe the services for which the person is subject to ID regulation, PQ regulation, or both.[38] [39]

2.70 The first regulatory period for the fibre regulatory regime commences on 1 January 2022 (being the implementation date).[40]

2.71 PQ regulation involves the regulation of the price and quality of regulated services[41] and includes specifying either the maximum price or prices that may be charged or the maximum revenues that may be recovered.[42] ID regulation requires the disclosure of specified information to enable interested persons to assess whether the purpose of Part 6 of the Act is being met.

35 The withdrawal of copper services is subject to a copper withdrawal code. Further information on the copper withdrawal code is available here: https://comcom.govt.nz/regulated-industries/telecommunications/projects/copper-withdrawal-code.

36 Further information on the fibre regulatory regime is available here: https://comcom.govt.nz/regulated-industries/telecommunications/projects/fibre-input-methodologies.

37 See s 5 of the Act for the definition of FFLAS.

38 The Governor-General has made the first regulations under s 226 providing LFCs be subject to ID for all FFLAS; and Chorus be subject to PQR in respect of all FFLAS, except to the extent that a service is provided in a geographical area where another regulated provider has installed a fibre network as part of the UFB initiative.

39 http://www.legislation.govt.nz/regulation/public/2019/0275/latest/LMS185107.html?src=qs

40 In November 2018, the Minister granted our request to extend the implementation date to 1 January 2022: Hon Kris Faafoi "Re: Commerce Commission request to extend the implementation date for the new fibre regulatory regime" (23 November 2018).

41 Telecommunications Act 2001, ss 192.

42 Telecommunications Act 2001, ss 194(2)(b) and 195.

2.72 The concept of FFLAS is broad enough to cover all services supplied under the Fibre Deeds and the RBI Deeds, and those services could be made subject to PQ regulation and/or ID regulation by means of s 226 regulations.

2.73 Accordingly, for PQ regulation, all services under the Fibre Deeds and the RBI Deeds supplied by a regulated provider that are subject to PQ regulation will be subject to overall revenue caps and/or price caps under the regime.

Geographically consistent pricing

2.74 Under s 201, a regulated provider who is subject to PQ regulation is subject to an obligation of geographically consistent pricing, requiring them, regardless of the geographic location of an access seeker or end-user, to charge the same price for providing FFLAS that are, in all material respects, the same.

2.75 Accordingly, any fibre services provided under the Fibre Deeds by a regulated provider[43], that are subject to PQ regulation, will be subject to the geographically consistent pricing requirements of s 201.

Regulated services

2.76 Sections 227 to 229 allow the Governor-General by Order in Council, made on recommendation of the Minister, to make regulations declaring a FFLAS to be an anchor service, DFAS or unbundled fibre service, respectively. Regulations made under these sections may prescribe both price and non-price terms for the services.

2.77 Apart from the first regulations made under ss 227 to 229,[44] the Minister must not recommend that regulations be made unless the Commission has first carried out a review of the relevant service and made recommendations to the Minister.[45]

2.78 These provisions mean that, from 1 January 2022, the PONFAS and DFAS and any service that constitutes an anchor service under the Fibre Deeds will also become subject to regulated price and non-price terms, if those services are declared in regulation under ss 227 to 229.

2.79 Further to paragraph 2.73 above, any FFLAS declared in regulation under ss 227 to 229 will also be subject to revenue caps under the regime.

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43 Where the regulated provider is subject to PQ regulation.

44 Telecommunications Act 2001, Schedule 1AA, clauses 13 to 16.

45 Telecommunications Act 2001, ss 227(4), 228(4) and 229(4).

2.80 These provisions are consistent with s 156AD(5) in relation to the fibre undertakings regime, which prohibits the Fibre Deeds from specifying price or non-price terms of supply for any telecommunications service.

Anchor service

2.81 The initial anchor service under s 227 will be a L2 service[46], and a regulated provider subject to PQ regulation would need to provide that anchor service on a non-discriminatory basis under its deed.

2.82 Clause 14 of Schedule 1AA of the Act provides that, initially, the Minister may recommend regulation without the Commission having carried out a review of the service. However, the first regulations for the anchor service must prescribe price and non-price terms that are not materially different to the terms of the UFB contracts. For LFCs subject to PQ regulation, this service will initially be subject to an overall revenue cap.[47]

DFAS and unbundled fibre service

2.83 A regulated DFAS under s 228 and unbundled fibre service under s 229 would need to meet the requirements in the Fibre Deeds for DFAS and PONFAS, which will, subject to modification discussed below, require the LFCs, to provide those regulated services on an equivalent and non-discriminatory basis.

2.84 Section 209 provides for the Commission to review the DFAS and unbundled fibre service three years from the implementation date. Under s 209(5), in carrying out a review, any maximum price the Commission might recommend for DFAS or the unbundled fibre service must be cost based.

2.85 Section 209 prevents our review of the DFAS and unbundled fibre service until 1 January 2025 at the earliest.[48] For LFCs subject to PQ regulation, these services will initially be subject to an overall revenue cap.[49] As explained above, after the first regulatory period, the Commission would be able to review these services and make recommendations about PQ regulation for ministerial approval.

[46] Telecommunications Act 2001, Schedule 1AA, clause 14.

[47] Telecommunications Act 2001, s 195.

[48] In respect of initial regulations for DFAS under s 228, clause 15(3) of Schedule 1AA provides that the Minister must not recommend that regulations be made to prescribe a description of the service that is, or conditions of the service that are, materially different from the terms set out in a UFB contract.

[49] Telecommunications Act 2001, s 195.

2.86 Parliament considered this was a proportional approach that supported a predictable transition from the UFB contracts to regulation under Part 6, and provided incentives for LFCs to innovate or face additional regulation. [50]

Regulated services and price controls

2.87 The requirements of ss 228 to 229 and s 209, taken together with the requirements of s 156AD(5), prevent the Commission from:

2.87.1 determining or setting price or non-price terms for DFAS or PONFAS under the Fibre Deeds; and

2.87.2 determining or recommending to the Minister price or non-price terms for these services under Part 6 until 1 January 2025.

Modifications to the Fibre Deeds

2.88 Section 206 provides that a regulated provider is not required to achieve price equivalence in relation to the supply of an unbundled L1 service, to the extent that the service is an input to a relevant service which is subject to a prescribed maximum price and that maximum price is not cost-based.

2.89 The Governor-General may declare, in regulations, a FFLAS to be an anchor service under s 227, which a regulated provider subject to PQ regulation must provide.[51] The first anchor service will be a L2 service, the price of which will not be cost-based under the first regulations.[52] Accordingly, a regulated provider supplying this anchor service would be exempt from meeting price equivalence under its deed, in relation to its consumption of PONFAS to supply the anchor service.

2.90 Section 230 provides that, in making regulations under ss 228 or 229 in respect of DFAS or an unbundled fibre service, the Governor-General may, on the recommendation of the Minister, make further regulations to discharge an LFC from its obligations to supply a service under the Fibre Deeds.

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50 MBIE "Regulatory Impact Statement: Implementing a post-2020 fixed line communications regulatory framework" (8 December 2016), paragraph 69, available at https://www.mbie.govt.nz/dmsdocument/1119-regulatory-impact-statement-implementing-post-2020-fixed-line-pdf.

51 Telecommunications Act 2001, s 198. As per the initial regulations, Chorus is the only regulated provider subject to PQ regulation.

52 Clause 14 of Schedule 1AA provides, for the first regulations, the maximum price for an anchor service is to be based on the maximum price that may be charged for providing the service under a UFB contract, with an annual CPI adjustment mechanism.

2.91 Such exemptions may relate to a geographic area in which the service under the Fibre Deed is supplied, or to the end-users or access seekers of the service, or to the technical specifications of the service.

2.92 As set out above, apart from the first regulations,[53] before ss 228 and 229 regulations are made, we must carry out a review under s 209 and make recommendations to the Minister.[54]

[53] Telecommunications Act 2001, Schedule 1AA, clauses 15(2) and 16.

[54] Telecommunications Act 2001, ss 227(4), 228(4) and 229(4).

Chapter 3 Equivalence

Purpose and structure of this chapter

3.1 The purpose of this chapter is to explain equivalence as it applies in the Act and the deeds.

3.2 This chapter is structured as follows:

3.2.1 general overview;

3.2.2 equivalence in the Act and the deeds;

3.2.3 equivalence of inputs; and

3.2.4 equivalence of price.

General overview

3.3 Equivalence is a regulatory tool requiring a network operator to provide access seekers with the same service, on the same terms and, under the Act and the deeds, at the same prices that the network operator provides the service to itself.

3.4 Equivalence is imposed when a vertically-integrated network operator supplies a wholesale service both to itself and to competing access seekers.[55] Equivalence is not a standard that can be applied when a service is only supplied externally, as it relies on a comparison between internal and external supply.

3.5 Equivalence aims to prevent network operators from distorting competition in downstream markets. It does so by requiring the network operator's own downstream business to compete with third party access seekers on an equal footing in terms of key upstream inputs.

Equivalence in the United Kingdom and European Union

3.6 EU and UK experience has influenced the formulation of the equivalence obligations in the Act and the deeds.

[55] The Vodafone RBI Deed is an example of where equivalence is not applied where the network operator supplies wholesale services both to itself and access seekers. In this case only non-discrimination applies.

United Kingdom

3.7 New Zealand's equivalence obligations are substantially based on the operational separation requirements of British Telecommunications plc (**BT**), which in turn were influenced by EU law.[56]

3.8 In the UK, the incumbent provider, BT, has given undertakings to Ofcom under which BT:

3.8.1 consents to a functional separation between its upstream access division, Openreach, and its downstream wholesale and retail service divisions; and

3.8.2 undertakes to provide upstream inputs on an "equivalence of inputs" basis.[57]

European Union

3.9 The European Commission (**EC**) has published a Recommendation to promote competition and enhance the broadband investment environment. The Recommendation proposes that for newly built fibre networks, national regulators in Europe should seek to ensure "equivalence of access" by imposing an "equivalence of inputs" obligation, combined with guidance to ensure the pricing permits the "economic replicability" of the network operator's own downstream product offering.[58]

[56] David Cunliffe 'Telecom Operational Separation' (31 March 2008) explained that Part 2A was developed in consultation with BT, Ofcom, UK DTI and the European Commission. Ofcom accepted undertakings from BT in lieu of making a reference under the Enterprise Act 2002.

[57] See BT undertakings, section 2 (defining "equivalence of inputs"), 3.1. A consolidated version of the BT undertakings is available at: https://www.ofcom.org.uk/__data/assets/pdf_file/0023/47075/consolidated_undertakings24.pdf.

[58] European Commission "Commission recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment - C(2013) 5761" (11 September 2013), recitals 12 and 13, available at: https://ec.europa.eu/digital-single-market/en/news/commission-recommendation-consistent-non-discrimination-obligations-and-costing-methodologies.

Equivalence in the Act and the deeds

3.10 Equivalence is defined in Parts 2A and 4AA of the Act as follows:

> **equivalence,** in relation to the supply of a relevant service, means equivalence of supply of the service and access to the service provider's network so that third-party access seekers are treated in the same way to the service provider's own business operations, including in relation to pricing, procedures, operational support, and supply of information and other relevant matters

3.11 The undertakings regimes for copper and fibre require Chorus and the LFCs to achieve equivalence in the supply of relevant regulated services, and unbundled L1 services, respectively.[59]

3.12 The Copper Deed, the Fibre Deeds and Chorus RBI Deed prescribe equivalence obligations to implement the requirements of the Act.

3.13 Equivalence as defined in the Act and the deeds incorporates both equivalence of inputs and equivalence of price.

Equivalence of Inputs

3.14 Equivalence of inputs requires a network operator to use the same systems, inputs and processes to supply itself and access seekers.

3.15 To satisfy equivalence of inputs, a network operator must provide all inputs to access seekers on exactly the same terms (including timeliness and quality of provision) as those the network operator offers its own downstream business operations.

3.16 The Copper Deed and the Fibre Deeds are the only deeds that impose equivalence obligations. The Chorus RBI Deed contains equivalence obligations that are tied to its obligations under its Copper and Fibre Deeds.

Equivalence obligations under the deeds

3.17 In relation to equivalence, the Copper Deed and the Fibre Deeds require the network operator to:

3.17.1 provide itself and access seekers with the same service;

3.17.2 deliver the service to itself and to access seekers on the same timescales and on the same terms and conditions (including price and service levels);

[59] Telecommunications Act 2001, ss 69XB and 156AD.

3.17.3 deliver the service to itself and to access seekers by means of the same systems and processes (including operational support processes);

3.17.4 provide its own business operations and access seekers with the same confidential information about the service and those same systems and processes; and

3.17.5 when providing the service to itself, use systems and processes that access seekers can use in the same way, and with the same degree of reliability and performance.

Exemptions

3.18 In relation to equivalence under the Copper Deed and the Fibre Deeds, there are a number of exemptions. As a result, the 'same' means exactly the same, subject to:

3.18.1 trivial differences;

3.18.2 differences that reflect the fact the network operator is a single business and is not required to maintain separate business units, including relating to: (i) credit requirements and vetting; (ii) payment; (iii) provisions relating to the termination of supply; and (iv) provisions relating to dispute resolution;

3.18.3 differences relating to: (i) requirements for a safe working environment; (ii) matters of national and crime related security, physical security, security required to protect the operational integrity of the network, or any other security requirements the network operator agrees with the Commission;

3.18.4 differences that the network operator identifies and agrees with the Commission in writing if those differences are not inconsistent with equivalence under the Act, having regard to the purpose statement in Part 2A or Part 4AA, as applicable; and

3.18.5 differences relating to terms required by a residual terms determination under subpart 2A of Part 2.

Scope of application

3.19 Where a network operator is required to provide a service that is subject to the equivalence of inputs obligation, the deeds list the aspects of that service to which the obligation applies. These aspects are listed at paragraph 3.17 above.

3.20 The deeds require specifically that a network operator delivers the relevant service to itself and to access seekers using the same systems and processes. We consider that relevant processes relating to a service to which equivalence would apply include the following:

3.20.1 Pre-ordering/ordering. This includes any systems, processes and information for pre-qualification of end-users, access to systems containing relevant information, including information about network development and service availability;

3.20.2 Provisioning. Including access to appointment systems, workforce scheduling systems (where relevant) to ensure that the access seeker is not disadvantaged compared to the network operator. New connections for access seekers must be processed in the same way and take the same length of time as new connections for the network operator's downstream service;

3.20.3 Change control. Access seekers must have equal access to any process used to control changes that affect services that are subject to the equivalence obligation. This includes systems that provide advance information of the impact of changes on those services (eg, infrastructure moves or changes impacting on co-location);

3.20.4 Data access. Access seekers must have equal access to the network operator's relevant data, including information about plans (eg, planned outages etc);

3.20.5 Service assurance. The time taken to fix faults as well as the availability of information regarding faults such as the expected restoration time of current faults and the ability to influence priorities must be the same for the access seekers and the network operator's downstream services; and

3.20.6 Governance. The access seekers should have equal access to information about the network provider's risk management and high-level access management approach. This includes information about plans for network expansion and product development and approval milestones for investment plans.

Commercial information

3.21 The Fibre Deeds contain specific requirements for LFCs relating to commercial information for the Input Services. They are required to disclose:

3.21.1 prior to 1 January 2020, Commercial Information relating to DFAS to access seekers on a non-discriminatory basis; and

3.21.2 from 1 January 2020, Commercial Information relating to Input Services to access seekers in accordance with equivalence. This obligation applies to DFAS, PONFAS and the Central Office and POI Co-location Service.

3.22 Commercial Information is defined in the deeds as information that is:

3.22.1 confidential;

3.22.2 in respect of a Service, information regarding:

3.22.2.1 service development;

3.22.2.2 pricing;

3.22.2.3 marketing and strategy and intelligence;

3.22.2.4 service launch dates;

3.22.2.5 costs;

3.22.2.6 projected sales volumes; or

3.22.2.7 network coverage and capabilities.

3.22.3 but does not include:

3.22.3.1 any information that is not current and which has been superseded by identifiable new information or is more than 18 months old; or

3.22.3.2 any information, or types of information, that we agree in writing is not Commercial Information.

Equivalence of price

3.23 Equivalence of price requires network operators to treat access seekers the same way as the network operators' own operations in relation to pricing. This means network operators must provide access seekers with a service at the same (imputed) price they charge internally to their own downstream operations. This (imputed) internal price can be calculated using a number of different approaches and assumptions. We explain below the approach that we consider would meet the minimum requirements to satisfy the equivalence of price obligation.

3.24 If a network operator has separate business units, it can use the transfer price paid between these business units as a reference for the 'equivalent' price only if the transfer price satisfies the minimum requirements for equivalence of price set out below.

3.25 In our view, the approach set out below for considering equivalence of price gives effect to government policy, the legislative framework, and the requirements in the deeds relating to the design of the UFB networks to facilitate unbundling and to promote downstream competition. The approach is based on the use of the economic replicability test, which is discussed below.

Equivalence of price does not prescribe a price methodology

3.26 Equivalence, as defined in the Act and the deeds, does not specify a pricing methodology that a network operator must apply, nor does equivalence set price terms for specific services. Rather, prices must be set under the regulatory regimes for copper and fibre, respectively. We discussed in Chapter 2 why price setting is not a feature of the undertakings regimes.

3.27 A range of prices and pricing structures can potentially satisfy equivalence of price obligations:

3.27.1 the equivalence obligation does not prescribe a specific price level for the upstream inputs, provided that the price(s) applied to access seekers are equivalent to the (imputed) price applied to the network operator's own operations;

3.27.2 the equivalence of price obligation allows a network operator to determine the methodology and the structure of its prices, provided it treats access seekers the same way as the network operator's own downstream operations; and

3.27.3 in this context, we note that discounts off the upstream price linked to volumes or longer-term supply arrangements can be consistent with the equivalence of price obligation, but such discounts must, separately, satisfy the non-discrimination obligation. Non-discrimination is discussed in more detail in Chapter 4.

3.28 The Expert Economist Report[60] details a number of different methodologies that can be used to determine the upstream price to satisfy equivalence of price. The report discusses how different methodologies have different advantages and drawbacks in terms of promoting the different limbs of the purposes in Part 2A and Part 4AA (for example, promoting competition in telecommunications markets and facilitating efficient investment in telecommunications infrastructure).

The economic replicability test

3.29 Equivalence of price concerns the difference between a network operator's upstream price(s) and its downstream price(s), ie, the margin between the two sets of prices.

3.30 In our view, to satisfy equivalence of price, the margin between the network operator's upstream and downstream prices has to cover the costs of providing the downstream service including a normal return on capital, ie, the available margin has to satisfy an economic replicability test (**ERT**).

3.31 The absence of a transparent internal transfer price does not render meaningless the equivalence of price obligation. The network operator's own downstream operations will not be treated equivalently to access seekers if, when faced with the explicit external price payable by access seekers, the network operator's downstream operations would trade at a loss.

3.32 If the network operator's own downstream operations traded at a loss based on the price payable by access seekers, it could be inferred that the network operator's downstream operations were receiving different and more favourable terms than access seekers. This would be in the form of a lower implicit transfer price, which permitted those operations to continue to trade when it would be uneconomic for them to do so at the external price. In these circumstances, equivalence of price would not be satisfied.

3.33 The interpretation that equivalence of price requires satisfying the ERT is consistent with the approach adopted in EU and UK competition law and regulation. It underlies *ex post* and *ex ante* margin squeeze analysis undertaken by different international agencies. For example:

[60] Ingo Vogelsang "Equivalence and non-discrimination in New Zealand telecommunications markets: The case of Layer 1 unbundled access to fibre networks" (16 October 2019).

3.33.1 the concept is explained in the EC Recommendation as follows:[61]

> National regulatory authorities (NRAs) "should ensure that the margin between the retail price of the SMP operator and the price of the NGA wholesale input covers the incremental downstream costs and a reasonable percentage of common costs. … [A] lack of **economic replicability** can be demonstrated by showing that the SMP operator's own downstream retail arm could not trade profitably on the basis of the upstream price charged to its competitors by the upstream operating arm of the SMP operator ('equally efficient operator' (EEO) test). The use of the EEO standard enables NRAs to support the SMP operators' investments in NGA networks and provides incentives for innovation in NGA-based services." (emphasis added)

3.33.2 the same concept is reflected in the standard test for a margin squeeze applicable under EU and UK competition law. For example, the EC characterises a margin squeeze as a specific form of abuse:[62]

> "a dominant undertaking may charge a price for the product on the upstream market which, compared to the price it charges on the downstream market, does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis (a so-called 'margin squeeze'). In margin squeeze cases the benchmark which the Commission will generally rely on to determine the costs of an equally efficient competitor are the LRAIC of the downstream division of the integrated dominant undertaking."

3.34 There are multiple approaches that can be used to determine whether ERT has been met in a specific market. Specifically, what constitutes economic replicability may depend on the circumstances of a particular market and may vary with eg, market structure and/or the existence of economies of scale or scope.

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61 European Commission "Commission recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment - C(2013) 5761" (11 September 2013), recital 64.

62 European Commission 'Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' (24 February 2009), available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52009XC0224%2801%29, recital 80.

3.35 In practice, to determine whether ERT has been met, one can adopt:

3.35.1 an approach starting with the downstream product price (p_d) and subtracting the downstream costs (including a normal return on capital) (c_d) to arrive at the upstream price (p_u) that would satisfy equivalence – this is sometimes referred to as a 'retail-minus' approach[63] or the Efficient Component Pricing Rule (ECPR). This approach is expressed as a simple equation: $p_u = p_d - c_d$; or

3.35.2 an approach under which the upstream price, as determined by the network operator (whether using a cost-based methodology or not) is subtracted from the downstream price and the resulting 'margin' is compared to the downstream costs (including a normal return on capital). This approach is expressed as a simple equation: $p_d - p_u >= c_d$.

3.36 To apply the ERT, several high-level determinations must first be made:

3.36.1 which downstream price should be used;

3.36.2 what is the cost standard for the downstream costs that should be used; and

3.36.3 what is the relevant time period over which the 'margin' between the downstream prices and the network operator's upstream price(s) should be assessed.

3.37 We discuss these in turn below.

Downstream price

3.38 With respect to the downstream price used to determine whether ERT is met:

3.38.1 the price should reflect the effective prices charged in the downstream market, ie, it should be net of discounts, rebates and other promotional offers;

[63] We note that the relevant downstream market may be a wholesale market as well.

3.38.2 in the case of differentiated downstream services, the (notional) downstream price should be calculated as a volume-weighted average across all downstream services supplied using the same upstream service. In some cases, it may be appropriate to use downstream prices at a service group level or at an individual service level, rather than at the aggregate level across all downstream services;[64]

3.38.3 in the case of differentiated downstream services, the volume weights used to calculate the notional average price across all relevant downstream services may be determined either:

3.38.3.1 based on the actual service mix supplied by the network operator; or

3.38.3.2 based on a representative basket of downstream services.

3.39 For ERT to be effective, the test requires the reference downstream price to be current, preferably updated at regular intervals; for example, on an annual basis.

3.40 We note that in markets with differentiated downstream services that rely on a single upstream input service, access seekers will have an incentive to sell (only or more of) the higher-end downstream services to the extent that those are (at least initially) associated with higher margins.[65] In the longer term, the effective (average) downstream price of the network operator would be expected to come down because either:

3.40.1 they sell less higher-end products since some end-users have switched to access seekers' offers; or

3.40.2 the prices of higher-end products have decreased in response to downstream competition from access seekers; or

3.40.3 both of the above.

[64] We recognise that additional complexities may need to be considered on a case-by-case basis, such as where there are promotional offers or discounts for bundles.

[65] Access seekers will also have an incentive to enter geographic areas where downstream costs are lower. As noted in paragraphs 2.74 and 2.75 above, a network operator who is subject to PQ regulation must provide certain FFLAS at geographically consistent prices. This will condition any response of the network operator to such entry.

3.41 If the increase in competition in the downstream market is relatively concentrated at the higher-end of the differentiated services range, this may create an incentive for the network operator to try and increase the prices of lower-end downstream services. This would be particularly the case when the network operator is subject to revenue or price controls that limit the downstream prices at, or close to, the combined costs of the upstream and downstream markets, so that the network operator can recover its downstream costs without compromising its ability to recover its upstream costs.[66] Over time this may lead to a narrowing of the price range available in the downstream market and some loss of allocative efficiency. Whether any loss of allocative efficiency is offset by the gains in dynamic efficiency due to the entry of access seekers in the downstream market and thus, leads to long-term benefits for end-users, would depend on the relative size of these welfare effects.

Downstream cost

3.42 As explained at paragraphs 3.29-3.31 above, to satisfy equivalence of price, a network operator must be able to demonstrate at a minimum that its own downstream operations can profitably supply the downstream service when faced with the upstream input price(s) offered to access seekers.

3.43 When assessing the profitability of the downstream operations (ie, whether ERT is met), the 'margin' between the downstream and upstream prices must be equal to or greater than:

3.43.1 the network operator's own downstream costs (ie, applying EEO cost standard); using

3.43.2 the long-run average avoidable costs of the downstream service (plus any incremental costs of providing access to access seekers).

3.44 Compared to other downstream cost standards that can be used to satisfy ERT, the downstream cost standard specified above is likely to result in the highest upstream price that can be charged to access seekers and still satisfy equivalence of price. In other words, this is a 'minimum' cost standard that will result in a 'ceiling' for the upstream price that can satisfy equivalence relative to the downstream price. This is because:

[66] The extent to which a network operator would be able to lower its upstream price would depend on the available profit margin above normal return on capital at the time the initial upstream price is set – see illustration at Figure 3.2 below.

3.44.1 the network operator's own downstream costs (EEO standard) are likely to be lower than the costs of an efficient access seeker[67] because of economies of scale that the network operator enjoys; and

3.44.2 long-run average avoidable costs do not include an allocation of common costs shared between the relevant downstream service and other services (whether upstream services or services in other markets). The different cost types that can be incurred in providing a service are illustrated below.

3.45 The minimum cost standard in paragraph 3.43 above is a relevant benchmark for judging whether there is sufficient economic space for an efficient access seeker to enter and compete at the downstream level, using the upstream service supplied by the network operator.[68] In our view, this can be consistent with the purpose under s 156AC(a) of subpart 2 of Part 4AA and the requirement in the deeds that LFC fibre networks be designed and built to facilitate unbundling to promote competition in telecommunications markets.

Cost standards

3.46 In setting the 'minimum' downstream cost standard for satisfying equivalence of price as one relying on the network operator's own costs (ie, an EEO cost standard), we note that under this 'minimum standard' only access seekers that are at least as productively efficient as the network operator in providing the downstream service can enter the downstream market. This 'minimum standard' thus might help prevent productively inefficient investment, consistent with the purpose under s 156AC(c) of subpart 2 of Part 4AA. However, the 'minimum standard' may also prevent some investments by access seekers that would lead to gains in dynamic efficiency over time and thus, the 'minimum standard' might be insufficient to promote competition to the long-term benefit of telecommunications end-users in New Zealand, per the purpose under s 156AC(a).

[67] Using the estimated costs of a hypothetical reasonably efficient access seeker is usually referred to as a reasonably efficient operator (REO) cost standard.

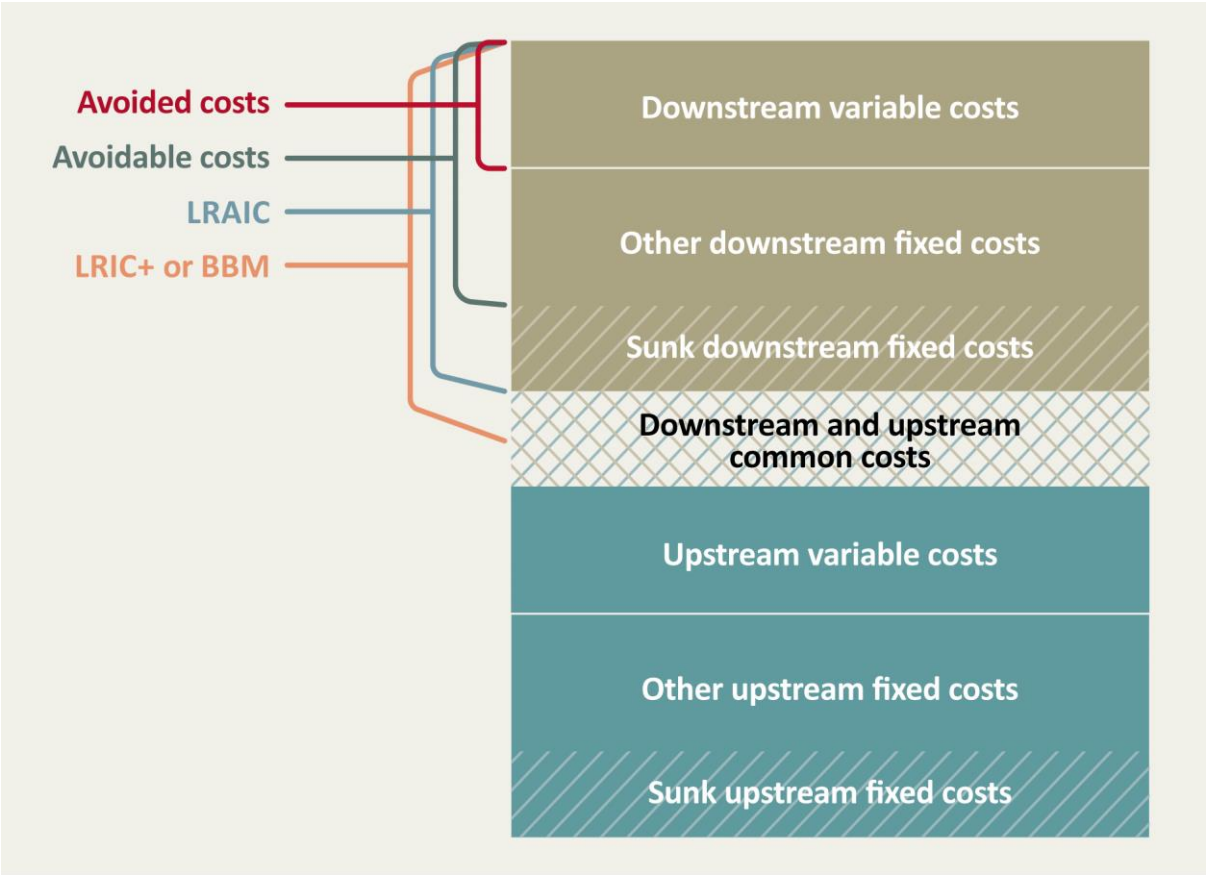
[68] Later in this chapter, we discuss the circumstances in which alternative cost standards may be appropriate when considering whether equivalence of price has been satisfied.

3.47 We consider that setting a 'minimum standard' by reference to the economic costs of a different operator, eg, one that may not benefit from the same efficiencies as the network operator in terms of economies of scale or scope, is not appropriate in a setting where prices are set commercially and are subject to enforcement action under the equivalence requirement. This is because the network operator will not know the downstream costs of its downstream competitors. In our view, a departure from this equivalence approach for the purposes of setting a 'minimum standard' will be merited only if it is necessary to take into account specific market circumstances. We provide further discussion of alternative downstream cost standards in paragraphs 3.54 to 3.55 below.

3.48 We note that in markets in which there are limited economies of scale or scope, the EEO cost standard and the REO cost standard would in theory produce similar estimates of downstream costs, assuming the network operator is itself reasonably efficient.

3.49 Figure 3.1 below provides a stylised illustration of the different types of costs that a network operator incurs in providing both downstream and upstream services, and how they relate (in a simplified manner) to different categories of downstream costs that could be used to determine whether ERT is satisfied.

Figure 3.1 Stylised illustration of the relationship between cost types and cost standards



3.50 For simplicity, Figure 3.1 represents the different cost types (variable, fixed, etc)[69] incurred in providing a service as distinct 'stacks'. In reality, however:

3.50.1 fixed costs become variable in the longer run, so that the difference (if any) between avoided and avoidable costs depends on the period evaluated;

3.50.2 not all cost types are relevant for individual services provided in different markets – for example, in the absence of any common (variable or fixed) costs shared between upstream and downstream products, the LRIC+ standard would not be relevant, as the 'plus' would be zero; and

[69] Sunk costs are costs that, once incurred, cannot be recovered, even if the network operator ceases to provide the service in question. They are therefore not avoidable by definition.

3.50.3 a BBM methodology is likely to estimate the total costs of providing a downstream service including an allocation of common costs (if any) similar to LRIC (or LRIC+).[70]

3.51 In markets with significant fixed and common costs, a 'margin' between the downstream price and the upstream price that is only equal to, but not greater than, the long-run average avoidable costs of the downstream product might not be sufficient to allow entry by access seekers, unless the access seekers were significantly more efficient than the network operator. Therefore, to achieve the policy goal of promoting competition in telecommunication markets for the long-term benefit of telecommunication end-users (under s 156AC(a)), it might be appropriate to adopt an alternative downstream cost category during an investigation of equivalence of price in such markets.

Relevant time period

3.52 To assess whether equivalence of price, or ERT, is met, an investigation would need to consider the relevant time period over which the profitability of the downstream products should be assessed. In our view, profitability would have to be maintained over a sufficiently long period to allow access seekers to recover their investments. Such a dynamic (multi-period) approach would:

3.52.1 provide the correct signal for efficient entry by access seekers; and

3.52.2 allow for initial losses (which under a static (period-by-period) approach would fail the ERT) to be compensated by higher profits in later periods.

Alternative standards

3.53 Equivalence of price can also be satisfied by upstream prices that are below the imputed upstream price calculated using the ECPR-based minimum standard discussed above. Specifically, equivalence of price can be satisfied by applying ECPR using a different downstream cost standard or by upstream prices based on the costs of providing the upstream service. These alternatives are discussed in turn below.

[70] For a more detailed explanation of the building blocks model, see chapter 2 of Commerce Commission "Fibre input methodologies: Draft decision – reasons paper" (19 November 2019).

ECPR-based rules using a different downstream cost standard

3.54 Equivalence of price can also be implemented by applying ERT using an ECPR-based approach with a different downstream cost standard, allowing for a higher 'margin' between the upstream and downstream prices. Such alternatives include an adjusted EEO cost standard that is based on the network operator's downstream costs but takes into account the scale and scope that can reasonably be achieved by third party access seekers, or a standard relying on REO costs.

3.55 Alternative downstream cost standards will be appropriate if applying an alternative standard would promote competition and investment for the long-term benefit of telecommunication end-users. Examples of markets in which an alternative cost standard might be appropriate when applying the ERT are as follows:

3.55.1 markets in which regulation or workable competition does not constrain downstream prices;

3.55.2 markets in which there are economies of scale / scope in the downstream market which result in downstream costs for the network operator (based on an EEO standard using long-run avoidable costs) that access seekers cannot feasibly replicate because of their smaller scale, even if they are as efficient as the network operator; and/or

3.55.3 markets in which additional investment / entry by access seekers might be deemed to be to the long-term benefit of New Zealand consumers (for example, if a loss of productive efficiency is likely to be outweighed by a gain in dynamic efficiency as a result of overall expansion of market demand or innovation arising from the additional entry in the downstream market).[71]

Cost-based upstream prices

3.56 Cost-based upstream prices can also be consistent with the equivalence of price obligation provided they meet the ERT standard determined to be appropriate for the markets concerned (ie, at a minimum, the ECPR-based rule specified above).

3.57 Cost-based standards for the upstream price can include:

3.57.1 the LRIC of the upstream product;

[71] This is consistent with the ECPR approach discussed by Armstrong, Doyle, and Vickers (1996). See Ingo Vogelsang "Equivalence and non-discrimination in New Zealand telecommunications markets: The case of Layer 1 unbundled access to fibre networks" (16 October 2019), page 15.

3.57.2 a LRIC+ standard (such as TSLRIC)[72], in which the long-run incremental costs of the upstream product are adjusted for allocations of common costs and/or sunk costs; and

3.57.3 costs, including a normal return on capital, of supplying the upstream product derived using BBM.

3.58 We note that cost-based (including LRIC-based) upstream prices that fail the minimum requirement above (ECPR-based rule relying on an EEO cost standard) implicitly favour the network operator's own downstream operation (see also discussion at paragraph 3.31 above). As such, cost-based prices will be presumed to fail the equivalence of price obligation if they do not meet the minimum ECPR-based rule specified above.

3.59 However, cost-based upstream prices below the minimum ECPR-based standard implicitly favour *both* access seekers and the network operator's own downstream operations. Equivalence will not be breached since using a cost-based upstream price will not put the downstream operations of the network operator in a more favourable position than access seekers' downstream operations. Rather, using cost-based upstream prices might disadvantage a network operator's upstream operations when upstream prices are below the ECPR-based prices.

3.60 We acknowledge that if the ECPR minimum standard is applied during periods when downstream prices are below costs, it would not be appropriate to move to a cost-based standard for the upstream price in subsequent periods without considering the costs to end-users from the risk of asset stranding.

Application of the above pricing principles

3.61 In considering compliance with the equivalence requirements in the Act and the deeds, we will likely apply the ERT principle, as it should ensure that the upstream service can be used either by the network operator or an access seeker to economically replicate the network operator's downstream service. However, as set out in Chapter 1, the question of whether or not there has been a breach of the equivalence obligations is a matter for the High Court.

3.62 In providing guidance to network operators subject to an equivalence obligation and required to set prices that comply with this obligation, we consider that the use of ECPR based on the EEO standard is a practical approach that the network operators can implement. To be consistent with equivalence, upstream prices should always meet this test at a minimum.

[72] TSLRIC refers to total service long-run incremental cost, and is defined in Schedule 1 of the Act.

3.63 A cost-based upstream price can also be implemented by the network operators, and such a price may satisfy equivalence as long as it is equal to or lower than the upstream price that meets the minimum ECPR-based standard discussed above.

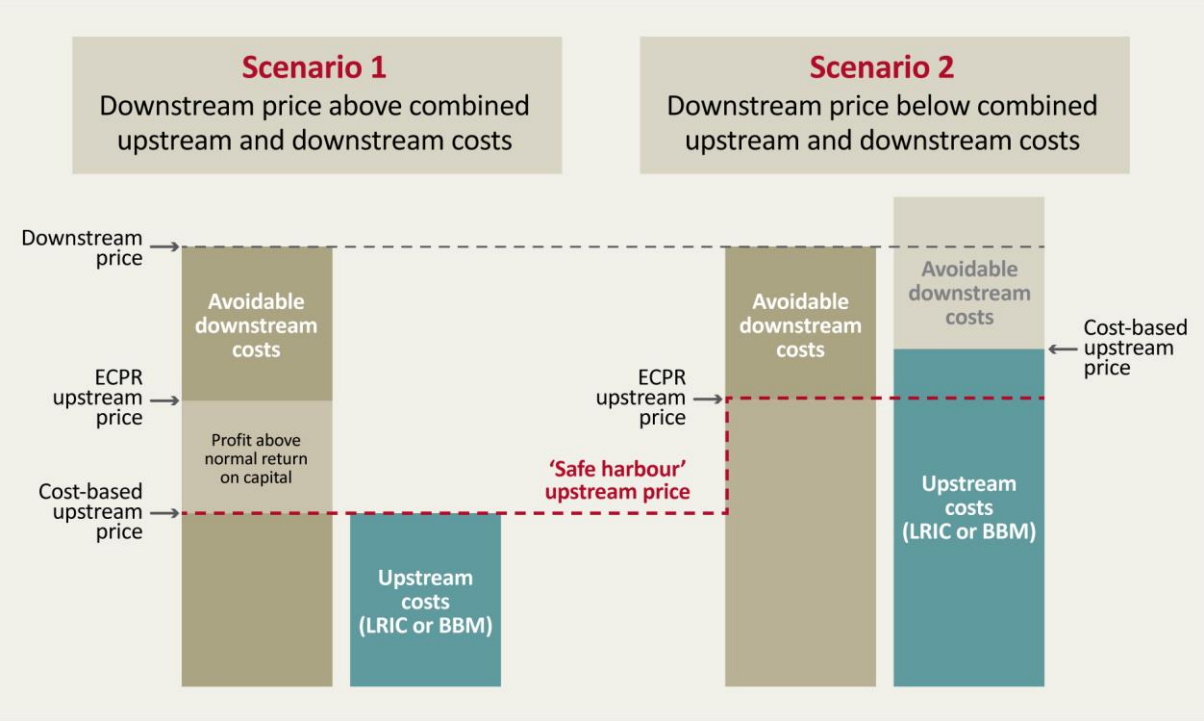
3.64 In our view, equivalence of price is likely to be satisfied if an upstream price is shown to be at the *lower* of:

3.64.1 the imputed upstream price calculated using the minimum ECPR-based rule set out above; or

3.64.2 the upstream costs including a normal return on capital, calculated using either the LRIC or BBM methodology – see the above discussion of alternative standards for satisfying equivalence of price.

3.65 This establishes a 'ceiling' for the upstream price that could be lower than the 'ceiling' established by the 'minimum' downstream cost standard specified above. Figure 3.2 below illustrates how this upstream price relates to the downstream prices and costs. An upstream price that meets the *lower* 'ceiling' established according to these parameters will be presumed to meet the equivalence of price obligation unless evidence to the contrary is provided.

Figure 3.2 Illustration of assessment of upstream price



3.66 Upstream prices that do not meet these criteria, but still satisfy ERT using the minimum standard for the downstream costs set out above, may also satisfy equivalence of price, but further investigation will be required to determine whether equivalence of price is satisfied, depending on the specific market circumstances.

Chapter 4 Non-discrimination

Purpose and structure of this chapter

4.1 The purpose of this chapter is to explain non-discrimination as it applies under the Act and the deeds.

4.2 This chapter is structured as follows:

4.2.1 general overview;

4.2.2 non-discrimination in the Act and the deeds;

4.2.3 objective justification and no harm to competition;

4.2.4 difference in treatment with respect to prices; and

4.2.5 difference in treatment with respect to non-price terms.

General overview

4.3 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.

4.4 Non-discrimination aims to deter anti-competitive behaviour from network operators that have an incentive to discriminate between different access seekers to distort the competitive process in any telecommunications market. For example, a network operator may have an incentive to discriminate in an anti-competitive way if reducing or distorting competition would benefit the network operator as a supplier in the downstream market, or protect its dominant position in the upstream market.

4.5 A network operator may find it efficient to discriminate between customers even without anti-competitive incentives.[73] We discuss below how the non-discrimination obligations in the deeds allow for differences in treatment in certain cases—specifically, to the extent that a particular difference in treatment is objectively justifiable and does not harm, and is unlikely to harm, competition.

Non-discrimination in the United Kingdom and European Union

4.6 EU and UK experience has influenced the formulation of the non-discrimination obligations in the Act and the deeds.

[73] See for example Dennis Carlton & Jeffrey Perloff "Modern Industrial Organisation" (4th ed, Addison Wesley, 2005), pages 306-308.

United Kingdom

4.7 As discussed in Chapter 2, the concept of non-discrimination in the Act is substantially based on the operational separation of BT in the UK. Ofcom imposed an obligation on SMP providers not to 'unduly discriminate', and adopted a two-stage test to assess whether a difference in treatment was unlawful:

4.7.1 Can the difference in treatment between the customers be objectively justified because of relevant differences in the customer's circumstances (for example, the cost of supplying to that customer or their creditworthiness)?

4.7.2 If not, does the difference in treatment have the potential to affect competition?

4.8 A difference in treatment would not be unlawful if it could be objectively justified, or it would have no effect on competition.[74]

4.9 We explain below how the New Zealand approach requires both objective justification and no harm to competition for the conduct to be lawful.

European Union

4.10 In the EU, Article 102 of the Treaty on the Functioning of the European Union[75] prohibits firms from abusing their dominant position in a market. Article 102(c) prohibits a dominant firm from applying dissimilar conditions to equivalent transactions with other trading parties, placing them at a competitive disadvantage. The EU courts' case law has recognised that this prohibition is subject to the possibility of objective justification.

4.11 Under EU competition law, differential treatment must be shown to give rise to competitive disadvantage to prove prima facie abuse. Once abuse is established, objective justification follows separately and subsequently.

4.12 We explain below how, in New Zealand, differential treatment can be sufficient to give rise to discrimination, unless the conduct is both objectively justified and causes no harm to competition.

[74] Ofcom "Undue discrimination by SMP providers" (15 November 2005), paragraphs 5.10 to 5.15.

[75] Formerly Article 82 of the Treaty Establishing the European Community, cf s 36 Commerce Act 1986.

Non-discrimination in the Act and the deeds

4.13 Non-discrimination is defined in Parts 2A and 4AA of the Act as follows:

> **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

4.14 The undertakings regimes for copper and fibre requires network operators to achieve non-discrimination in the supply of relevant services as discussed in more detail in Chapter 2.[76]

4.15 Non-discrimination as defined in the Act and the deeds applies to both price and non-price terms.

Differential treatment of access seekers

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

4.17 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. While a network operator cannot be expected to tailor their offers 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.

4.18 Non-discrimination applies to access seekers in their capacity as access seekers, but may also extend to differences in treatment affecting the activity of access seekers in their capacity as participants in any other telecommunication market. The reference to "effects on competition in any telecommunications market" in the definition of non-discrimination in the Act and the deeds reinforces this interpretation. For example, a network operator's conduct may discriminate against an access seeker in a way that harms competition in markets in which the access seeker supplies mobile services or fixed wireless services.

4.19 We also note that in considering different treatment of access seekers under the Act and the deeds, we do not consider intent to be necessary, or a consideration, for establishing discrimination.

[76] Telecommunications Act 2001, ss 69XB, 156AD, and 156AY.

Objective justification and no harm to competition

4.20 The non-discrimination obligation in the Act and the deeds[77] is subject to the following exclusion: to discriminate means to treat differently, except to the extent a particular difference in treatment:

4.20.1 is objectively justifiable; and

4.20.2 does not harm, and is unlikely to harm, competition in any telecommunications market.

4.21 Unlike the position in the UK, under the New Zealand legislation, 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. As discussed below, however, these considerations can overlap in some circumstances.

4.22 The two limbs of the exclusion to the non-discrimination obligation must be read together to identify whether particular difference in treatment is unlawful or is legitimate competitive behaviour. Our approach to applying the non-discrimination obligation is as follows:

4.22.1 The first question to ask is whether the conduct involves a difference in treatment, either between different access seekers[78] or between the network operator and other access seekers. As explained below, a difference in treatment could include offering different terms to different access seekers, and offering the same terms if the offer has a different effect depending on the position of the access seeker purchasing the service.

4.22.2 If we identify a difference in treatment, the next question is whether there is an objective justification for the treatment.

4.22.3 To avoid a breach of the non-discrimination obligation, it is also necessary that the difference in treatment not harm, and be unlikely to harm, competition in any telecommunications market.

[77] Telecommunications Act 2001, ss 69XA and 156AD. Also clause 5 of the Copper Deed and Fibre Deeds.

[78] A network operator may have an incentive to offer different price terms to different access seekers even if the network operator is not vertically integrated – for example, price discrimination can be efficient. At paragraphs 4.4 and 4.5 above we also point to some reasons a network operator may have to offer different price and non-price terms to access seekers that could lead to harm to competition.

Objective justification

4.23 The objective justification limb requires a legitimate purpose or explanation for the difference in treatment, to demonstrate that the difference is something other than an attempt by the network operator to exploit its position in the market to distort competitive dynamics.

4.24 The concept of objective justification should be viewed as relatively broad and flexible, but one which requires adequate supporting evidence and the difference in treatment to be proportionate, having regard to the justification offered.

4.25 Objective justification depends on individual circumstances and available evidence in support. Not all differences in treatment engage the policy concerns that drove Parliament's decision to impose the non-discrimination obligation.

4.26 We have taken account of the purposes of the undertakings regimes[79] and provide the following examples of when conduct might be objectively justifiable—in all cases depending on the facts of the matter:

4.26.1 a difference in treatment might promote product differentiation or efficient investment;[80]

4.26.2 if different access seekers have different requirements or objective characteristics that affect the cost of supplying the relevant service; or

4.26.3 the conduct is necessary to meet competition (i.e., 'competition on the merits').

Meeting competition as an objective justification

4.27 It may be difficult to distinguish unlawful discrimination from competition on the merits. This is a challenge found in competition law generally: volume rebates, for example, may, depending on the circumstances, constitute anti-competitive conduct or a legitimate response to a competitive challenge. In the first case, the network operator uses its position to distort competitive dynamics, whereas in the second case, the network operator responds to a competitive challenge.

79 Telecommunications Act 2001, ss 69W and 156AC.

80 For example, component-based pricing, which is likely to result in a difference in treatment between different access seekers, can prevent inefficient investment. See Ingo Vogelsang "Equivalence and non-discrimination in New Zealand telecommunications markets: The case of Layer 1 unbundled access to fibre networks" (16 October 2019), pages 4 and 25-26.

4.28 Although objective justification and the absence of an effect on competition are cumulative requirements, the above example shows that they will often be closely related.

4.29 If a network operator argues that differential treatment was actually competition on the merits, it will in most cases have to point to a particular competitive challenge and show that the differential treatment was a good-faith and proportionate response to that challenge.[81] Conduct which may be pro-competitive or competitively neutral when engaged in by a firm lacking market power may harm competition when engaged in by a firm with market power.

No harm to competition

4.30 The no harm to competition limb requires that the difference in treatment does not harm, and be unlikely to harm, competition in any telecommunications market.

4.31 The no harm to competition limb recognises that not every disadvantage to an access seeker is harmful to competition. This limb requires a wider consideration of the market context to determine whether there has been a more than minimal impact on competition.

4.32 Economic regulation is generally concerned with the harm to the competitive process, not protection of individual competitors.[82] International case law supports the interpretation of harm to competition as a broader concept than the concept of harm to an individual market participant. For example, the Opinion of AG Wahl in *MEO* in the European Court of Justice states,[83]

> 96. In order for a 'competitive disadvantage' within the meaning of point (c) of the second paragraph of Article 102 TFEU to be found, the practice in question must, in addition to the disadvantage caused by the price discrimination taken in isolation, have a specific effect on the competitive position of the undertaking suffering the alleged discrimination.

[81] For example, if the firm only behaved in a certain way because its dominant position insulated it from the consequences that competition would otherwise visit upon that conduct, that will suggest the conduct is not objectively justifiable: see *Commerce Commission v Telecom Corporation of New Zealand Ltd* [2010] NZSC 111, [2011] 1 NZLR 577 at 599 ([28]).

[82] Likewise, the Commerce Act is concerned with protecting competition, not individual competitors: see *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554 (CA) at 564-565 and *Commerce Commission v Telecom Corporation of New Zealand Ltd* [2010] NZSC 111, [2011] 1 NZLR 577 at 598 ([25]).

[83] Opinion of Advocate General Wahl, Case C-525/16 MEO – Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência (20 December 2017), available online at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=198089&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=6846629.

97. In other words, it is necessary for the disadvantage suffered to be sufficiently significant as to have consequences for the competitive position of the undertaking discriminated against. It is therefore necessary to establish that the discriminatory prices have a tendency to distort the competitive relationship between the trading partners on the downstream market.

98. Such an analysis requires the competition supervisory authority to take all of the circumstances of the case submitted to it into account. A price discrimination practice places the customers of a company in a dominant position in a disadvantageous competitive situation when it is actually capable of having a negative effect on competition on the market in which its customers operate. In order to identify a distortion of competition in that context, it is therefore not sufficient merely to evaluate the impact of the discriminatory practice on a specific trading partner.

99. In particular, it is necessary to examine whether the price discrimination at issue is likely to have a negative effect on the ability of trading partners that are disfavoured to exert competitive pressure on trading partners that are favoured.

…

104. Therefore, the fact that one of the trading partners is charged a higher price may, at most, have an effect on the costs borne by that undertaking and, quite hypothetically, on the profitability and net income which that undertaking hopes to achieve. However, that does not imply that the level of competition on the downstream market is affected by the price discrimination in question.

…

106. In order to establish the existence of a competitive disadvantage it is necessary to examine the actual or potential effects of the practice complained of in the light of *all the relevant circumstances*, in relation to the transactions at issue and the characteristics of the market on which the trading partners of the dominant undertaking operate.

107. In this examination of a distorting effect on competition or exclusionary effect of a price discrimination practice, attention must first of all be paid to the reality and relative significance of the price differentiation at issue.

108. Next, importance must also be attached to examining how much the goods or services supplied by the dominant undertaking cost in relation to the total costs borne by the allegedly disadvantaged trading partner or partners.

109. If the price charged by the dominant undertaking represents a significant proportion of the total costs borne by the disfavoured customer, the price discrimination may have an impact not only on the profitability of the customer's business, but also on its competitive position."

4.33 While the legislation focuses on harm to the competitive process rather than the effect on individual competitors, we note that in markets with few actual (or potential) competitors, harm to an individual competitor can have a significant impact on the competitive process as well.[84]

[84] *Rural Press Ltd v ACCC (A197 of 2003)* [2003] HCA 75, (2003) 216 CLR 53 at [46] per Gummow, Hayne and Heydon JJ, with whom Gleeson CJ and Callinan J agreed.

4.34 The requirement that any difference in treatment does not harm, and is unlikely to harm, competition shows the importance attached to avoiding the harm that could result from discriminatory terms of access to the wholesale services:

4.34.1 if they are essential for access seekers to compete with a network operator or each other in downstream markets; and/or

4.34.2 if they could result in foreclosing competing upstream operators from the downstream market.

4.35 As set out above, objective justification alone will not justify a difference in treatment. If conduct or a relevant service offer could be expected materially to impede competition from access seekers – for example, if, realistically, only the network operator could access the terms of a service offer – it may be harmful to competition and incapable of justification, irrespective of whether there exists an objective justification for it.

4.36 We note, however, that not all differences in treatment should be presumed to lead to harm to competition.

The Commission's approach to enforcement

4.37 When deciding whether to bring enforcement action, we would apply the approach outlined in paragraph 4.22 above.

4.38 This assessment under the above approach might require the respective parties to provide evidence relevant to the particular issue. The network operator may be best placed to show that there is an objective justification for the difference in treatment in question – for example, by showing that the cost of supplying particular access seekers was greater. Similarly, the network operator and access seekers may be best placed to provide evidence about the likely effect of the difference in treatment in question on competition, and in particular, whether the difference in treatment does not, and is unlikely to, harm competition.

4.39 It follows that if we consider there is a *prima facie* case of discrimination, a network operator may need to demonstrate that there is an objective justification, and that the difference in treatment does not, and is unlikely to, harm competition. As we explain below, while we must assess whether enforcement action is appropriate, the question of whether or not there has been a breach of the non-discrimination obligation is a matter for the High Court.

Difference in treatment with regards to price

4.40 Below we discuss what constitutes a difference in treatment with regards to price.

Definition of difference in treatment with regards to price

4.41 Based on our analysis set out above, 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 (or the network operator's own downstream operations) are the same (ie, have the same quality characteristics).[85]

4.42 The non-discrimination obligation in the Act and the deeds does not require that services are priced on a particular basis (cost-based or otherwise). So too, there may be a difference in treatment even if prices are linked to differences in the underlying costs of the service for access seekers.

4.43 However, while underlying costs in themselves are not relevant in establishing a difference in treatment, underlying costs may be relevant to whether the difference in treatment is objectively justifiable and does not harm competition. If prices appear discriminatory, the network operator may need to show how the difference in price, or the difference in the effect the same price has on access seekers, is justifiable by differences in the underlying costs.

Price structure

4.44 The price structure of a service can in itself result in a difference in treatment. Examples of price structures that can result in difference in treatment include:

4.44.1 multi-part tariff structures, such as if the price for the product is a combination of a fixed upfront price and a variable-per-unit price;[86]

4.44.2 a menu/schedule of prices equally offered to all access seekers, such as volume discounts;[87] and

4.44.3 offering different prices to different categories of access seekers that share a common characteristic.[88]

4.45 As explained above, depending on the given market, a difference in treatment can be both efficient and not harmful to competition. As indicated in paragraphs 4.37 to 4.39 above, it may fall to a network operator to provide persuasive evidence

[85] The definition of what constitutes a unit of service will vary from market to market and will depend on the characteristics of the particular service and how it is sold. For example, a service may be supplied on a per-subscriber basis or on a physical component basis (eg, cable). Irrespective of the underlying cost structure of the product, the combination of services sold together to a customer constitutes a 'unit' if the customer cannot choose to purchase a smaller volume or a subset of services.

[86] In the economic literature, two- (or multi-) part tariff price structures are considered a form of price discrimination, common where the supplier cannot distinguish between different types of consumers.

[87] In economics, this type of price discrimination is referred to as 'second-degree' price discrimination.

[88] In economics, this type of price discrimination is referred to as 'third-degree' price discrimination.

that the practice is compatible with the non-discrimination obligation because there is both an objective justification for the difference in treatment with regards to price, and the difference in treatment does not, and is unlikely to, harm competition.

4.46 By way of example, in assessing whether a particular non-uniform price structure may be compatible with the non-discrimination obligation because it is both objectively justifiable and not likely to harm competition, we are likely to consider whether:

4.46.1 the price terms offered are functionally available to access seekers, in that access seekers can feasibly meet the conditions for a particular price or discount – for example, loyalty rebates are often discriminatory, because they are only available to access seekers that are willing to commit to purchasing a certain share of their overall demand from the network operator, thus placing access seekers that prefer to use multiple suppliers (or self-supply part of their requirements) at a competitive disadvantage;[89]

4.46.2 the pricing practice is designed to favour the network operator's own downstream or upstream operation – for example, large volume discounts not directly linked to fixed-cost savings realised from larger volume sales, so large that they are only available to the network operator's own downstream business, are likely to be discriminatory; and

4.46.3 the pricing practice is likely to be to the long-term benefit of telecommunications end-users in New Zealand[90] in that it balances in an appropriate way the limbs of the purposes of the undertakings regimes:

4.46.3.1 particularly, to promote competition in telecommunication markets; and

[89] Loyalty rebates can also help protect the upstream operations of the network operator by limiting the overall demand available to operators of alternative networks.

[90] Telecommunications Act 2001, ss 69W and 156AC.

4.46.3.2 to facilitate efficient investment in telecommunication infrastructure – for example, if the pricing practice is likely to lead to product innovation or market growth, it might be found to be compatible with the non-discrimination obligation. In this regard, we note that both network operators and access seekers can invest in innovation and market expansion, and at different functional levels.

Different treatment with regards to non-price terms

4.47 In relation to non-price discrimination, in many cases, if equivalence is required, non-discrimination will also be satisfied. However, there are several cases in which this will not be the case. We discuss the relationship between non-discrimination and equivalence in more detail in Chapter 5.

4.48 Even where the service in question is subject only to a non-discrimination obligation, and not equivalence, the non-price dimensions that would be relevant to an assessment of difference in treatment are the same as those listed at paragraphs 3.19 and 3.20 above in the section 'Scope of application' for equivalence of inputs.

The deeds

4.49 Several of the deeds deem certain differences in the supply of services to be objectively justifiable and to not harm, and be unlikely to harm, competition in any telecommunications market:

4.49.1 for the Copper Deed, this includes certain differences relating to the UFB initiative or RBI, grandfathered services, telecommunications service obligations (**TSO**) input services, UBA, POTS and baseband services;[91] and

4.49.2 for the Fibre Deeds, this includes certain differences relating to the UFB initiative, and for Chorus specifically, the RBI and grandfathered services.[92]

4.50 As part of the non-discrimination obligations under the Copper Deed and Fibre Deeds, Chorus and the other LFCs must provide access seekers with Commercial Information on a non-discriminatory basis.

[91] All defined and set out in more detail in clauses 1.1 and 5.3 of the Copper Deed.

[92] All defined and set out in more detail in clauses 1.1 and 5.4 of the Fibre Deeds.

4.51 Commercial Information is discussed in detail in Chapter 3. It includes information on service development, pricing, marketing strategy and intelligence, service launch dates, costs, projected sales volumes, and network coverage and capabilities.

Product or service differentiation

4.52 The non-discrimination obligation is not directly concerned with differentiation between services, provided network operators offer each differentiated service to all access seekers (and to their own downstream operations) on the same terms, including price.

4.53 Non-discrimination does not prevent network operators from providing differentiated services to access seekers, provided all services are offered to all access seekers and each service is offered to all access seekers on a non-discriminatory basis. If a network operator offers differentiated services (with different quality characteristics at different prices), this may not constitute discrimination, irrespective of whether the underlying costs of the different services are the same. This is because non-discrimination concerns discrimination between access seekers (including between the network operator and other access seekers), not differences between services.

Chapter 5 The interaction between equivalence and non-discrimination

Purpose and structure of this chapter

5.1 The purpose of the chapter is to discuss the relationship between equivalence and non-discrimination.

5.2 This chapter is structured as follows:

5.2.1 general overview of the relationship between equivalence and non-discrimination; and

5.2.2 services that are subject to equivalence and non-discrimination requirements.

General overview

5.3 The equivalence and non-discrimination obligations under the Act and the deeds are distinct and complementary requirements and may both apply to the same conduct from a network operator.

5.4 The non-discrimination obligation is a broader obligation applying to all services specified in the deeds. The equivalence obligation applies to a smaller set of services: only the L1 services described in the deeds.[93]

5.5 A network operator may supply or price services on an equivalent basis, but the nature or effect of the terms of supply may have a different effect on access seekers, which may be discriminatory. For example, a network operator could discriminate against access seekers compared to its own business by packaging a service in a way that is only efficient to purchase if an access seeker shares the network operator's unique characteristics.

5.6 A network operator might provide terms and conditions on an equivalent basis, but may discriminate if it favours a particular access seeker (or its own downstream operations) based on the size of the access seeker's customer base by offering volume discounts (that cannot be objectively justified by reference to the differences in underlying costs) or if it discriminates against access seekers competing with respect to upstream services.

[93] To avoid doubt, L1 services are expressed to include co-location services.

5.7 As both the Act and the deeds provide that a particular service may be subject to both equivalence and non-discrimination obligations, we must consider both obligations. As we note above, a network operator may supply a service in a way that meets the equivalence obligations but is still discriminatory.

Services that are subject to equivalence and non-discrimination requirements

5.8 The Act and the deeds specify the services that are subject to equivalence obligations and those that are subject to non-discrimination obligations. The equivalence obligation applies to specified L1 services that network operators self-supply. The non-discrimination obligation applies to all services supplied under the deeds (including L1 and L2 services).

5.9 In Chapter 4, we explained that, for services subject to both equivalence and non-discrimination obligations, if equivalence is satisfied, then non-discrimination is often satisfied in relation to general non-price supply terms.

5.10 However, there are cases in which services may comply with equivalence obligations but fail non-discrimination obligations. This may arise in situations in which a network operator competes with access seekers in downstream or upstream markets, giving rise to an incentive to give preference to its upstream and/or downstream business units to the detriment of access seekers.

5.11 Common examples of different treatment with regard to price include loyalty rebates and exclusive discounts, which apply dissimilar conditions to equivalent transactions and potentially foreclose the contestable customer base, placing trading parties at a competitive disadvantage.

Volume discounts

5.12 Volume discounts are an example of a service that might meet equivalence standards but could give rise to discrimination by creating a difference between access seekers. A volume discount means that an access seeker that purchases a large volume of services receives a lower per-unit access price than access seekers that purchase a smaller volume of services.

5.13 Volume rebates may not necessarily be problematic. For example, in Michelin II the European Court of Justice said:[94]

> Quantity rebate systems linked solely to the volume of purchases made from an undertaking occupying a dominant position are generally considered not to have the foreclosure effect prohibited by Article 82 EC …. If increasing the quantity supplied results in lower costs for the supplier, the latter is entitled to pass on that reduction to the customer in the form of a more favourable tariff.

5.14 However, if volume discounts treat access seekers differently, they would have to be objectively justified (for example, by demonstrating that they reflected a difference in the cost of supply) and not harm competition.

Loyalty rebates/discounts

5.15 Loyalty rebates/discounts are a form of pricing structure that offers lower prices in return for the access seekers' agreement to purchase all or a large (or increasing) portion of their overall demand from a given network operator. European case law recognises that such schemes may be abusive.[95] Loyalty rebates can come in many forms but their main differentiating feature from volume discounts is that the price relates to the percentage of the overall customer demand, eg, a requirement:

5.15.1 to purchase say 80% of all network connections from a given provider; or

5.15.2 to increase the share of connections purchased from a given provider by, say, 5% in a given year.

5.16 Similar to volume discounts, loyalty rebates can result in lower prices that can benefit end-users and, depending on the exact form of the loyalty rebate, they can also have an efficiency rationale. However, some forms of loyalty rebates can reduce price transparency and exclude or restrict competitors in the market in a way that leads to anti-competitive outcomes. If a difference in treatment is established, it will fall to the network operator to demonstrate that any loyalty rebates offered have an objective justification and are not likely to harm competition in either the upstream or the downstream market.

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94 *Michelin v European Commission* (T-203/01), at [58].

95 See for example *Tomra v European Commission* (C-549/10) at [70]-[71]; *Intel Corp Inc v European Commission* (C-413/14) at [137].

5.17 Loyalty rebates were relevant to the Telecom loyalty offer investigation, discussed in appendix B. Telecom offered discounted loyalty pricing on broadband/phone bundles to all access seekers that discriminated against access seekers who had invested in copper unbundling.

5.18 The investigation considered whether:

5.18.1 the loyalty discount was in substance only available to access seekers who had not invested in copper unbundling; and

5.18.2 whether the offer made copper unbundling less attractive to those access seekers, preventing them from competing effectively with Telecom at the L1 wholesale level.

Bundled services

5.19 Service bundling can also have a discriminatory effect on access seekers, even if a network operator makes the service offer to all access seekers on the same terms.

5.20 Bundling involves selling two or more services together in a predetermined ratio at a discount from the standalone price of the component services in the bundle. When the services in the bundle can only be purchased together, and not separately, the practice is referred to as 'tying'. Offering services in a bundle at a discount can be efficient and benefit customers both through lower prices and improved experience (eg, the convenience of purchasing products together).

5.21 However, service bundling may be discriminatory if it requires access seekers to buy services in ratios that are likely to benefit some access seekers over others or the network provider itself. Bundling and specifically, tying, may also have an anticompetitive effect if it results in customer foreclosure, excluding some competitors from the market or reducing the competitive constraint they exercise. The Telecom loyalty offer investigation, discussed in appendix B, is also relevant to service bundling.

Chapter 6 Compliance and enforcement

Purpose and structure of this chapter

6.1 The purpose of this chapter is to set out the provisions of the Act and the deeds that relate to compliance and enforcement. We generally monitor compliance with the deeds through:

6.1.1 ID;

6.1.2 considering complaints; and

6.1.3 conducting investigations.

6.2 This chapter is structured as follows:

6.2.1 ID under the Act and the deeds;

6.2.2 complaints under the Act and the deeds; and

6.2.3 enforcement provisions for the Commission and access seekers.

Information disclosure

6.3 ID requirements in the deeds and the Act enable the Commission and interested parties to measure the network operators' compliance with the deeds.

The undertakings regimes

ID under Part 2A

6.4 In relation to the Copper Deed, s 69XB requires Chorus to give undertakings that require Chorus, amongst other things, to:

6.4.1 conduct quarterly reviews of performance as measured against the key performance indicators; make information relating to those reviews available to the Commission to support our assessment of its compliance; internally audit the controls and processes and publish quarterly reports on its performance;

6.4.2 carry out quarterly customer surveys of its performance in relation to relevant services;

6.4.3 implement a policy to control commercial information and audit the effectiveness of that policy;

6.4.4 require the directors of Chorus to certify that Chorus has complied with the undertakings; and

6.4.5 provide for the disclosure of relevant information to the Commission to support our assessment of compliance with the Copper Deed.

ID under Part 4AA

6.5 Under s 156AD, an LFC's undertakings must, amongst other things:

6.5.1 provide for the LFC to maximise the use of standard terms for the supply of services through the use of template, or model, agreements;

6.5.2 provide for access seekers to have the same access to information from the LFC;

6.5.3 specify rules for the treatment of confidential information relating to access seekers; and

6.5.4 provide for the disclosure of relevant information to the Commission, to support the Commission's assessment of compliance with the Fibre Deeds.

6.6 Section 156AY provides that an undertaking that a service provider enters into must provide for the disclosure of relevant information to us, to support our assessment of compliance with the undertaking.

ID under subpart 3 of Part 4AA

6.7 Subpart 3 of Part 4AA contains additional ID requirements for the LFCs.

6.8 The purpose of subpart 3 in s 156AT is to:

> promote competition in telecommunications markets for the long-term benefit of end-users of telecommunications services in New Zealand by requiring LFCs who have given undertakings in relation to certain services to provide reliable and timely information to the Commission to enable it to record over time the costs and characteristics of LFC fibre networks to inform the Commission's statutory processes and determinations.

6.9 Section 156AU requires the LFCs to prepare and disclose information to the Commission, annually, about the costs and characteristics of relevant services and the LFC fibre networks used to provide, or comprised of, relevant services.

6.10 Under the same provision, the Commission may require: financial statements, asset valuations and reports, price terms and conditions, costs and cost allocation methodologies, contracts, related party transactions, financial and non-financial performance measures, plans and forecasts, transfer payments, network capacity information, characteristics of relevant services, policies and methodologies.

6.11 Chorus and the other LFCs respectively provide this information on an annual basis under the Chorus ID Determination and the LFC ID Determination.[96] Under clause 4.2 of both determinations, we can exempt Chorus or the other LFCs from any or all of the provisions of the ID Determination, for a period and on such terms and conditions as we specify. We can also revoke such an exemption.

6.12 Section 156AV provides the Commission with further powers in relation to ID, including requiring certain methodologies for financial statements, disclosure of methodologies used, and specifying information in financial statements.

6.13 When the LFCs become subject to ID regulation under Part 6 of the Act, they will not have to comply with any ID requirements under subpart 3 of Part 4AA.[97]

The deeds

6.14 The deeds implement and prescribe ID requirements in accordance with the requirements of the Act.

The Copper Deed and Fibre Deeds

6.15 The LFCs and Chorus must, at the end of each financial year, certify to the Commission annually, that to the best of their directors' knowledge, after making reasonable enquiry, they have complied with their respective deeds (apart from any breaches that they have either previously reported to the Commission or are reporting in the certificate).[98]

6.16 The LFCs and Chorus must self-report any material breaches of their respective deeds as soon as reasonably practical. The LFCs and Chorus must, within 10 working days of the end of each quarter, report any non-material breach of their respective deeds.[99]

[96] The Chorus and LFC ID determinations are available at: https://comcom.govt.nz/regulated-industries/telecommunications/regulated-services/fibre-regulation/ultrafast-broadband-information-disclosure.

[97] Telecommunications Act 2001, clause 10 of Schedule 1AA.

[98] Clause 10 of the Copper Deed and Fibre Deeds.

[99] Clause 9 of the Copper Deed and Fibre Deeds.

The RBI Deeds

6.17 Under the Vodafone RBI Deed, clause 7 requires Vodafone to publish public information that is sufficient for interested persons to assess its compliance with the deed. Further, Vodafone must provide the Commission with certain information that we reasonably require to assess its compliance with the deed.

6.18 Under the RCG RBI Deed, clause 6 requires RCG to provide the Commission with certain information that we reasonably require to assess its compliance with the deed. Further, RCG must publicly disclose and provide the Commission annual certification in respect of RCG's compliance with its deed.

Service terms and conditions

6.19 Under the fibre undertakings regime, network operators must publish or disclose service terms for certain, but not all, services:

6.19.1 Under the Fibre Deeds, clause 8.1 requires the LFCs to publish a reference offer (being standard form terms and conditions in the form of a wholesale services agreement) for any services the LFCs are required to provide. Under clause 6.2 of the Fibre Deeds, LFCs are required to provide the Input Services.

6.19.2 Under the RCG RBI Deed, clause 6.3 requires the RCG to publicly disclose (including on a website owned or controlled by the RCG) its Backhaul Standard Terms and the Co-location Standard Terms.

6.19.3 Under the Vodafone RBI Deed, Vodafone will make available to the Commission all of the terms and conditions on which Vodafone has agreed to provide services to access seekers.

6.20 Under the copper regulatory regime, we publish price and non-price terms by way of STDs that apply to the relevant regulated services under the copper undertakings regime.[100]

Commercial Information

6.21 The Copper Deed and the Fibre Deeds require the provision of Commercial Information to access seekers on a non-discriminatory basis.[101] Under the Fibre Deeds, the LFCs must make Commercial Information[102] on the Input Services available from 1 January 2020.

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100 Telecommunications Act 2001, Subpart 2A.

101 Clause 5 of the Fibre Deeds and Copper Deed.

102 Commercial Information is discussed in detail in Chapter 3.

Complaints

6.22 This section discusses provisions relating to complaints under the deeds.[103]

The Act

6.23 Both the Act and the deeds contain provisions relating to complaints under the deeds.

6.24 Section 156O(1)(b) provides that a party to an undertaking under Parts 2A or 4AA may make a written complaint to the Commission alleging a breach of an enforceable matter.

6.25 Section 156N provides that undertakings under Part 2A and Part 4AA are 'enforceable matters'.

6.26 Section 156N also defines a 'party' to mean a party to an enforceable matter and includes, in the case of an undertaking under Part 2A or 4AA, any provider of a telecommunications service that is affected by a breach of the undertaking. Therefore, a party would include an access seeker.

6.27 Under s 156O(2), as soon as reasonably practicable after receiving a complaint, we must decide whether to take no action on the complaint or to take, or join another party in taking, enforcement action in the High Court.

6.28 Under s 156O(4), in deciding whether to take, or join another party in taking, enforcement action, we must consider the purposes of the undertakings regime to which the complaint relates, and we may consider the financial means of the complainant.

6.29 We may consider other relevant factors when making our decision on a complaint, provided they are consistent with the statutory purposes.

6.30 Under s 156O(6), we must promptly give written notice to the complainant of our decision on the complaint.

[103] We plan on developing guidelines for handling complaints under s 156O of the Telecommunications Act.

The deeds

6.31 Under the Copper Deed and the Fibre Deeds, clause 9.2 provides that, if we receive a complaint under the relevant deed, we may request in writing (which will include details of the alleged breach), which will be supplied to us in a reasonable period of time, such information as is relevant to support our compliance assessment.[104] We may request this information without revealing the identity of the complainant. When we request such information, we may require any information or report be provided by a time, or in a form and matter we reasonably require.

Enforcement

6.32 The general enforcement provisions for the undertakings regimes are found in Part 4A. We set out below our enforcement powers, followed by an access seeker's enforcement powers.

The Commission

6.33 Under s 156AR(1), on an application of the Commission to the High Court, if it appears to the Court that an LFC intends to engage, or is engaging, or has engaged, in conduct that constitutes, or would constitute, a breach of a deed, the Court may make any orders on any terms and conditions that it thinks appropriate, including an order to restrain conduct in breach of the deed, to require the LFC to do a particular thing, or to require the LFC to comply with the deed.

6.34 Under s 156P, we may enforce an enforceable matter by filing it in the High Court either on our own initiative or following a complaint of a breach received under s 156O.

Access seekers

6.35 Under s 156P(1), an access seeker may enforce a deed by filing the enforceable matter in the High Court, irrespective of any complaint under s 156O.

6.36 The s 156O complaints procedure is not a prerequisite to either the Commission or a party taking enforcement action.[105]

[104] There is an identical provision in clause 8.2 of Chorus RBI Deed.

[105] As set out above, the Act treats a person as a 'party' to a deed if it has been affected by the breach of the deed, which allows that party to bring proceedings in the High Court to enforce the deed.

Appendix A History of equivalence and non-discrimination obligations in New Zealand telecommunications

A1 This appendix discusses the development of equivalence and non-discrimination obligations in New Zealand under the Act.

The Telecommunications Act 2001

A2 Non-discrimination obligations have existed in the Act since it was first introduced in 2001 in the form of standard access principles for designated access services and specified services.[106]

A3 The standard access principles require designated access services and specified services to be provided on terms and conditions (excluding price) that are consistent with those terms and conditions on which the access provider supplies the service to itself.

A4 These principles remain in effect under the Act today.[107]

Telecommunications 2006 Amendment Act (No 2) 2006

A5 The Telecommunications Amendment Act (No 2) 2006 (**2006 Amendment Act**) introduced into the Act new equivalence and non-discrimination obligations to support Telecom's operational separation.

A6 New Part 2A purposes included a requirement for transparency, non-discrimination, and equivalence of supply in relation to certain telecommunications services.[108]

A7 Section 69D(1)(b) required Telecom to operate wholesale and retail business units on a stand-alone basis, at arm's length from any other business units.

106 Telecommunications Act 2001, Schedule 1, clause 5.

107 Originally there were only three principles. A fourth was added by s 56 of the Telecommunications Amendment Act (No 2) 2006.

108 Section 69A inserted by s 32 of the Telecommunications Amendment Act (No 2) 2006.

A8 New equivalence obligations also required Telecom to ensure transparency and equivalence in relation to the supply of relevant services.[109] Section 69E defined equivalence as follows:

> 69E **Meaning of equivalence**
>
> Section 69D(1)(f) requires equivalence of supply of wholesale telecommunications services and access to Telecom's network so that third party access seekers are treated in the same or an equivalent way to Telecom's own business operations, including in relation to pricing, procedures, operational support, supply of information, and other relevant matters.

A9 In 2007, the Minister made the Telecommunications (Operational Separation) Determination under s 69F of the Act (as amended by the 2006 Amendment Act) (**Minister's Determination**).[110]

A10 The Telecom Separation Plan[111] and the Telecom Separation Undertakings,[112] which we refer to as the Separation Deed, were provided to the Minister in March 2008 under s 69K(2)(c) of the Act (as amended by the 2006 Amendment Act) and implemented the requirements of the Act's equivalence obligation.

A11 The legislative process that considered the implementation of equivalence involved consultation on different equivalence models. The consultation particularly considered Ofcom's application of equivalence obligations in the UK including both 'equivalence of output' (**EOO**) and 'equivalence of inputs' (**EOI**).

A12 Parliament's decided that the EOO model was a lower standard than EOI, as it allowed supply on different systems and processes. EOI had a several advantages over EOO:

a. EOI provides stronger incentives to deliver efficient processes and systems;

b. under EOI, monitoring compliance is easier, and requires less intervention from the regulator; and

c. EOI provides increased transparency of process and information.

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109 Section 69D inserted by s 32 of the Telecommunications Amendment Act (No 2) 2006.

110 http://www.legislation.govt.nz/regulation/public/2007/0302/latest/DLM973571.html.

111 https://www.beehive.govt.nz/sites/default/files/Telecom%20Separation%20Plan_0.pdf.

112 https://www.beehive.govt.nz/sites/default/files/Telecom%20Separation%20Undertakings_0.pdf.

A13 It was proposed that the Minister's Determination would not adopt the EOO model, but rather it would adopt the EOI model, considering it would be more effective in delivering equivalence and would also simplify monitoring and compliance.[113]

A14 The Minister's Determination and the Separation Deed reflected the decision to implement EOI.[114]

A15 The Separation Deed required certain Telecom business units not to discriminate between service providers and other Telecom business units or between service providers.[115] It also required Telecom's Access Network Services Unit to provide certain services on an EOI basis.[116]

The Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2011

A16 The Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2011 (**2011 Amendment Act**) adapted the equivalence and non-discrimination obligations for Telecom's structural separation into Chorus and Spark.

A17 Specifically, the 2011 Amendment Act created two distinct undertakings regimes for copper and fibre services. The 2011 Amendment Act:

A17.1 substituted the provisions in Part 2A: Structural separation of Telecom;[117] and

A17.2 introduced a new Part 4AA: Services provided using network developed with Crown funding: Undertakings regime and Commerce Act 1986 authorisations.[118]

113 MED 'Development of requirements for the operational separation of Telecom' (April 2007), paragraph 146.

114 David Cunliffe 'Telecom Operational Separation' (31 March 2008) explained that Part 2A was developed in consultation with BT, Ofcom, UK DTI and the European Commission. Ofcom accepted undertakings from BT in lieu of making a reference under the Enterprise Act 2002.

115 Clauses 31 and 56 of the Separation Deed.

116 Clause 21 of the Separation Deed.

117 Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2011, s 51.

118 Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2011, s 81.

A18 The 2011 Amendment Act removed the previous Part 2A provisions, including the Separation Deed, and substituted a new Part 2A, which together with Part 4AA, set out defined terms for equivalence and non-discrimination as follows:[119]

> **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
>
> **equivalence,** in relation to the supply of a relevant service, means equivalence of supply of the service and access to the service provider's network so that third-party access seekers are treated in the same way to the service provider's own business operations, including in relation to pricing, procedures, operational support, and supply of information and other relevant matters

A19 These Parts of the Act provide for the Copper Deed,[120] the Fibre Deeds[121] and the RBI Deeds.[122]

A20 The 2011 Amendment Act incorporated the concept of equivalence into the undertakings regime in the Act, largely without change.

A21 The 2011 Amendment Act further developed the non-discrimination obligations in the Act's undertakings regime, similarly based on the operational separation of BT and EU law. Ofcom had imposed an obligation on providers with significant market power (**SMP**) not to 'unduly discriminate', and adopted a two-stage test to assess whether a difference in treatment was unlawful:[123]

a. can the difference in treatment between the customers be objectively justified because of relevant differences in the customer's circumstances;

b. if not, does the difference in treatment have the potential to affect competition?

A22 While in the UK, a difference in treatment would not be unlawful if <u>either</u> it could be objectively justified, or it would have no effect on competition, the non-discrimination obligation in the New Zealand undertakings regime requires <u>both</u> objective justification and no harm to competition for the conduct to be lawful.

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119 Telecommunications Act 2001, ss 69XA and 156AB.

120 Telecommunications Act 2001, s 69XB.

121 Telecommunications Act 2001, s 156AD.

122 Telecommunications Act 2001, s 156AY.

123 Ofcom 'Undue discrimination by SMP providers' (15 November 2005), paragraphs 5.10 to 5.15.

A23 Section 25 of the 2011 Amendment Act also introduced s 157AA into the Act, requiring the Minister to, no later than 30 September 2016, commence a review of the policy framework for regulating telecommunications services in New Zealand, taking account of the market structure and technology developments and competitive conditions in the telecommunications industry at the time of the review, including the impact of fibre, copper, wireless, and other telecommunications network investment (**regulatory framework review**).

Telecommunications (New Regulatory Framework) Amendment Act 2018

A24 In providing for the regulatory framework review, Parliament decided to retain the fibre undertakings regime, particularly the obligations to unbundle point-to-multipoint parts of the network from 1 January 2020, in the Act.[124, 125]

A25 Following the regulatory framework review, Parliament passed the Telecommunications (New Regulatory Framework) Amendment Act 2018 (**2018 Amendment Act**), introducing a new utility-style regulatory framework for fibre services in Part 6. The 2018 Amendment Act also introduced new provisions for the deregulation of copper networks under Part 2AA.

A26 The 2018 Amendment Act did not significantly change the provisions of the undertakings regimes but did introduce new provisions for the Minister to amend or consolidate the deeds under s 156ANA.[126]

A27 The provisions of Part 6 of the Act that directly relate to the fibre undertakings regime include the following:

a. section 201 requires geographically consistent pricing;

b. sections 227-229 allow for regulations setting price and non-price terms for an anchor service, DFAS and an unbundled fibre service; and

c. sections 206 and 230 enable modifications to be made to certain deeds.

Forbearance period

A28 Following the regulatory framework review, Parliament also decided to retain the forbearance period prescribed in Part 4AA under which LFCs must design and build their fibre network in a way that enables equivalence in supplying unbundled L1 services, but not supply unbundled L1 services until 1 January 2020 for UFB1 and 1 January 2026 for UFB2.[127]

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124 https://www.mbie.govt.nz/dmsdocument/1113-review-telecommunications-act-2001-cabinet-minute-pdf

125 https://www.mbie.govt.nz/dmsdocument/1118-review-telecommunications-act-2001-final-policy-decision-cabinet-paper-pdf, paragraph 56.

126 Telecommunications (New Regulatory Framework) Amendment Act 2018, s 22.

127 Telecommunications Act 2001, s 156AD(2)(c).

A29 Parliament's intention under the 2011 Amendment Act was that the forbearance period would provide sufficient certainty to LFCs so that prices under the UFB initiative could be achieved at low levels to compete with copper, and the fibre networks could be rolled out within the desired timeframes.[128]

A30 Accordingly, s 156AP prevented the Commission from reviewing and recommending the unbundling of any point-to-multipoint L1 service provided by an LFC that is subject to a binding undertaking, before the close of 31 December 2019.

[128] https://www.parliament.nz/resource/en-NZ/49SCFE_ADV_00DBHOH_BILL10470_1_A180435/4a786161ea4c6a48f5c81c1124a2d2d46fb32b9d.

Appendix B Previous investigations and guidance

B1 In this appendix we discuss:

B1.1 previous investigations and proceedings we have brought under the deeds; and

B1.2 relevant guidance that we have published.

Investigations

B2 This section sets out previous investigations the Commission has made in relation to equivalence and non-discrimination under the Separation Deed and the Act.

Telecom loyalty offer investigation

B3 In 2009, we opened an investigation into an alleged breach of the Separation Deed. Telecom had offered discounted loyalty pricing on L2 copper services to access seekers who promised to serve 100% (or 90%) of their customers through Telecom for the next two years.

B4 Although the offer was the same to all access seekers, unbundlers were unable to take advantage of the discounted price offered. The discount was material enough that it was difficult for unbundlers to compete with access seekers who had not unbundled and were therefore eligible for the discount.

B5 The Separation Deed did not contain a definition of non-discrimination, simply a requirement that the wholesale unit of Telecom would not discriminate between service providers and retail units.

B6 In October 2009, as part of our investigation, we consulted on the meaning of 'equivalence of inputs' and 'non-discrimination' in the Separation Deed.[129]

B7 In November 2009, we announced that we were issuing proceedings against Telecom in relation to Telecom's loyalty offers,[130] and in July 2010 we announced we had reached a $1.6 million settlement with Telecom.[131]

[129] https://comcom.govt.nz/__data/assets/pdf_file/0028/65089/Commerce-Commissions-Consultation-Telecom-Wholesale-Loyalty-Offers-16-October-2009.pdf.

[130] https://comcom.govt.nz/news-and-media/media-releases/archive/commerce-commission-to-issue-proceedings-against-telecom-over-loyalty-offers.

[131] https://comcom.govt.nz/news-and-media/media-releases/archive/telecom-settles-over-wholesale-loyalty-offer-$1.6-million-to-be-paid-in-compensation.

Telecom UBA investigation

B8 In October 2010, we launched another investigation into Telecom's compliance with its non-discrimination obligations under the Separation Deed.[132]

B9 Following this investigation, in May 2011, we decided to issue proceedings alleging that Telecom had discriminated against other telecommunications companies in breach of the Separation Deed by failing to provide them with UBA in conjunction with the sub-loop extension service when Telecom was providing an equivalent service to its own retail business unit.[133]

B10 In October 2011, we reached a $31.6 million settlement with Telecom over its alleged discrimination under the Separation Deed.[134]

Previous Commission guidance

B11 Our previous guidance related to the Separation Deed.[135] In 2011, Part 2A of the Act was replaced and following the structural separation of Telecom, the Separation Deed is no longer relevant.

B12 Our previous guidance provides useful historical background. However, since that guidance was published the structure of the undertakings regimes under the Act has changed in relation to non-discrimination and equivalence.

Complaints handling guidance – 2008

B13 The Commission first published complaints handling guidelines in 2008, under Part 4A of the Act. These guidelines were specific to complaints management under the Separation Deed.[136]

Non-discrimination guidance – 2009

B14 In December 2009, the Commission published draft guidance on Telecom's non-discrimination obligations under the Separation Deed.[137]

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132 https://comcom.govt.nz/__data/assets/pdf_file/0024/92913/Notice-of-investigation-into-UBA-with-SLES-to-Telecom-15-October-2010.pdf.

133 https://comcom.govt.nz/news-and-media/media-releases/archive/commerce-commission-to-issue-proceedings-against-telecom-for-discriminating-against-other-telco-companies.

134 https://comcom.govt.nz/news-and-media/media-releases/archive/telecom-pays-$31.6-million-in-compensation-in-settlement-of-sub-loop-extension-discrimination-claim.

135 The Separation Deed did not include a definition of non-discrimination.

136 Commerce Commission "Complaints (Operational Separation) handling under Part 4A of the Telecommunications Act 2001" (July 2008).

137 https://comcom.govt.nz/news-and-media/media-releases/archive/draft-guidance-on-telecoms-non-discrimination-obligations-released-for-consultation.

B15 The guidance set out our proposed approach to assessing whether differences in the terms and conditions on which a relevant service is provided (including price and non-price terms) would be likely to merit further investigation. We received several submissions on the draft guidance in early 2010.

Non-discrimination guidance – 2011

B16 As part of our Telecom UBA investigation, we provided interested parties with an overview of Telecom's non-discrimination obligations under its Separation Deed.[138]

B17 We published this guidance in March 2011 as it provided a useful overview regarding our approach to assessing whether discrimination is likely to have occurred in relation to the Separation Deed.

[138] Commerce Commission "Overview of Telecom Non-Discrimination Obligations" (24 March 2011).