Body of European Regulators for Electronic Communications

BEREC

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BEREC Consultation Report on the BEREC Guidance on functional separation under Articles 13a and 13b of the revised Access Directive and national experiences

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This document contains BEREC's report on the outcome of the public consultation on the "Draft BEREC Guidance on functional separation under Articles 13a and 13b of the revised Access Directive and national experiences" (BoR (10) 44). Interested parties were invited to comment on the Draft. The consultation was open from 11 October 2010 to 19 November 2010.

The Consultation Report summarises by topic the main comments received and outlines how the BEREC has taken account of those remarks in the final document. The Report is structured in the same order and under the same headings as the Draft Guidance.

Responses were received from the following 9 stakeholders:

1) Association Française des Opérateurs de Réseaux et de Services de Télécommunication (AFORST)

2) European Competitive Telecommunication Association (ECTA)

3) European Telecommunications Network Operators' Association (ETNO)

4) Fastweb S.p.A.

5) Polish Chamber of Information Technology and Telecommunications (PIIT)

6) Portugal Telecom S.A. (PT)

7) Telecom Italia S.p.A.

8) Telefónica S.A.

9) Wind Telecomunicazioni S.p.A.

BEREC welcomes this feedback and thanks the respondents for their efforts and submissions. The full text of these documents is available on the BEREC website.

The guidance document including the annex, has been modified in order to take stakeholders' comments into account and to provide some clarifications.

General remarks

Stakeholders' comments

Stakeholders welcomed the opportunity to comment on the proposed BEREC guidance. Views were expressed by some stakeholders (Telefónica, PT, PIIT, ETNO) disputing the merit of Functional Separation (FS) as a remedy and suggesting negative outcomes were it to be imposed. Given the special nature of FS and the negative consequences of its imposition, PT thinks that it should be addressed with extreme caution and thus the document must not overlook the singular characteristics of this measure. Some stakeholders noted that most of BEREC guidance concerns the reasons that may justify the imposition of FS and does not address the conditions that should lead to the inverse conclusion. As a result, it was suggested (PT and ETNO) that guidance should be given on scenarios where FS would be inappropriate and also that the document should give a better view of technological and service neutrality.

BEREC responses

BEREC does not share the views expressed on the demerits of FS and in particular on the inevitability of the outcomes. BEREC reiterates that FS will only be contemplated as a remedy when "standard" remedies are considered insufficient to address the market failure. The document sets out guidance in section 2.1.4 on both the assessment of the need to impose FS and the impact assessment. BEREC remarks that the aim of the document is to provide a non-binding guidance capable of being applied to national circumstances, that can be used by NRAs should they consider the appropriateness and implementation of FS. Therefore, it is not intended to be binding on NRAs in terms of either assessing the case for FS or in designing the various

components needed to give effect to this measure. For the same reasons, the guidance given in that section also makes it unnecessary for BEREC to suggest scenarios where FS would be inappropriate. Moreover, the principle of technological and service neutrality and the consideration of alternative infrastructure platforms are well established in the market review process and will be taken into account when the case for applying FS is evaluated by an NRA, will be subject to public consultation and will be reviewed by the Commission.

Meaning of functional separation (par. 2.1.1)

Stakeholders' comments

1. ECTA, Wind and Fastweb agree with the statement in the Draft that the purpose of FS is to achieve equivalence of access (EoA). However, they note that the Draft introduces both the "equivalence of input" (EoI) and "equivalence of output" (EoO) models as possible implementations of Art. 13a. In their view, the definition of EoA in the Access Directive refers to the model of EoI only and it would be appropriate to set this out explicitly in the final document. To support their opinion, they compare the voluntary separation in the UK, based on EoI, with the separation in Italy, based on EoO, and set out their views of weaknesses relating to the EoO model as implemented in Italy.
2. Fastweb remarks that Art. 13a requires a relevant change in the organisational structure through the set up of a separate business entity. In Fastweb's view, different and lighter forms of separations which do not guarantee the independence of the business unit and/or do not require EoI should therefore not qualify as FS and be rather considered as implementation of standard non discrimination remedies. In such cases, the NRA should not be required to carry out the burdensome procedure of Art. 13a. If not amended, Fastweb is of the view that the guidance document could end up reducing the capability of NRAs to apply standard non discrimination remedies effectively. On the contrary, PT argues that conditions set by Art. 13a apply to any type of separation and strongly believes that the principle of Equivalence of Access may only be pursued with respect to the requirements set out in the regulatory Framework. PT then suggests clarifying that the steps in Art. 13a should always be complied with, regardless of the type of separation to impose.
3. According to Wind, FS should have at least all the characteristics of Martin Cave's Level 3 separation; lower levels do not qualify as FS. Wind and Fastweb ask that BEREC map the FS models implemented in Italy and UK against Cave's taxonomy as "top of level 1/bottom of level 2" for the former and level 4 for the latter. In addition, Fastweb suggests clarifying that Openreach in the UK is the only true experience of FS in the EU, in line with the wording of the directive and with Cave's taxonomy.
4. ECTA and Wind would like the document to add further analysis on how effective the six degrees are to combat discriminatory behaviours. They both propose including a specific qualitative bar chart which colour grades the amount of residual discriminatory behaviour for each degree of separation.
5. TI stresses that current FS experiences in Member States are based on different functional/operational models and it is difficult to set a clear boundary between level 3 and 4 of Martin Cave's taxonomy. In this regard, TI suggests that BEREC establish its own taxonomy and propose a classification which merges levels 3 and 4 into a single option named "Functional separation".

BEREC responses

1. BEREC notes stakeholders' comments about the need to be more explicit as to which specific implementation model (i.e. EoI vs EoO) the directive relates to. However BEREC would like to clarify that the definitions of EoI and EoO provided in the document are not intended as "*possible implementations of Article 13a*", but rather possible implementations of EoA. In addition, these should be read as examples of existing implementations of voluntary FS, namely the UK and Italian cases. The definitions provided are therefore not theoretical, as they draw from current practices, and consequently cannot be considered as exhaustive.

More importantly, BEREC believes that the principles underpinning the EoA model to be chosen by the NRA when imposing FS under Art. 13a are clarified in Art. 13a(1): all the relevant access products supplied by the functionally separated division must be provided to both the incumbent's and the other operators' divisions on the same terms and conditions, within the same timescales, at the same price and quality and by means of the same systems and processes. BEREC understands, however, that the current Draft does not reflect the above very clearly and has amended the text accordingly.

2. BEREC believes that the analysis and submissions described in Article 13a(2) and 13a(3) are due only when the NRA intends to mandate full FS, i.e. when the SMP operator is required to go through a major organisational restructuring, create a separate business entity and implement full Equivalence of Access. To this backdrop, it is worth recalling that Art. 10 of the Access Directive provides: "*Obligations of non-discrimination shall ensure, in particular, that the operator applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of it subsidiaries or partners*". BEREC has therefore added some text in the final document (see section *Exceptionality of the measure*) to clarify that forms of equivalence falling within the scope of what is permitted under Art. 10 do not require additional procedures as set out in Art. 13a.[1]

3. As set out in the introduction, the Italian and UK cases are not example of mandatory separations. For this reason, BEREC does not intend to compare or evaluate other countries' experiences. Reference to existing forms of separations in Member States are included to offer examples of how separation has been implemented in practice. However, BEREC does recognise that it would be helpful to identify the minimum set of elements to be considered when designing the draft measure. On this basis, BEREC has added the following text in two different parts of the section:

   a. *Article 13a does not deal with accounting separation, which can be adopted by the NRA as a standard remedy. Nor does it refer to structural separation which could in principle be imposed under competition law.*
   b. *In general, all the elements listed in 13a(3), points a-f, represent the minimum set of elements to be considered when imposing functional separation under Article 13a, therefore, among Cave's six options, only those that satisfy at least those elements should be regarded as appropriate to the submission of the draft measure.*

4. BEREC accepts the suggestion and has now included a qualitative figure which adds a further dimension to the chart proposed by the respondents. The chart illustrates how the FS options are likely to perform against the incumbent's discriminatory behaviour (x axis), but also emphasises the level of intervention required when imposing a certain degree of separation (y axis). See the document.

5. BEREC believes that a BEREC taxonomy would not add any particular value to the document and hence be superfluous. BEREC chose Martin Cave's model as it is well renowned in economic literature and offers a common language which many in the sector are familiar with. Moreover, BEREC does not agree with TI that levels 3 and 4 can be joined together. Level 4 has two key differences from level 3: 1) governance arrangements to ensure independence from group management and 2) different employee incentives. Note also that both these elements are required to be part of the draft measure (see Art. 13a(3), point c).

Exceptionality of the measure (par. 2.1.2)

Stakeholders' comments

[1] See for example Annex II "*Application of the principle of equivalence for access to the civil engineering infrastructure of the SMP operator for the purpose of rolling out NGA networks*" of the Commission recommendation on regulated access to Next Generation Networks (NGA).

1. Telefónica, PT and PIIT agree in general with BEREC position as to the exceptional nature of FS and the application of the principle of proportionality, emphasizing the fact that FS should not be imposed if there is the slightest possibility to correct the market failures by using standard remedies or by strengthening their application. For PT, this exceptionality is stressed by the fact that FS is a highly intrusive and non-reversible measure. As for the "impossibility of reversing" the FS once imposed, Wind disagrees with the Draft since it believes that it is not possible to state *a priori* that FS is an irreversible measure because it depends on how it was implemented. For instance, a reversibility option could be included since the beginning.
2. Some operators raise the point of when can an NRA consider that the standard remedies have failed and therefore FS is necessary to address competition problems. While Telefónica agrees that a "*reasonable*" amount of time will need to pass, PIIT considers that a period of 2-3 years is needed before the assessment of their impact. In Wind's view, it would be easy to verify, after the second/third round of market analysis, the inefficacy of the remedies imposed on the incumbent.
3. On the assessment of the effectiveness of the remedies, Telefónica points out that the existence of a track record of enforcement activity should be considered only in case of discriminatory behaviour of the SMP operator and not for other reasons that may also affect the enforcement of remedies such as *i*) excess of demand making impossible to fulfil tight delivery times or *ii*) different delivery times at the wholesale and retail level.
4. PT addresses the point of the revision of the decision implementing FS and proposes to modify the document in order to recommend that FS is revised within, at least, the first period of 3 years, i.e., without using the possibility (provided by Art. 16(6) FD) to extend this deadline for more than 3 years. In fact, when FS is imposed, its effects on the market shall be constantly measured in order to quickly eliminate any regulatory obligation deemed unjustifiable.
5. As for the issue of reversing FS, Wind thinks that such a situation would only occur if market structure has evolved towards a scenario in which the discriminatory concerns addressed by FS are no more present or much less relevant. In this case, Wind proposes, for example, that it could be followed a procedure similar to those adopted in competition law context for the removal of undertakings.

BEREC responses

As noted by some operators as well as in the document submitted to public consultation, imposition of FS is subject to a different set of requirements than those set for the establishment of "standard" remedies as foreseen in the Art. 9 to 13 of the Access Directive. The rationale for such additional requirements, both in terms of process and the elements that must be considered by the NRA, is implicit in the existence of the figure of FS itself, which – it is worth recalling – is exceptional in nature. In general, the respondents to the public consultations agree with BEREC's position in this regard, although some of them differ on the irreversible character of the measure.

In this sense, BEREC stresses the fact that it is not the intention of the document to draw conclusions on whether FS can or cannot be reversed, nor to provide recommendations on how to reverse it. The emphasis is rather on the description of FS as a costly, complex and intrusive measure and, in consequence, on the need to fulfil specific requirements before its imposition, in line with Art. 13a. In order to clarify this, the text of the Draft Guidance has been modified avoiding references to the (ir)reversible character.

On the other hand, in reaching the conclusion that FS is the only effective regulatory option available, the increased experience gained in the context of the subsequent rounds of market analyses may assist national regulators. However, it would be inappropriate to set in the document concrete specifications as to the "reasonable" period that should be granted to the standard remedies before assessing effectiveness or after which a conclusion can be automatically drawn about their failure. Flexibility is needed in this sense in order to adapt to the conditions of the specific markets under analysis, a one-size-fits-all approach being counterproductive. The same argument applies to the proposal made referring to a fixed time-

limit for revisiting the imposition of FS on an SMP operator, where BEREC refers to the flexibility given in Art. 16 FD.

Procedures (par. 2.1.3)

Stakeholders' comments

1. ETNO believes that the sentence on page 11 "*This means that if for instance the exceptional remedy is designed to include both wholesale bitstream access and local access, the NRA can come to that conclusion after analysing both those relevant markets*" shows a preconceived intention to impose FS even before conducting a market analysis. Similarly, PT considers that any form of FS should only be applied following a thorough market analysis and believes that, as in all regulatory remedies, FS is not an end in itself and may not justify a market analysis *per se*. NRAs should therefore not initiate a market analysis with the view to imposing FS since this would distort the assessment. PT further notes that the guidance document should discuss the feasibility of imposing FS when market analyses have defined sub-national markets.
2. ETNO believes that it should be clarified that BEREC and COCOM must be informed by receiving the draft proposal and the analysis along with the Commission to be able to submit an opinion.
3. ETNO requires BEREC to specify that where FS is mandated, the other existing remedies will likely be no longer justified and proportionate and, therefore, should be withdrawn. Moreover, PT disagrees with BEREC's opinion that a coordinated analysis should be undertaken after FS starts being implemented. In particular, PT believes that the imposition of FS and the revision of the different markets related to the access network should be coordinated. If the coordinated analysis follows the imposition of FS, the document should give precise guidance on the timeframe.
4. PT disagrees with BEREC's statement according to which the proposal has a complementary nature and considers that the proposal represents the key part since it reflects the exceptional nature of the measure. Moreover, PT believes that the proposal should be separate from the draft measure.
5. PT believes that interested parties should have the chance to comment on the proposal and the draft measures within a reasonable period.
   PIIT further believes that the Commission as well as BEREC and COCOM should, on an obligatory basis, request the SMP operator's opinion/position, in order to be able to estimate conditions, costs and effects of a possible separation in an objective manner.

BEREC responses

1. BEREC agrees with PT that the application of any remedy, including this of exceptional nature, must originate from the conclusion of a market analysis. In this context, the NRA can take into account any sub-national market definition and consequently how FS can be implemented in the presence of sub-national markets. BEREC also agrees that FS should not drive the market analysis *per se*. To avoid any doubt, BEREC has modified the sentence highlighted by ETNO.
2. Article 8 of the Access Directive requests NRAs to notify the Commission of the exceptional measure. This Article also requires the Commission to take a decision – authorising or preventing the NRA from adopting such measures – by taking the utmost account of the BEREC opinion and assisted by COCOM (in accordance with Art. 14(2)).
3. Article 13a(4) mandates the NRA to conduct a coordinated analysis on the existing regulation, once the Commission has made its final decision on the draft measure. The Article sets out: "*[…] On the basis of its assessment, the national regulatory authority shall impose, maintain, amend or withdraw obligations […]*". In response to ETNO's point, the NRA can thus still conclude that the existing regulation is justified and proportionate. For example, wholesale price regulation can still be required to address price discrimination. BEREC believes, moreover, that setting a specific timeframe for the coordinated analysis would not be in the interest of all stakeholders as the implementation process can have different timescales

depending on the specific national circumstances. By setting these timescales in the document, BEREC could reduce the NRA's discretion in mandating appropriate implementation deadlines.

4. BEREC has modified the document in order to take PT's concern into account.

5. BEREC acknowledges PT and PIIT's concerns about all stakeholders, including the incumbent, having the chance to comment on the proposed remedy and believes that this should be done through public consultation.[2] BEREC does not think, however, that it is appropriate to require BEREC and COCOM to interact with the SMP operators.

Content of the proposal to the Commission (par. 2.1.4)

Stakeholders' comments

1. The respondents refer to the cost-benefit analysis mentioned in the Draft in different ways. Wind thinks that both benefits and costs should be assessed in a qualitative rather than quantitative way. ETNO, Telefónica and PT believe that a rigorous and objective cost-benefit analysis should be run for two different scenarios: for FS and for a better design and/or a stricter enforcement of standard remedies. Moreover, Telefónica thinks that all the financial outlays associated to the FS, the hidden costs produced by the distortion in the focus of the company and costs associated with a major change in the concept of the competitive model of the country should be considered in the analysis.

2. As for the evidence that an NRA has to provide to justify its conclusion that the conditions of Art. 13a(1) are met, Wind believes that these conditions are automatically met if after two or three rounds of market analysis there is still evidence of insufficient competition. On the other hand, ETNO thinks that the Draft has not defined the criteria in a sufficiently rigourous way. In particular, ETNO thinks that a low take-up of LLU is not necessarily equivalent to a lack of effective competition and suggests that the guidance document should highlight that lack of effective competition may be the result of other factors such as poor corporate management, lack of investments, etc. Moreover, ETNO objects that proving the existence of enforcement activity of standard remedies from the NRA is sufficient to justify FS.

Assessment of the need to impose functional separation

3. As a general point, Telefónica thinks that current obligations, if properly designed and enforced, will be a much better tool than FS. ETNO argues that BEREC appears to recognise the inconsistency of imposing FS when at page 14 it is stated: "[…] *functional separation may lead to a form of monopoly in the access segment of the telecommunication market*".

4. Several contributions refer to assessment of the competitive conditions required by Art. 13a prior to the imposition of FS. Wind believes that, if after the second/third round of market analysis competition is not yet sufficient, the competitive problem is certainly due to vertical integration itself and therefore FS should be imposed. In ETNO and Telefónica's opinion, the Draft fails to set out correctly how to carry out the assessment that there is little or no prospect of effective competition. According to ETNO, this should take into account the entire market and not just the alternative operators seeking LLU access (e.g., the assessment should take into account alternative access platforms, such as cable, wireless, mobile and satellite). Telefónica thinks that competition from wireless platforms should be taken into account when considering replicability in the market and that the existence of viable alternative infrastructures should not only be assessed in the short/medium term, but also in the long term. For PT there are several factors, such as demographic aspects, media literacy, purchasing power, etc., that could help NRAs in making a better assessment of the competitive conditions and that are independent of regulatory policies. PT also believes that behavioural problems, namely discriminatory conduct, could be suitably addressed using the standard regulatory tools already available. Also according to PT, the Draft does not take into account current NGN deployment

[2] See Art. 6 of the FD *" […] Member States shall ensure that where national regulatory authorities intend to take measures in accordance with this Directive or the Specific Directives which have a significant impact on the relevant market, they give interested parties the opportunity to comment on the draft measure within a reasonable period.*"

in Europe, and therefore suggests BEREC consider that if platform competition (via hybrid fibre-coax, fibre or cable) is in place or will be in place in a reasonable timeframe, then FS should not be imposed.

5. As for the relation between the FS and the incentive to invest, Wind believes that a FS remedy would not modify any real investment decision since the willingness of the alternative operators to invest on their own infrastructures depends primarily on the necessity to climb the ladder of investment and then to reduce its dependency on incumbent's network. However, PT believes that FS does not promote investment, but hampers investment decisions and ultimately affects infrastructure-based competition and deems very important that BEREC recognizes this aspect. As for the sentence: "*it will encourage investments since it gives greater legal certainty to both incumbent and new market entrants*", Telefónica believes that the problem of legal certainty will remain, as it will certainly imply legal appeals and the need of continuous adaptation.
6. As for the existence of structural barriers to entry, Telefónica thinks that the absence of alternative access infrastructures could be also due to a regulatory model focused on promoting competition based on wholesale products. PT notes again that BEREC's references on the existence of structural barriers and the persistence of competition problems should include other criteria that go beyond those being considered in standard market analysis

Assessment of the impact of imposing functional separation

7. ETNO and PT believe that a thorough quantitative analysis, although difficult, is always required. Both respondents do not agree with the Draft where it says that the impact on competition is the most relevant criterion and think that prioritising a given objective over others would be inappropriate.
8. As for the impact on the NRA, ETNO proposes to include in the guidance document that it is very likely that the level of regulation needed will remain very high, as also concluded by the French NRA, ARCEP, when reviewing the UK example. Moreover, ETNO provides a long ad detailed list of costs that should be considered in the quantitative analysis.
9. As for the impact on the undertaking and the sector, Telefónica suggests expanding this part and to take into account other elements. In addition Telefónica thinks that NRAs are probably not the best placed to carry out such analysis, since the effects of a FS would go well beyond the scope of the telecommunications sector.
10. As for the incentive to invest, ETNO and Telefónica disagree with the statement at page 16: "*Nevertheless, equivalence could lead competing operators to invest in intermediary infrastructure (e.g. LLU), which may incentivise the incumbent to invest in newer infrastructure (e.g. NGA)*", and ETNO thinks that this statement lacks economic arguments or empirical evidence. Moreover, ETNO believes that the reference to the Universal Service Obligation on page 16, as an alternative means to impose the incumbent to invest in NGA, is inappropriate. Telefónica thinks that FS implies fewer incentives to invest for both the alternative and incumbent operators.
11. As for the impact on consumers, Telefónica believes that in terms of prices it is necessary to analyse if the added costs outweigh the increased competition, and thinks that there will be less in innovation in retail offers as they will rely on a single network, and competition will mainly turn around price rather than around higher capacity or new services (the lower deployment of alternative infrastructures implies that there are fewer incentives to invest in NGAs).

BEREC responses

Regarding the assessment on the need to impose FS, the position of the respondents is not surprising in the sense that SMP operators support the strengthening of the requirements while the alternative operators defend a more flexible approach. BEREC emphasizes that FS could not be seen as a standard remedy but a final resort one. Therefore, NRAs cannot conclude

directly from “the evidence of insufficient competition” or from the fact that “after the second/third round of market analysis competition is not yet sufficient” that the imposition of FS is justified. On the contrary, some additional analysis and indicators are required given that, as some operators noted, insufficient competition could be compatible with an appropriate compliance and enforcement of the remedies imposed to the SMP operator. Therefore it cannot be said that pure qualitative arguments, as the ones used for standard remedies, are sufficient to justify the imposition of FS.

However, it is not the intention of the BEREC document to provide an exhaustive list of all the criteria that NRAs should take into account in such an assessment and in the analysis of the impact of the measure. The concrete parameters that should be covered are very wide and depend on the markets affected, and therefore a flexible approach which leaves leeway to NRAs to take into account specific situations linked to their market is more appropriate. Therefore, the different suggestions made by the contributors to the public consultation pointing to a detailed prescription of the conditions that would allow NRAs to conclude on the need to impose FS or the elements that should be taken into account in the cost-benefit analysis cannot be taken on board, as they are covered in general terms by the current Draft. However, regarding the impact assessment, BEREC would like to highlight that the benefits obtained by the SMP operator as a result of its behaviour should not be included in such an analysis, the same applying to the costs incurred due to the shift on the focus of the incumbent or to the worsening of its results due to the need to acquire wholesale inputs in the same conditions as its competitors, as proposed by one of the respondents.

Contents of the draft measure (par. 2.1.5)

Stakeholders’ comments

1. *Precise nature and level of separation*. ECTA and Fastweb suggest better specifying which forms of separation fall under the definition provided by Art. 13a. Furthermore ECTA suggests BEREC provides guidance on how the level of separation is to be defined in more detail. Fastweb suggests that only forms between level 3 and 6 should be considered. Wind believes that NRAs should choose any possible solution suitable to the specific market. PT and PIIT disagree with BEREC that the separated undertaking can belong to the same group as it may be regarded as structural separation.
2. *Identification of assets of separated entity, products or services supplied*. Wind believes that the assets should include all services involved in the provision of access services. PT stresses that the costs for identifying separated assets should be taken into account as the access network may not be fully privatized and thus public contracts would have to be considered. Fastweb thinks that BEREC should specify that a detailed description of all physical, intangible and financial assets is needed to qualify for functional separation. In this regard NRAs could be advised to define a separate and transparent financial report for the business entity or a draft on separate regulatory accounting or any other information.
3. *Governance arrangements*. ECTA and Fastweb think that the guidance document should be very detailed in providing a list of measures that result in effective governance arrangements such as separate management, staff, commercial brand, headquarters, financial statement, business operation etc. In Wind’s opinion it must be specified that these measures should be described in terms of procedures, auditing activity and sanctioning process. Moreover, ECTA and Fastweb think that, in order to tackle discriminatory conduct, the draft measure should include detailed rules including sanctions and financial incentive systems. PT stresses that labour law should be taken into account when ensuring independence of the staff involved.
4. *Rules ensuring compliance with the obligations*. Wind underlines that these rules should cover both the obligation specifically imposed under Art. 13a and all other ordinary obligations already imposed on the incumbent and which interact with those specific measures regarding the separated entity. Wind, Fastweb, PT and ECTA believe that a compliance body is not to be sufficient to ensure that the separated entity acts independently so that monitoring by NRAs is regarded as necessary. Moreover, Wind thinks that setting up an independent body would

need to be accompanied by a full and detailed definition of rules and operational procedures while a single compliance officer is not a viable option. Furthermore, Wind believes that the final document shall specify that amendments to obligations already imposed should be conditioned to the effective achievement of predefined outcomes.

5. *Rules for ensuring transparency and operational procedures*. ECTA and Fastweb believe that the guidance document should specify that changes to the OSS need to take into account other operators' needs and views. Therefore, they propose that BEREC suggests NRAs introduce formal procedures for defining the OSS such as establishing technical boards chaired by the NRA. Wind thinks that the guidance document should include provisions on how operational processes are designed, managed and updated.
6. *Monitoring programme to ensure compliance*. Wind, Fastweb and ECTA think that the guidance document should include a detailed description of a minimum set of measures verifying the implementation of non-discrimination including KPIs and KPOs. Wind invites BEREC to develop benchmarks on KPIs and KPOs so as to facilitate comparing performance across the Member States. In addition, Fastweb and ECTA suggest BEREC encourages NRAs in publishing quarterly or monthly reports on KPIs as well as in publishing an annual report. On the contrary, PT thinks that publishing reports other than the annual report is regarded as an unjustified burden for the incumbent and is not even mentioned in the Access Directive.

BEREC responses

1. The Draft refers to the meaning of FS as set out in Art. 13a(3), points a-f, which represent the minimum set of characteristics for FS imposed under this Article. Which specific level of FS will be chosen in the end would have to be determined case by case. In fact, this approach meets the claim that was raised in the comments received from stakeholders that NRAs should choose any possible solution suitable to the specific market. Furthermore, BEREC maintains its position that the separated undertaking can belong to the same group. In fact, this cannot be regarded as structural separation since this would imply that the separated entity would be detached from the rest of the group.
2. BEREC agrees with a detailed description of the assets involved. The separated entity would have to draw up a report on the basis of all the assets involved that have been identified by the NRA. This report would have to be evaluated by the NRA.
3. The Draft does not provide a detailed list on purpose. As already said at point 1, BEREC believes that giving a detailed list may miss a measure that comes up with a specific case. This is basically the flaw when stating detailed rules. BEREC agrees that governance arrangements would need to contain a set of solid measures that the separated entity would have to follow as in fact it is important that the staff needs to perceive that they work for a "new" undertaking. BEREC is reluctant of explicitly stating in the guidance document that labour law would need to be considered when ensuring independence of the staff as this lies in the responsibility of the separated entity which will take necessary provisions to comply with labour law.
4. BEREC is reluctant to narrow the possibilities of how to ensure compliance with the obligations. BEREC believes that a compliance body accompanied by a set of provisions given by the NRA to the separated entity would be enough to ensure compliance. As the reference to a single compliance officer is concerned, BEREC thinks that it is one of the possible options – already implemented in other sectors – which could help in ensuring compliance. Furthermore, NRAs may intervene as soon as get notice that the separated entity violates the provisions of the monitoring programme (such as a compliance programme).
5. BEREC thinks that the provision on how operational processes are designed, managed and updated should not be predefined and therefore takes the view that these would have to be supplied by the separated entity.
6. BEREC is reluctant to put down a description of a set of measures verifying the implementation of non-discrimination as this should be done when the case comes. However, BEREC stresses that the draft measure shall include a "monitoring programme" (see Art. 13a(3)(f)) describing

the set of measures – aimed at verifying the compliance – which could include also KPIs and KPOs. BEREC wants to put it in the NRA's hands how often it would want the separated entity to publish reports.

Voluntary separation – Art. 13b (par. 2.2)

Stakeholders' comments

1. Wind thinks that BEREC's guidance on Art. 13b should be particularly detailed and aimed at avoiding that voluntary separation could be used by incumbents as a strategy to delay or postpone the development and enforcement of ordinary obligations. In this respect, Wind thinks that it should not be given to the SMP operator the option to withdraw or substantially modify its proposal if pre-existing regulatory obligation have been modified by virtue of the notified voluntary measure.
2. ETNO and PT stress that any form of voluntary vertical separation should be left to the decision of an individual company. In particular, PT points out that Art. 13b does not grant NRAs the power to modify the notified transaction and stresses that NRAs should not impose the terms of separation since their sole role is to assess the effects of the intended transaction on existing regulatory obligations and, on the basis of its appraisal, maintain, amend or withdraw such obligations. PT thinks that the preliminary assessment of the notification does not match the wording and the requirements of Art. 13b and fears that NRAs could use this assessment to condition the terms of separation. In particular, PT does not think that NRAs should be given the possibility of rejecting the proposed transaction when it is manifestly unreasonable. PT stresses that, although the notifying operator may decide to wait for the NRA to finalize its coordinated analysis before implementing the proposed transaction, the implementation of voluntary separation does not seem to depend on a favourable decision from the NRA, i.e. NRAs should only be informed of the separation and of any following changes.
3. Fastweb emphasises that a form of separation which implements EoO does not comply with the provision of fully equivalent products required by Art. 13b. According to Fastweb, the minimum separation model that may trigger the "onerous and burdensome" activities described in Art. 13b is functional or legal/ownership separation. Therefore, Fastweb believes that forms of separation not ensuring full EoI should not fall under the procedure described but treated as a definition of standard non discrimination remedies. In conclusion, Fastweb suggests BEREC encourages NRAs in activating the procedures described by Art. 13b only when the voluntary proposal includes the minimum elements listed in Art. 13a.
4. According to Wind the undertakings voluntarily proposed by TI are not able to guarantee EoI but only EoO which would not be in line with Art. 13b requirement. Therefore, Wind suggests adding to the first sentence at page 22 the following "With respect to Art. 13b it can be noted that only the UK case would have fallen within the scope of Art. 13b".
5. Wind believes that it should be clearly stated that the interaction between the NRA and the SMP operator during the market analysis that follows the notification must be conducted in a transparent way, with the participation of the alternative operators involved in the markets affected by the proposal (for example by means of a public hearing).
6. Wind, in order to avoid delaying tactics, invites BEREC to suggest that the SMP operator should not be allowed to autonomously withdraw from the proposal after the conclusion of the public consultation.
7. In Wind's view, in case of the creation of a separate business entity which provides fully equivalent access products to all retail providers including its own retail divisions, NRAs should assess the capability of the proposed transaction to deliver EoI and not simply whether the transaction is suitable to improve competitive conditions.
8. TI is concerned by the regulatory role given to voluntary separation commitments especially with reference to the following sentence of the Draft: "*NRAs should notify the voluntary measures to the Commission only if they: i) constitute, ii) directly relate to, or iii) are ancillary to*

remedies". TI considers that to links voluntary separation commitments to existing remedies is a restrictive approach to the proposed voluntary measure since it neglects that voluntary separation commitments may fall outside the scope of standard remedies. TI believes that, if commitments are fully consistent with the provisions of Art. 13a, they should be always considered "exceptional measures" and thus transposed into "exceptional remedies". According to TI, this approach could avoid to give to the same set of separation rules a different status in different circumstances, i.e. when they are the outcome of a mandated functional separation or the outcome of a voluntary separation, and that the equal treatment of separation remedies in case of both voluntary and mandatory separation will give certainty to the regulatory framework.

BEREC responses

1. BEREC considers the Guidance on Art. 13b sufficiently detailed and emphasises that the Draft suggests measures aimed at avoiding eventual incumbent's delaying strategies. In particular, BEREC points out that, in order to guarantee a proper degree of certainty, the modification of existing remedies by NRAs should be conditioned to the implementation of the separation project (see last paragraph of section 2.2.3). Moreover, BEREC suggests NRAs conduct a "preliminary assessment" of the intended transaction in order to do a first screening on its reliability/seriousness and suitability to improve the competition in the sector (see section 2.2.3). This should prevent SMP operator to propose a manifestly unreasonable project of separation that will be in all likelihood withdrawn just to delay the regulatory process.
2. BEREC shares ETNO and PT's opinion and notes that this view is widely confirmed in many parts of the Draft. In particular, the fifth paragraph of section 2.2.2 states that "*The NRA action in the case of voluntary separation will be limited to conducting a coordinated analysis of the markets related to the access network in order to decide whether new remedies should be imposed or whether the remedies already in place should be maintained, amended or withdrawn accordingly*". Moreover, BEREC remarks that the possibility of a preliminary assessment proposed in the Draft is aimed at avoiding the risk of a manifestly unreasonable or unreliable proposal which would otherwise require NRAs to start their activities uselessly. This first assessment would not give NRAs the power to condition the terms of the intended transaction. BEREC shares PT's opinion that the implementation of voluntary separation does not seem to depend on the NRA's decision, but points out that Art. 13b doesn't clarify whether NRAs may affect the notified transaction or not. In any case, as reported in the second paragraph at page 23 of the Draft, BEREC notes that the NRA's assessment may lead the SMP operator to modify its project of separation before the conclusion of the market analysis and thus before any modification of existing regulation.
3. With regards to Fastweb's comment, BEREC emphasises that Art. 13b – unlike Art. 13a – does not imply "onerous and burdensome" activities. In BEREC's view the ratio of Art. 13b is to give NRAs the possibility to evaluate in a timely manner the effects of the intended separation on the markets involved. A restrictive interpretation of the provision – which strongly conditions the notification of the intended transaction and the following NRAs activities to the presence of the requirements of Art. 13a – does not allow NRAs to evaluate in a timely manner the impact on the markets of forms of separation based on principles different from those of Art. 13a, but which may have significant effects on existing regulatory obligations. In any case, an SMP operator that intends to voluntarily implement a form of separation will likely want to notify it to the NRA independently of the particular form of equivalence of access. Moreover, BEREC stresses that Art. 13b does not refer to the elements listed in Art. 13a as a necessary condition to apply the procedure described in Art. 13b. Indeed, mandatory and voluntary separation arise from different situations and involve different requirements and therefore cannot be grouped together in the way proposed by Fastweb.
4. BEREC remarks that all references to national experiences of voluntary separation have been included in the Draft as useful examples that can provide suggestions on possible implementations of Art. 13b independently of the form of equivalence that they imply. BEREC remarks that those experiences have been developed in different competitive contexts and on

different legal basis and should be understood in a context where no specific provisions regarding FS were included in the EU Framework.

5. BEREC agrees with Wind on the role of transparency and participation of all interested stakeholders in the NRA's assessment of the intended transaction. In this regard, BEREC remarks that this is already guaranteed by the simple fact that the above-mentioned assessment is conducted within a market analysis procedure which always implies a public consultation phase. In addiction, in the Draft, BEREC suggests that NRAs should submit the intended transaction to an ad hoc consultation in order to fully assess the transaction and acquire the comments of all interested parties. To emphasise the role of stakeholders in the process, BEREC has modified the text on page 24 of the Draft (fifth step of the process outlined in section 2.2.3) as follows "….*the NRA may need to acquire the comments of all interested stakeholders also by means of public hearings*".
6. BEREC thinks that Wind's proposal would not meet the spirit of Art. 13b which does not exclude the possibility that the SMP operator can "autonomously withdraw from the proposal" after the conclusion of the public consultation.
7. As far as the assessment of the intended transaction is concerned, BEREC stresses that the NRAs will assess whether the proposed separation will be able to ensure both equal treatment in the provision of access services and the improvement of competitive conditions (see the last paragraph at page 23 of the Draft).
8. BEREC believes that there is a fundamental difference between Articles 13a and 13b in that measures are imposed by an NRA under mandated separation whereas with voluntary separation, commitments are offered by the SMP operator. BEREC acknowledges that the imposition of an obligation of FS should be subject to prior approval by the Commission in recognition of its exceptionality. On the other hand, when an SMP operator decides to undergo structural or functional separation, this decision is taken by the operator for commercial and/or operational reasons. Commitments which may be made by the SMP operator in connection with such separation can impact on existing remedies and as such, will be evaluated under the coordinated market analysis referred to in Art. 13b(2) and subject to the same process thereafter. In summary, BEREC does not think that measures freely volunteered by an operator under Art. 13b should be subject to the same process of remedies imposed under Art. 13a. This would remove the distinction between mandated separation and a voluntary action taken by an SMP operator.

Annex I

BEREC clarifies that the aim of both the guidance document and the Annex is not to compare and evaluate the separation experiences occurred in Europe which developed in different legal and economic circumstances. BEREC's intention is only to describe these experiences since each of them can provide useful guidance on the implementation issues of new Access Directive rules. As already specified in the Draft, the cases described in the Annex should be understood in a context where no specific provisions regarding FS were present in EU Framework. As far as the effectiveness of the commitments in UK and Italy is concerned, there are conflicting opinions by stakeholders. In light of the above, in what follows BEREC only reports a summary of the comments on the Annex provided by respondents to the public consultation.

Stakeholders' comments

UK case

ETNO believes that in the UK case it should be clarified that competition was not achieved by means of the Undertakings only, but also by means of the operational improvements in the delivery of LLU introduced before Openreach was created and by the reduction in the LLU price (70% of shared LLU and 40% of full LLU). In addition, the quality of EoI Openreach products is not always good and BT reported that it spent £100 million to implement FS ("tremendous operational costs and capital expenditure").

Telefónica finds the description of the UK case of Annex I not fully objective. According to Telefónica that description does not provide relevant evidence including doubts stated by OFCOM (e.g. problems with quality, actual investment in NGNs, comparison with penetration in other countries, prices, etc.). Overall, the annex seems to convey the impression that FS has been a complete success in UK, when there are evident signs that the case is not so clear.

Italian case

TI shares the description of the Italian national experience on FS, however suggests some clarifications aimed at providing more details on the Italian model of FS.
Fastweb thinks that BEREC should clarify that the Italian separation model cannot be placed between level 3 and 4 but between levels 1 and 2 of Martin Cave's scale (this view is shared by Wind) and that the Italian model lacks most of the requirements listed by the Art. 13a to be qualified as functional separation (the arguments are the same of those reported by ECTA).

Polish case

ETNO suggests reviewing this section since the Polish case is not an example of functional separation, but a case where the regulator and the incumbent have chosen alternative methods to functional separation to eliminate concerns of non-discrimination.

ECTA Comparative analysis of the UK and Italian regimes

ECTA compares the UK and the Italian experiences on FS proposing mostly the same arguments of Fastweb. According to ECTA, Open Access, unlike Openreach, is not separated and placed outside the organization of the incumbent, it does not report directly to the CEO and/or the external board, has no separate management, no separate financial reports and maintains separate systems and processes. Moreover, whereas TI retail directly interacts with Open Access, alternative operators' retail divisions have to first interact with TI wholesale which, in turn, interacts with Open Access. ECTA points out that in Italy, unlike in the UK, there is no evidence of the wholesale products being provided internally and externally at the same price and there is no effective monitoring system because KPIs only measure lead-time within Open Access, not taking into account that alternative operators have an additional lead-time connected to the order being processed firstly by TI wholesale.