

OPINION

of the Polish Chamber of Information Technology and Telecommunications [PIIT] in relation to BEREC consultations regarding “Draft BEREC Guidance on functional separation under Articles 13a and 13b of the revised Access Directive and national experiences”

PIIT recognizes with satisfaction BEREC activities related to the preparation of guidance on introduction of another regulatory tool, i.e. functional separation. To date, this measure has been used by a number of countries as a voluntary undertaking adopted by an SMP enterprise and in line with arrangements agreed with a regulatory authority, as this obligation was not set out in the catalogue of regulatory tools under package of 2002 directives. The latest amendment of the Access Directive has added this measure to the catalogue of regulatory tools which might be used by the regulator. This tool, however, has been introduced as a ‘non-standard’ tool requiring previous acceptance. Therefore, it is extremely important to develop uniform and transparent standards for use by regulatory authorities which are intended for introduction thereof.

PTT, acting as a representative of telecommunications entrepreneurs, has been especially in favor of effective market mechanisms, and consequently, of reducing administrative intervention to the necessary minimum. Therefore, on the one hand, it is concerned by the introduction of an additional regulatory tool as it finds it a potential source of increased regulatory intervention into business activity of its members, but on the other, it has positive opinion about activities of the European Commission with regard to streamlining and harmonization of regulators’ activity in EU states.

As emphasized in the business literature as well as in the document subject to consultation, regulatory tool in the form of functional separation shall lead to division of the established organizational and business structure of the operator and, consequently, to irreversible transformations. Implementation of this obligation brings about huge costs related to the need to invest in infrastructure management systems and company reorganization and it may lead to increase in employment cost. There are many opinions pointing to potential restriction in infrastructure investments and lack of any added value for end users of the services.

Also, no experience in introduction of this mechanism by means of administrative decision, that is as a solution imposed on an enterprise against its will has been recorded. All instances of functional separation executed to date have been made on the basis of voluntary arrangements. In consideration of the above, in PIIT's opinion, in spite of legitimization of the obligation in question as a legal solution under the Access Directive, it should not be used in practice. This obligation should, as a last resort, be restricted to voluntary undertakings set out in Article 13(b) made between an SMP enterprise and the regulator.

PIIT is also concerned by all interpretations of new regulations which may lead to extension of powers of regulatory authorities and the degree of their impact on business activity. This in particular concerns interpretation of Article 13(a) provided in section 2.1.5 item a) (p. 18) *“Taking into account that this provision refers to an independently operating “business entity”, the imposition of the separation into a legally separate undertaking sited within the same group is possible.”* This statement allows for structural separation consisting in the introduction of the obligation to establish a separate enterprise acting within the same capital group, as a variant of the separation. It appears that this interpretation is incompliant with assumed amendments in the Access Directive intended to introduce functional separation only.

The document subject to consultations failed to explain reasons for and particular market situations in which such form of separation should be used. Therefore, in the event such approach is maintained, further analyses would be necessary to inspect which particular circumstances and forms of separation would be applied. Lack of such guidance may lead to situations in which regulatory authorities, when making a decision about implementation of the obligation in question, would adopt extreme solutions which would not necessarily be justified by the market situation. An interesting thing, and at the same time quite a difficult task, would be to prove why it is necessary to introduce structural separation on a given market and thus why functional separation would be insufficient.

What should be stressed, is that functional separation is not an obligatory but only optional and extraordinary measure which requires a number of conditions to be met. According to the newly implemented regulations, functional separation may be applied only in case of proving that other available (standard) remedies cannot ensure observation of the non-discrimination principle by the incumbent carrier. It has been expressly declared that this process should be based on an in-depth analysis of efficiency of remedies in force in a given country, and its implementation should be proportionate with the goals the regulator wishes to achieve.

Considering exceptional character and irreversibility of the tool, special attention should be paid to the application of the so called standard obligations governed by Articles 9 to 13 of the Access Directive. PIIT agrees with BEREC's position that prior to imposition of functional separation, the regulatory authority should prove correctness of implementation of less invasive, more standard tools, as well as regulatory body's determination to implement it in a proper manner. For the regulators have access to legal instruments with the use of which they may supervise and modify effective implementation of imposed obligations, in order to achieve the demanded market effects.

In this context, attention should also be paid to the proper period of functioning of accurately implemented obligations on the market. It is important to allow users use the new solutions after making of significant adjustments by the regulatory authority, which taking practical side into consideration, is not a short-term process. Upon each implementation, a transitory period of at least 2-3 years should be provided and only after the lapse thereof, their market impact could be assessed.

What should also be pointed, is the lack of information whether and what role in the process of imposing functional separation (item 2.1.3 – 2.1.5) should be played by an SMP entrepreneur. Due to the fact that this process will for the most part refer to an SMP entrepreneur, we believe that his right to present his position should be expressly indicated. NRA, when submitting documentation mentioned in the document for EC's opinion, EC itself as well as BEREC and Cocom should, on an obligatory basis, request SMP's opinion/position, in order to be able to estimate conditions, costs and effects of possible separation in an objective manner.

In the analyzed document, no attention was paid to a situation in which certain forms of functional separation or selected components thereof are voluntarily introduced by an entrepreneur. No analysis of methods practiced by the regulator in such situation has been provided, in particular whether in spite of voluntary undertakings, the regulator is allowed to impose another form of separation or other solutions than those suggested by the entrepreneur.

It should be stated, that 'voluntary undertakings' adopted by entrepreneurs with regard to functional separation result from specific regulatory circumstances and they are usually carried out in strict agreement with the regulator. We should, of course, agree with BEREC's position that an SMP carrier should be able to modify its plans in light of results of national consultations and NRA suggestions, especially of those leading to adoption of obligations going beyond those originally suggested. The carrier should be able to amend or withdraw its suggestions for various reasons and at any stage of this process.

However, in a situation when a given entrepreneur shall undertake to implement solutions with regard to which the regulator shall not make any reservations and he shall commence with the implementation process, including he shall spend funds related therewith, then despite the so called 'voluntary nature' thereof, this entrepreneur should be provided with certain regulatory stability. This means that until completion of the process of implementing the adopted solutions, the regulator should not introduce any solutions modifying prior arrangements, except for a situation when the entrepreneur agrees to their implementation.

Such approach is justified by the fact that by adopting the so called 'voluntary solutions', the entrepreneur incurs certain, very often significant costs related to modification of IT systems, process changes and other organizational costs. Therefore, imposition of other requirements on the entrepreneur may lead to multiplication of costs connected with imposing functional separation without any substance-related justification. In view of the lack of regulatory experience in implementation of the regulatory tool in question and complexity of impact analyses related to imposition of functional separation set out in section 2.1.4 of the document subject to consultation, reasons for which, regardless of costs incurred by the carrier during implementation of one form of separation, the entrepreneur would implement another form thereof, would be very hard to prove.

Considering the Polish case, where the carrier with significant market power on a number of wholesale markets, i.e. Telekomunikacja Polska S.A. under Memorandum of Understanding concluded with UKE on October 22, 2009 committed to comply with additional requirements with respect to non-discrimination including some elements comprising functional separation components, such as e.g. Chinese Walls – cooperation of this enterprise with the regulatory authority should be assessed positively.

Pursuant to the abovementioned Memorandum, TP committed to introduce Equal Access in the form of Equivalence Outputs, and to this date, in accordance with the schedule set out in the Memorandum, TP successfully completed a number of tasks which significantly affected its organization and the market. The Memorandum was concluded for the period of three years and comprehensive impact assessment may be conducted after implementation of all obligations.

Since conclusion of the Memorandum, i.e. from October 22, 2009 on, PIIT, through its members, currently in the number of 150, has carefully examined and analyzed progress of works by analyzing documents uploaded on UKE's website, participation in meetings with chamber representatives and analyzing reports submitted by its members.

Information about performance of the Memorandum has been made public and its provisions impose an obligation on TP to provide extensive progress reports. The reports are prepared and published in order to enable control of progress in implementation of obligations TP agreed to adopt by signing the Memorandum as well as effects of implemented solutions.

To date, TP has prepared, submitted to UKE and made public twelve progress reports. Majority of tasks have been performed according to the schedule and no significant threats to successful performance of the Memorandum have been reported.

Although implementation is pending, positive effects of the Memorandum in question may already be pointed out:

1. TP committed to secure the flow of unauthorized information emerged as a result of implementation of the so called **Chinese Walls**. Obligations related to restricting the flow of unauthorized information have been fulfilled at a satisfactory level, which enables meeting of requirements set forth in the Memorandum.

2. In order to provide for effective monitoring of Chinese Walls operation, TP launched communication channels ensuring that each stakeholder, i.e. TP Capital Group employees, AO employees, or any other individuals may report suspected violations of the non-discrimination principle. Channels used by TP for external communication with respect to potential discriminatory activities enable continuous enhancement of security mechanisms used by TP.
3. In accordance with provisions of the Memorandum, TP has prepared and enforced an internal regulation - **Code of Good Practices (CGP)**. Code of Good Practices:
 - defines and introduces the obligation to follow the non-discrimination principle by all TP employees (FTEs and entities fulfilling tasks for TP pursuant to other agreements – TP partners),
 - contains the list and definitions of principles for protecting and transmission of unauthorized data and procedure to be followed by employees in case of gaining access to such data,
 - determines sanctions and penalties for violation of the non-discrimination principle.Principles introduced by CGP, including sanctions provided therein, comprise a relevant tool ensuring observance of principles protecting against discriminatory activities by the employees.
4. Contracts concluded by TP with regard to wholesale services covered by reference offers, are signed in accordance with contract templates attached to specific reference offers. Final provisions of the contracts fail to contain clauses used prior to TP-UKE Memorandum's entry into force.
5. Inter-Carrier Cooperation Model offers favorable solutions for market operation and regulated wholesale services. Implementation of principles described therein by TP and all AO, will enhance operation of the market in case of subscriber switching between all operators, including TP. ICCM provides for transparency of principles and processes binding on the market and ensures identical switching regardless whether it is carried out between two AOs or between TP and AO. Extra advantage of ICCM implementation will be application of the same deadlines for all process participants.
6. Development and implementation of TTM process which enables reporting by all stakeholders their demand with regard to new wholesale services and ideas related to enhancement of the existing ones, means meeting expectations of market representatives. Implemented solutions ensure access to information by all stakeholders and they enable following the demand emerging on the market, and consequently, they give hope for further extension of the wholesale offer enabling creation of advanced communications services for end users.

In consideration of the above, it should be concluded that voluntary obligations adopted by telecommunications enterprises in agreement with regulatory authorities and other market players comprise an effective tool for improving operation of the telecommunications market. According to PIIT, regulatory tool in the form of functional separation should only be used on a voluntary basis.