Wind response on Consultation "Draft BEREC Guidance on Functional Separation"

Summary

Introduction

Wind Telecomunicazioni S.p.A. ("Wind"), the largest Alternative operator in Italy, welcomes this opportunity to offer its views on this public consultation regarding the draft Guidance on Functional Separation (the "Draft") developed by the BEREC. Wind sees the BEREC as a crucial element to improve harmonisation and consistency in the application and enforcement of the Regulatory Framework in EU countries, therefore supports development of guidance on Functional Separation ("FS").

In this document, we first make some general remarks on the main goals which should be pursued by BEREC with respect to providing guidance for application of Art. 13a and 13b. In the second part of this document, we address specific issues of the Draft and present our proposals.

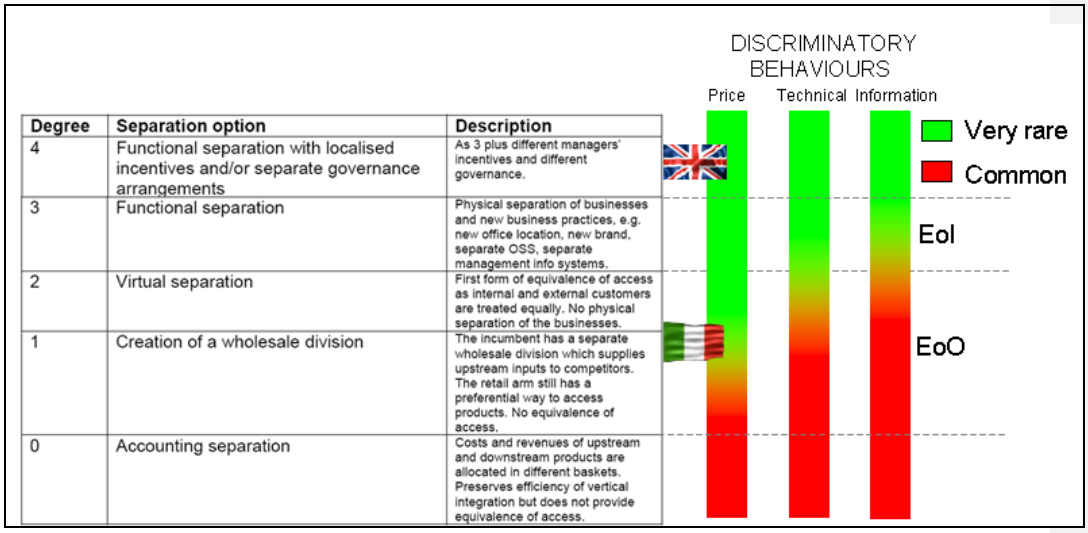
1. Guidance on definition and requirements of Functional Separation in art 13a and 13b of the Access Directive

In Wind view, given the "extraordinary" nature of the measures and procedures foreseen by Art. 13a and 13b guidance by the BEREC is extremely important and should regard clear identification of specific requirements for the application of Art. 13a and 13b. In this respect BEREC should provide clear guidance to NRAs to avoid an inconsistent application of such Articles in EU countries.

Wind opinion is that the Draft should be improved to provide clear cut rules which directly enable authorities to assess, without any doubt, which are the main elements for a FS to fall in the category of those recalled by Art. 13a and 13b.

In order to provide appropriate guidance, Wind appreciates the theoretic recap by BEREC of the different degrees of separation, including the "functional" one. As a matter of fact given the complexity, granularity and number of the different obligations (mainly already available to NRAs under Art. 9 to 13 of the Access Directive) which in practice are needed to build some form of separation it is particularly important to create a common ground of understanding among NRAs as well as market players with respect to what are the main relevant aspects which differentiate one degree of separation from the other both in terms of provisions needed on the entities to be separated and in terms of expected outcomes. To this latter, Wind invites the BEREC to provide further analysis on the expected impacts in terms of improvement of the competitive scenario which can be progressively reached climbing the ladder of separation. Figure 1 shows, according to Martin Cave's taxonomy, at what level of the ladder of separation it can be expected to be reached a certain outcome regarding discriminatory behaviours.

Figure 1 Analysis of the effects on discriminatory behaviours as the degree of separation increases according to Martin Cave's taxonomy.



Degree	Separation option	Description
4	Functional separation with localised incentives and/or separate governance arrangements	As 3 plus different managers' incentives and different governance.
3	Functional separation	Physical separation of businesses and new business practices, e.g. new office location, new brand, separate OSS, separate management info systems.
2	Virtual separation	First form of equivalence of access as internal and external customers are treated equally. No physical separation of the businesses.
1	Creation of a wholesale division	The incumbent has a separate wholesale division which supplies upstream inputs to competitors. The retail arm still has a preferential way to access products. No equivalence of access.
0	Accounting separation	Costs and revenues of upstream and downstream products are allocated in different baskets. Preserves efficiency of vertical integration but does not provide equivalence of access.

Going back to the objective of providing clear cut rules to NRA for assessing without any doubt which are the main elements for a FS to fall in the category of those recalled by Art. 13a and 13b, Wind finds fundamental to start from the intended outcome of separation which is delivery of Equivalence of Access ("EoA").

Wind fully agrees with the definition given by the Draft that EoA is the objective being pursued by applying any form of separation meaning that:

> *"all the relevant access products supplied by the functionally separated division must be provided to both the incumbent's and the other operators' retail divisions on equivalent terms and conditions, within equivalent timescales, at equivalent price and quality and by means of equivalent systems and processes."*

Settled what EoA means, the Draft introduces Equivalence of Input ("EoI") and Equivalence of Outputs ("EoO") which are presented as two different implementation forms for EoA. In this respect Wind sees the risk that current wording may give rise to misunderstandings and erroneous interpretations by stakeholders and stresses the need that in the final document it is clearly evidenced, as shown in figure 1, that the two different implementation forms do pertain to different separations degree and do deliver completely different market outcomes. Rather than two different implementations, EoI and EoO should be regarded as two different degrees of EoA with only EoI being able to guarantee "full EoA" whilst EoO being a lesser substitute of EoI.

Clarification of the difference between EoI and EoO is of the outmost importance given that a "full EoA" requirement is present in the EC Directive[1] for the functional separation, be it imposed or voluntarily proposed by SMP operators.

[1] Whereas 61: *The purpose of functional separation, whereby the vertically integrated operator is required to establish operationally separate business entities, is to ensure the provision of fully equivalent access products to all downstream operators, including the operator's own vertically integrated downstream divisions*;

A confirmation that only EoI would be coherent with delivering "full EoA" is also already clear from the reading of the Article 13a dictate which clearly specifies for the functional separation to be imposed:

> *"That business entity shall supply access products and services to all undertakings, including to other business entities within the parent company, on the same timescales, terms and conditions, including those relating to price and service levels, and by means of the same systems and processes."* (emphasis added)

Leaving aside the easy case of the legal separation with different ownership as referred by Art. 13b, and once clarified that EoI is a necessary condition to deliver "full EoA" and that FS, as intended in the Art. 13a and 13b, must guarantee "full EoA" the following applies:

"Functional Separation" at least implies "EoI" to deliver "full EoA"

By labelling lighter forms of separation not imposing EoI and which do not have the nature of "exceptional measure" with invasive effects on the internal organisation of the SMP operator, BEREC may end up reducing the power of NRA to implement effective non discrimination

To conclude, FS referred to by Art. 13a and Art. 13b of the Directive is at a minimum, characterized by a level of separation which, according to Martin Cave taxonomy, would not be lower than level 3 and in any case should be able to guarantee that wholesale services are provided to all undertakings on the same timescales, terms and conditions, including those relating to price and service levels, and by means of the same systems and processes.

1.1. The Italian case

Wind notes that the Draft widely refers to Italy and UK in order to give clear examples of separations experiences. Wind shares the idea that concrete examples may be used to provide clear guidance regarding Art. 13a and 13b and in this respect invites BEREC to develop an "ex post" analysis of the Italian and UK cases in light of the Art. 13a and 13b dictate which could help other authorities facing similar situation in the future. Unfortunately with respect to the Italian case Wind notes that some of the references should be modified since or they do not currently reflect the effective situation or may give rise to misunderstandings rather than provide useful guidance.

First, Wind invites the BEREC to provide a clear identification of the UK and Italian case with respect to Martin Cave's taxonomy and with respect to the Art. 13a and 13b dictates. For the sake of clarity and to avoid misunderstandings or erroneous interpretation it should be clarified that the degree of separation currently implemented in Italy broadly corresponds to around top of layer 1, bottom of layer 2 of the Martin Cave's compared to UK case being at level 4.

Below a short comparison of Italian situation and main elements characterising level 2, 3 and 4 as listed in the table 1 of BEREC document:

Martin Cave's Level 4

1. different managers' incentives and different governance.
    a. **Open Access has no separate management no HR, no strategy Head, no CFO, no commercial director**. Simply speaking Open Access is just another wholesale

division fully integrated within TI organization absolutely not separated from the rest of the organization and in charge of practical implementing decisions taken in Telecom Italia.

b. TI undertakings do include the establishment of a Board of Vigilance (Equality of Access board) which is merely in charge of ensuring the respect of the undertakings as they are and should not be confused with governance arrangements guaranteeing the independence of the staff and of the separate business unit.

c. As far as the incentives to prevent discriminatory information sharing practices, a "Code of Conduct" has been developed internally in TI. Unfortunately monitoring of behaviour is entirely delegated to Telecom Italia's internal procedures and sanctions applied are those envisaged for disciplinary violations by the "Contratto Collettivo di Lavoro". As a result, the Code has proven to be ineffective in dissuading discriminating behaviour.

Martin Cave's Level 3

1. Physical separation of businesses and new business practices, e.g. new office location, new brand, separate OSS, separate management info systems.

   a. Telecom Italia undertakings do not include the creation of Open Access division with the result that TI can at anytime decide for a different organization. Only role left to AGCOM is to evaluate whether changes proposed by TI would hamper effectiveness of undertakings.

   b. With respect to physical assets included in the separated entity in the Italian case there is no reference at all to the perimeter of such assets if any. In effect it is very likely that no asset were separated and put under the control of Open Access which in facts does not produce any kind of economic accounting showing financial results and assets allocated.

   c. Open Access offices are not separated from other TI divisions (e.g. "TI customer operations" personnel in the same office).

   d. OSS and management info systems used by Open Access are not separated from those used by other divisions. A mere commitment to foreclose access to such OSS by means of passwords and access rights is included in the undertakings.

2. New Brand

   e. Open Access is not a brand and field operation personnel continues to wear Telecom Italia brand a use Telecom Italia branded cars.

Martin Cave's Level 2

1. First form of equivalence of access as internal and external customers are treated equally.

   a. **Technical discrimination** (timing, process and SLA) still absolutely in the control of TI:

      i. Telecom Italia retail division has direct access to Open Access through different IT systems and may obtain preferential technical conditions.

      ii. No effective monitoring system even for EoO in place given that KPI do not measure and compare end-to-end lead-time.

b. **Price discrimination** still in the control of TI:

   i. no evidence of the wholesale products being provided internally and externally at exactly the same price. Pricing essential wholesale services at exactly the same price is not even an undertaking. Access products are provided internally through OSS which don't keep track of the specific transactions and prices applied. A mere ex post reconciliation with application of "transfer charges" (whose price level is unknown) is part of the undertakings but as far as we know this has not been implemented yet[2].

c. **Market evidence shows persistent discriminatory behaviours continue to take place despite undertakings.** Two cases opened against TI by Italian competition authority during 1H2010 for three different alleged abuses all connected with TI anticompetitive exploitation of vertical integration:

   i. Excluding behaviour by means of refusal to supply Altnets relevant wholesale access services and information need to participate in a multiple year carrier selection procedure.

   ii. Excluding behaviour by means of hindering Altnets capability of activating essential wholesale access services by means of excessive and unjustified "KOs" and/or to inappropriateness of processes.

   iii. Excluding behaviour by means of TI proposing retail offers with not replicable economic and/or technical conditions only in LLU areas.

As for the references in the text of the document to the Italian case which, in Wind view, should be revised to reflect the effective situation in Italy please find below a short list of the paragraph interested, the critic and a proposed amendment:

1. Page 8: *"In the UK, BT implements the former, while in Italy the product level equivalence adopted can be broadly classified as EoO. In practice, however, many of the systems and procedures used by alternative operators are the same as those used by Telecom Italia's retail division."*

   Critic: as clearly shown by the diagram in pag. 1 of Annex 1 of the BEREC document actually TI retail division directly access Open Access while Altnets interface is TI Wholesale division. Such structural difference obviously undermines at the roots any possibility for Altnets to use same systems and procedures followed by TI retail divisions. Accordingly to avoid misunderstandings Wind proposes to amend the paragraph as follows:

   "In the UK, BT implements the former, while in Italy the product level equivalence adopted can be broadly classified as EoO."

2. Page 22: *"EU countries like UK and Italy have implemented functional separation by means of voluntary commitments of SMP operators, which were subsequently accepted by national regulatory authorities in accordance with national laws"*

[2] There are no formal contracts in place between TI retail and OA establishing the prices/transfer charges at which TI retail acquires the wholesale access products.

Critic: The statement is included in the paragraph dealing with Art. 13b and gives the idea that both the Italian and UK cases should, if treated today in presence of the Directive, follow the procedure established by Art. 13b. Wind stresses that while this may be true for the UK functional separation this is absolutely untrue for the Italian one which does not fall into the scope of Art. 13b since the undertakings voluntarily proposed by TI do not include any form of organizational commitment regarding assets and personnel and in any case are not able to guarantee EoI but only a mere EoO which would not be in line with Art. 13b requirement. Accordingly to avoid misunderstandings Wind proposes to amend the paragraph as follows:

"EU countries like UK and Italy have implemented separations by means of voluntary commitments of SMP operators, which were subsequently accepted by national regulatory authorities in accordance with national laws. With respect to Art. 13b it can be noted that only the UK case would have fallen within the scope of Art. 13b".

2. Wind comment on the BEREC Draft proposal

In this paragraphs Wind will comment on specific paragraphs of the Draft.

Wind comment on paragraph 2.1.2. "Exceptionality of the measure"

Wind shares the Commission's view on treating functional separation as an exceptional measure that may be imposed on SMPs "*where the national regulatory authority concludes that the appropriate obligations imposed under Articles n.9 to n.13 have failed to achieve effective competition and that there are important and persisting competition problems and/or market failures identified in relation to the wholesale provision of certain access product markets*".

Nevertheless Wind does not agree with some of the concerns about the difficulties in and backsides aspects of a decision to impose such a measure.

As for the impossibility of reversing the functional separation once imposed Wind disagrees with the Draft. As a matter of fact it is not possible to state *a priori* that the functional separation is an irreversible measure because it strongly depends on the *specificity* of each functional separation chosen by the NRA. Moreover it is not clear the relation between the difficulty of reversing the functional separation and the legal provisions to deal with it, indeed despite of the fact that the NRA demonstrated that the functional separation is necessary, the reversibility of the measure strongly depends on the specific options and obligations imposed to implement the functional separation which may for example also directly include from the beginning reversibility option.

As for the necessary analysis of proportionality, Wind totally agrees with the Commission that the NRA will be required to follow specific procedures to justify the implementation of functional separation in the national markets. Furthermore, from Wind's point of view, demonstrating the need of the functional separation doesn't mean automatically an unjustified *burden* for the NRA (see the first indention of chapter 2.1.2) but obviously, as "exceptional" and "last resort" measure to ensure the provision of fully equivalent access product to all downstream division, it will likely imply a reasonable but still justified effort by the NRA. In fact it is worth noting that among other factors lists:

- *the "reasonable" amount of time between the imposition of the obligations foreseen in Articles 9 to 13 and the proposal of a functional separation by the NRAs and*
- *whether the standard wholesale access obligations have been properly imposed and systematically enforced.*

Both conditions listed in the above points should be, in Wind view, easy to be verified if, after the second/third round of market analysis (namely more than 10 years of regulation), the NRA still highlights that the competition is not yet sufficient due to the inefficacy of remedies imposed on the incumbent (Wind assumes that, after 10 years of experience and a couple of market analysis, remedies should be designed and consistently applied)

As for the issue of reversing FS, Wind finds it a really remote and an "happy problem" given that such a situation would only occur if market structure has evolved towards a scenario in which the discriminatory concerns addressed by the FS are no more present or much less relevant. Such a situation would inevitably not be reached in a short term perspective (since persistence also in a forward looking view of discriminatory behaviors is a prerequisite for FS) and hence NRA and Altnet would all have the possibility to progressively deal with it for example following a procedure similar to those adopted in competition law context for the removal of undertakings adopted in presence of a conditioned merge.

Wind comment on paragraph 2.1.4. "Content of the proposal to the Commission"

Wind agrees with BEREC that the functional separation should be proposed to the Commission by the NRA only after a *national* analysis that takes due account of the specificities of the *national* markets.

Among the elements needed by an NRA to demonstrate that imposition of FS is justified according to Article 13a:

First, the NRA has to provide evidences justifying its conclusions that the conditions of Article 13a (1) are met. In this respect, as also stated in the comments to chapter 2.1.2., Wind believes that this condition seems to be the natural conclusion if after two or three rounds of market analysis (see also 2.1.4 answer) there is evidence of national markets lacking of sufficient competition.

Second, the Draft seems to suggest that a quantitative impact analysis should be required. In this regard is worth remembering that reference to impact analysis has also been addressed with respect to common remedies as well as by the revised ERG itself which in the Common Position on the approach to appropriate remedies in the ECNS regulatory framework[3] explains in several part of the document that an NRA should take into account several impacts, also related to the imposition of remedies, for example:

- An NRA imposing remedies must considers that "*Regulatory decisions in one sector will, of course, always have an impact on the other sector, which has to be taken into account by NRAs when evaluating the effects of regulatory action*"[4]
- "*In applying remedies, NRAs will need to bear in mind how effective these remedies are in achieving their objectives. This will be important when NRAs come to consider the issue of*

[3] *ERG Common Position on the approach to Appropriate remedies in the new regulatory framework* - 29 May 2006 - http://www.erg.eu.int/doc/meeting/erg_06_33_remedies_common_position_june_06.pdf

[4] *Chapter 2.3.4 Case 4: Termination - ERG Common Position on the approach to Appropriate remedies in the new regulatory framework* - 29 May 2006 - http://www.erg.eu.int/doc/meeting/erg_06_33_remedies_common_position_june_06.pdf

proportionality as the negative impacts of a remedy need to be balanced against how effective it is"[5]

- "*The impact on market players might also have to be considered if there is strong evidence to believe that the immediate introduction of a remedy might cause excessive adjustment costs*"[6]
- "*NRA also has to bear in mind the impact that their actions have on the incentives to invest in alternative infrastructure. This is made explicit in the recitals to the Access Directive where it is stated that "the imposition by national regulatory authorities of mandated access that increases competition in the short-term should not reduce incentives for competitors to invest in alternative facilities that will secure more competition in the long-term*"[7]

After two-three year of market analysis experience it clearly emerged as a common practice that the impact analysis being referred to is qualitative rather than quantitative. Accordingly it can be also assumed that for a functional separation the NRAs will adopt a similar approach, considering that actually in the Art. 13 (a) and Art. 13 (b) of the revised Framework[8], as is for the standard remedies, there are no explicit requests to a *quantitative assessment of both benefits and costs*.

Assessment of the need to impose functional separation

The reported procedure to demonstrate the need of a functional separation seems to be only objective, not *emphasized*, that is:

"*The starting point of the analysis provided by Article 13a is the requirement for the NRA to conclude "that the appropriate obligations […] have failed to achieve effective competition and that there are important and persisting competition problems and/or market failures identified […]"*

As a matter of fact, if on one hand it is reasonable to require a deep and reasoned analysis to impose this remedy, especially because is defined as a "measure of last resort", on the other hand many steps of this procedure are already provided for the procedure of SMP individuation on a specific market.

Moreover, it is reasonable to consider that if, after the second/third round of market analysis the competition is not yet sufficient and is harmed by the SMP operator, it is almost clear that the competitive problem is the vertical integration itself given that different and several remedies were imposed on the incumbent for more than 10 years and fine tuned by at least a couple of market analysis cycles.

For what concern the relation between the functional separation and the incentive to invest it is important to highlight two main consideration which are summarized by Figure 2.

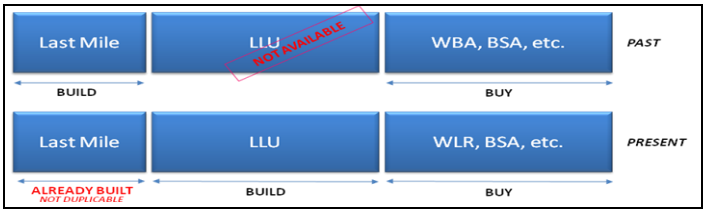
[5] *Chapter 4.2.1 NRAs should produce reasoned decisions in line with their obligations under the Directives - ERG Common Position on the approach to Appropriate remedies in the new regulatory framework* - 29 May 2006 http://www.erg.eu.int/doc/meeting/erg_06_33_remedies_common_position_june_06.pdf

[6] *Chapter 4.2.1 NRAs should produce reasoned decisions in line with their obligations under the Directives - ERG Common Position on the approach to Appropriate remedies in the new regulatory framework* - 29 May 2006 http://www.erg.eu.int/doc/meeting/erg_06_33_remedies_common_position_june_06.pdf

[7] *Chapter 4.2.3 Supporting feasible infrastructure investment - ERG Common Position on the approach to Appropriate remedies in the new regulatory framework* - 29 May 2006 http://www.erg.eu.int/doc/meeting/erg_06_33_remedies_common_position_june_06.pdf

[8] *DIRECTIVE 2009/140/EC, amending Directives 2002/21/EC (Framework Directive), 2002/19/EC (Access Directive, and 2002/20/EC (Authorization Directive)*

Figure 2. The make or buy decision before (*past*) and after (*present*) introduction of LLU

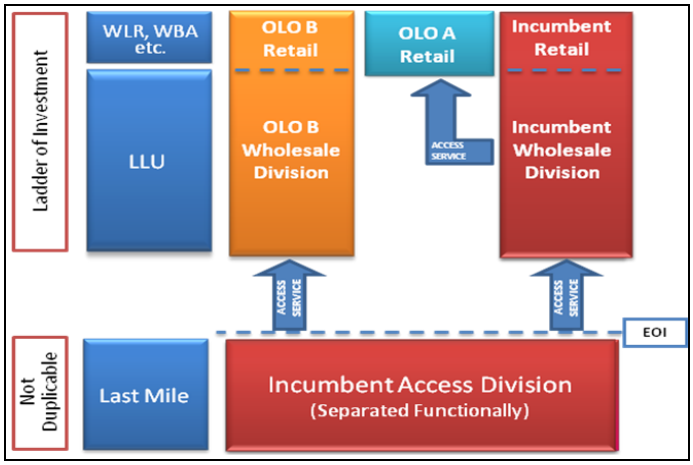


First, the above mentioned concept of *incentive to investments* usually refers to the possibility for OLOs to build a network, last mile included, despite of the fact that such possibility exist or not in the reality of economics faced by an efficient investor.

For example before the introduction of LLU wholesale access in several EU countries Incumbents contrasted introduction of LLU exactly saying that such introduction would have altered incentives to invest in a parallel access network. On those grounds some Authority took the (wrong) decision to not fully enforce such remedy from the beginning on the (wrong) basis that investment decision faced by new entrant were to "build" a full parallel network or to "buy" CPS/CS and WBA access services. Time and market evidenced showed that the option to build a parallel copper access network was not a real one being the real investment decision to "build" a parallel network to local exchanges to use LLU or to "buy" CPS/CS WBA wholesale access services.

Figure 3 below clearly summarizes for the copper and according to the real investment choices how a FS would not modify any real investment decision.

Figure 3 Functional separation and implications according to real investment choices for copper



Taking into account the above considerations in practice the s.c. *ladder of investment* doesn't include anymore the Last Mile (see **Erreur ! Source du renvoi introuvable.**), therefore, despite of the fact that the wholesale access services are provided by the incumbent or by its separated unit, the willingness of the alternative operator to invest on its own infrastructure depends primarily on the necessity to climb the ladder of investment, then to reduce its dependency on incumbent's network, so there is no actual reason to fear a reduction of investments.

Second, and for absurd, even if we include the rebuilding of Last Mile as a real option in the ladder of investment, from Wind's point of view there is still no reason to fear a reduction of investments incentives. As a matter of fact it should be considered that exist two different drivers of investments:

- Virtuous incentive: such as, for example, the achieving of economy of scale and earn from the entire part of the value chain;
- Perverse incentive: such as the necessity to invest in alternative infrastructures for self-defense so as to compensating the regulatory inefficacy, reducing the possibility of discriminatory behaviors by the incumbent operator.

Bearing in mind these two drivers, it is without doubt that investments should be only driven by virtuous needs, and taking into account the definition of functional separation of the Article 13a, by which is required *to supply access products and services by a separated unit on an equivalent basis to all communication providers, including the downstream arms of the separated undertaking*, it seems reasonable to consider that an *eventual* reduction of OLOs' investments will only affect the perverse incentive leaving unaltered the virtuous one.

On the other side should be evaluated that when reached an overall non discrimination provision of the access inputs, competition moves from the access infrastructure[9] to the provision of innovative services to the final customers. So investments will move from low to high technologies, being redirected to implementation of transmission technologies , IT systems and platforms to deliver better or new services (both from incumbent and Altnets)

Assessment of the need of imposing functional separation

Wind shares the opinion of BEREC regarding to the fact that "*according to Article 13a(2)(c), NRAs shall assess the impact of the imposition of functional separation from several points of view, which includes the effects on the NRA, on the undertaking and on the sector as a whole, with a special view on the workforce, on the incentives to invest, taking into account social and territorial cohesion, and on the overall competitive situation and on consumers*".

Wind comment on paragraph 2.1.5 "Contents of the draft measures"

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While the proposal must provide information supporting the basis leading to impose the separation, the draft proposal should specify ***how*** such a separation would be performed.

In art. 13a are listed the minimum elements that should be included in the draft proposal, but must be considered that a more detailed definition of the imposed separation would provide more certainty about the way in which the new separated entity will operate, lifting any possibility for the incumbent to depower the FS effects.

Hereafter are illustrated the Wind observations to the set of elements listed.

A) *"the precise nature and level of separation, specifying in particular the legal status of the separate business entity".*

Among the minimum points listed in art 13a.3 can be found the "*precise **nature** and **level** of separation, specifying in particular the **legal status** of the separate business entity*".

[9] which duplication in the most periferical part are widely considered inefficient.

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In doing such specification the NRA shouldn't be constrained to adopt one of the 6 predetermined solutions (or combination of them) but must choose any possible solution considered to be the most suitable to the specificity of the country market situation.

In any case Wind share the BEREC opinion that the NRA are entitled to impose any kind of separation both the one leading to a separate company (even if fully owned by the same incumbent's shareholder or not) and the one leading to a simple business unit or division.

Independently from the formal solution adopted to "label" the separation imposed, the most relevant point remains the way in which it works, remind that the scope of the separated entity is to "*supply access products and services to all undertakings, including to other business entities within the parent company "* in the same ways so to place all the player in a really level playing field.

B) "an identification of the assets of the separate business entity, and the products or services to be supplied by that entity".

WIND agrees with BEREC draft guidelines about the relevance of a proper definition of assets to be provided to the separated entity and the services that it will provide, in order to reduce arbitrary implementation of functional separation across Europe.

On the opposite Wind doesn't agree on the possibility that the separated entity could guarantee a non discriminatory provision of the services adopting indifferently equivalence of input or equivalence of output.

Even Ofcom recognized this issue when it compared its proposed Equivalence of Input obligation to the far less effective Equivalence of Output obligation; *"In principle, equivalence of input delivers many advantages over equivalence of outcome. It generates better incentives to BT to improve the products it offers to its competitors, it increases transparency, it is easier to monitor compliance, and it would require less on-going intervention by Ofcom. It therefore offers greater potential to solve the problem of inequality of access in a sustainable fashion" (page 68* Strategic Review of Telecommunications *- SRT)*

So Wind reaffirm, once again, that a separated entity in charge of providing access services in a non discriminatory way could only operate on Equivalence of Input basis meaning that in practice the separated entity would have to supply all access seekers (including retailers referable to the incumbent) with, at least, :

a) the same service;
b) on the same terms and conditions (both technical and economics);
c) using the same operational support systems (including ordering, provisioning, invoicing, billing, fault rectification and reporting);
d) with access delivered in the same timeframes.

The experience of the Italian case leaded the NCA (AGCM) to open a proceedings (A428 - WIND-FASTWEB/CONDOTTE TELECOM ITALIA) against the operational behavior of Telecom Italia confirming the low relevance of an EoO basis.

Regarding the identification of the **assets to be assigned to the separate entity**, and the products or services to be supplied by that entity, their identification should be based on the principle of **causality**, respecting the **ladder of investment** and **ancillarity**.

The assets to be assigned to the separated entity would be that involved in the provision of services (**causality**) which resulted so affected by discriminatory practices to drove NRA to adopt an extreme solution like the imposition of a form of separation, so including not only passive assets, but including also "active" elements.

Another key principle to be followed in such activity is the one of "**ladder of investment**", in order to assure the benefit of the measure to all the forms of competition in the market.

For example in Italy a separation that will include the only passive access infrastructure, like copper lines ducts and co-location facilities excluding all the services related to the WBA (wholesale Broadband access) provision would hamper the sustainability of competition both in the actual "copper" market, reducing the capability of operators to build up a customer base enabling investment in LLU facilities, and even on a forward looking approach related to the coming NGA adoption.

Same consideration apply to the **ancillary services** needed to effectively use the main (core) services provided by the separated entity. Among them can be listed the co-location related services, (i.e. power supply, conditioning, in building backhauling, short –medium backhauling)

In the assets (material or immaterial) to be conferred to the separated entity should be included also the commitments to promote the maintenance and the evolution of separated infrastructures[10] in order to avoid that such separation would be detrimental of the innovation process needed to promote the evolution of the EU market.

C) *"the governance arrangements to ensure the independence of the staff employed by the separate business entity, and the corresponding incentive structure".*

The guidelines report a series of measures aimed to grant the independence of the separate entity in its decisional process, investment decision procedures, information handing and diffusion throughout the company, personnel activities and incentives program, all of them agreeable even if must be clearly specified that in the draft measure all of them should be clearly described in terms of:

- Procedures;
- Auditing activity (to verify procedures respect)
- Sanctioning process.

[10] E.g. defining research and development (R&D) plans.

Must also be eliminated the possibility that some dept. of the separated company can use as "consultant" the correspondent dept. in the incumbent company, in order to avoid tunneling of the Chinese walls that should be defined in the draft measure.

Regarding this guidelines aspect should be promoted that bonus and incentives schemes, in addition to be linked to the separated entity's objectives rather than to the ones of the whole company, should be defined in a way capable to promote non discrimination, i.e. specifying explicitly that bonus and incentives objectives must be related to **equivalence of performance provided to the whole set of companies served**.

Example could be the level of refusal of orders provided to the different retailers, measured in a predefined and fully equivalent way.

Particular relevance must be placed in the definition of the IT systems supporting the provision of separated company services (OSS) and its upgrade or modification.

D) "rules for ensuring compliance with the obligations".

Guidelines should highlight that what referred by the point d) of the directive ("rules for ensuring compliance with the obligations") should cover both :

- the obligation specifically imposed on the separated entity under art. 13a;
- all the other ordinary obligations already imposed on the incumbent company and which interact with those specific measures regarding the separated entity.

For such a complex task, Wind view is that such a compliance activity shall be preferably under the responsibility of the NRA. Placing the burden of enforcement on the NRA leaves to the Authority to decide whether a newly created and dedicate body under NRA control would be preferable. Following such approach would have the following benefits:

- eliminate the overhead related to the relationships between an additional body separated and not dependent from the NRA and the NRA.
- eliminate the regulatory uncertainty regarding the overlaps between NRAs activities and those of a separated and independent body which at a minimum introduce delays in the enforcement activity.

If the institution of an independent body is foreseen in the draft measure it must be accompanied by full and detailed definition of at least:

- Rules regarding composition of Board and staff members of the new body
- Rules regarding the relationships between such body and the NRAs in the matter of powers, sanctions, and proposals for amendments to operative issues.

- Rules and Operational procedures regarding how such body interacts with the SMP operators separated entities and the Altnets (including reporting activities by the Body aimed at assuring full transparency over its operate)
- Financing

With respect to the option regarding the assignment of any compliance activity to a single officer employed by the SMP operator, Wind does not valuate such solution as a viable one and invites the BEREC to remove it from the final Guidelines.

Regardless of the solution adopted, the final Guidelines shall include two more aspects, not included in the Draft document.

The first relates to conditioning eventual amendments to obligations already imposed on the SMP and which are envisaged to be modified once the FS is in place only to the effective achievement of predefined outcomes in terms of eliminating discriminatory behaviors to be verified by the indicators better described in point f). The need to link any relaxation of ordinary obligation not to FS expected positive impacts but only to effective and real results is fundamental to avoid incumbent anticompetitive tactics to delay implementation, effectiveness and efficacy of FS which would result if an immediate relaxation of the ordinary obligation is granted on the basis of a forward looking evaluation.

E) "rules for ensuring transparency of operational procedures, in particular towards other stakeholders".

Ensure an equal and transparent access to the services provided by the functionally separated entity must be considered the main objective of the separation process addressed by art 13.a.

In order to do this the final Guidelines should contain among the others, some provisions related to the way in which operational process and systems are *designed* , *managed* and *updated*, considering that if a separation measure has to be adopted it is because ordinary non discrimination obligations have revealed insufficient.

The guidelines should, at least, state that :

- the OSS modification process should be conducted in an open and transparent manner to keep into account the requirements of all the retailers using the separated entity including the SMP one.
- It should be foreseen a process to allow for any retailer to ask for new developments or particular configuration or arrangements of the infrastructure and services provided by the separated entity in order to foster innovation and investments. Obviously all the information and negotiation should be transparently managed and openly shared since the beginning with all parties showing interested.

F) "a monitoring program to ensure compliance, including the publication of an annual report".

A relevant element of the draft measure is the set of measures identified in order to verify effectiveness of the separation, because the modification of the current obligation must be

conditioned to the successful implementation of the separation and provisioning of the awaited precompetitive results.

The final Guidance must contain a detailed description of, at least, the minimum set of measures aimed at verifying the full implementation of non discrimination, including :

- KPI and KPO and description of parameters needed to verify them;
- Principle regarding definition of measurement methods, measuring points, frequency of measure;
- Internal auditing activity description

First, the definition of the KPO (Key performance objectives) and KPI (Key performance indicator) that should be measured to verify effectiveness of FS is at the basis of the monitoring program. For each of the parameters identified it must be appropriately specified how it is calculated and the measuring points in order to prevent misleading comparisons or measurements of performance not adherent to the reality and which would also lead to an inappropriate relaxation of ordinary obligations.

Second, reports on the activity of the separated entity constitute a key element of the separation process. Such a reporting activity must be carefully **scheduled in terms of frequency and timing of release**.

In other words even if for some internal auditing activity report a yearly frequency would be acceptable, for the main operative parameters (e.g. indicators related to delivery and assurance processes, availability of the network elements and services, product equivalence, behavioral metrics) it is reasonable to expect that reports should be produced on a much more frequent basis (e.g. monthly), and must be available (online and in electronic format) within 15 days from the period of reference. Such a strict procedure is fundamental to enable timely fine tuning of operational problems and to avoid that temporary but still relevant problems may not be detected due to averaging over a longer time period.

Notwithstanding the Guidance document Wind invites BEREC to start developing benchmarks on KPI and KPO to facilitate performance comparison all over EU as well as emerging of best practices, irrespective of FS being in place or not.

As a general remark it must be noted that, even if a cross country comparison of such parameters, is easier in case of separation[11], the above would be useful, in general, to increase enforcement of the ordinary non discrimination obligations.

Wind comment on paragraph 2.2. "Voluntary separation by a vertically integrated undertaking (Article 13b)"

Art 13b of the Access Directive addresses the issue of voluntary separation, **proposed** by a vertically integrated incumbent. According to the fact that only the cases of *separation* (not always functional) occurred in EU are exactly on the basis of voluntary actions by the incumbents, the

[11] Where points of measurements and performance are easily comparable.

relevance of such Article is somehow even higher than that of Art. 13a. Accordingly and given the complicated procedure set by Art. 13b it is of the outmost importance that guidance by BEREC regarding Art. 13b is particularly detailed and aimed at avoiding that it becomes an "opportunistic option" in the hands of the incumbents to delay or postpone appropriate enforcement and development of ordinary obligations.

In this sense the Italian case is exemplary of such situation, were, briefly, Telecom Italia with its proposal stopped and delayed the just started market analysis related to markets 1, 4,5 for around a year (it took 24 months to complete the second round of market analysis for access services compared to 14 months for the first round).

Scope of these guidelines should be the previous analysis of the issues that may arise from application of art 13b by NRAs.

The main issues to be addressed by the guidelines relate to:

1. Communication of the intention and related timing
2. Evaluation of the relevance of the proposal
3. Market analysis and interactive process to tune separation proposal

Wind comment on paragraph 2.2.2 " NRA role"

If the intended changes fall in the scope of art 13b , means that the incumbent is :

- Changing the ownership of its access network **or**,
- setting up a separate entity that, for its intrinsic structure, would perform the provisioning of access products ***on a fully equivalent basis***, to the whole set of players in the downstream market,

In both case it's evident the relevance of the changes and the need for an NRA deep evaluation of the impact on the related markets, assessing the effects of the intended transaction on existing regulatory obligations, performing a coordinated analysis of the different markets related to the access network in accordance with the procedure set out in Article 16 of Directive 2002/21/EC (Framework Directive).

On the basis of its assessment, the NRA shall impose, maintain, amend or withdraw obligations, in accordance with Articles 6 and 7 of Directive 2002/21/EC (Framework Directive).

In the first case foreseen in art 13b it is clearly evidenced the possibility of a partial separation of the access network:

> *"when they intend to transfer their local access network assets* ***or a substantial part thereof*** *to a separate legal entity under different ownership"*

Such specification is, in Wind view, particularly relevant in the actual phase which sees access network going through significant technological upgrade moving towards fiber optical solutions.

The NRA should evaluate carefully intended separation aimed to partially separate portion of copper or fiber network in order to avoid that patchwork regulatory context may further complicate

the transition phase which is already widely recognized as a critical one and a candidate for possible preemption and anticompetitive behaviors by SMP operators.

The Draft document correctly address the matter of the modification of the intended voluntary separation on unilateral basis by the incumbent, after the original proposal, under the provisions of art 13b.1 where it states that :

> *Undertakings shall also inform the national regulatory authority of any change of that intent as well as the final outcome of the process of separation.*

Such modification according to the Draft is possible both:

i. during the phase in which NRA evaluates if proposed separation is eligible to fall in the scope of art 13b

ii. later (in case the intended separation passes the first assessment of eligibility by the NRA) after the *ad hoc* public consultation but during the market analysis process.

Wind shares the need that during the preliminary phase (i) such possibility allows for a positive negotiation between NRA and the SMP operators on the adjustments that would be needed to the proposal in order to fall into Art. 13b perimeter. On the contrary Wind disagrees with the possibility for the SMP operator to withdraw or substantially modify its proposal once the ordinary process for imposing the obligations has been affected (i.e. market analysis process stopped to wait for the final conclusion on the FS) since this, again, would give incentives and powers to SMP operators to strategically propose Art. 13b form of separation just to hamper the ordinary obligations imposition process and finally withdraw from the proposed transaction without suffering from any cost.

Accordingly Wind invites BEREC to modify the flow chart (in paragraph 2.2.3) of the process to be followed according to Art. 13b as follows:

1. **SMP to propose a voluntarily separation**
2. **NRA to evaluate interactively with SMP whether the proposed transaction or a modified form is eligible for Art. 13b**
3. **An *ad hoc* public consultation for a market-text of the proposed separation is opened.**
4. **After the conclusion of the public consultation the SMP operators confirms, modifies or withdraws the voluntarily separation.**
5. **From this moment the SMP operator cannot autonomously withdraw from the proposal.**
6. **Only in case the voluntarily separation is confirmed the process of imposing and reviewing ordinary obligations is affected**.

The possibility for the NRA to modify the intended changes must be foreseen in order to ***avoid to provide a tool to the Incumbent*** that could adopt it in order to introduce a perturbance in the implementation process and so masking inefficiency or delaying implementation.

Wind believe that the guideline sentence:

> *A frequent interaction between the NRA and the SMP operator **during the market analysis** that follows the notification of the intention to separate the access network should ensure a smooth communication process which could facilitate the assessment of the measure by the NRA.*

should be integrated, specifying that such interaction must be conducted in a transparent way, with the contribution of the Altnets involved in the markets affected proposal (for example by means of a public hearing).

In any case the results of the coordinated market analysis, ***shouldn't produce a withdrawal or relaxation of existing remedies only on the basis of a forward looking approach***, but the remedies modification must be conditioned to the evidence of results previously defined, in terms of value and measurement methods.

Such measurements must be conducted only **after the full implementation of the intended changes**, in order to avoid any incumbent policy aimed to gain immediately advantages postponing pro-competitive effect to a later date.

The introduction of measures aimed to reinforce existing remedies in case the awaited results are not obtained would constitute an efficient **deterrent for potential abuse** by the incumbent of the previsions reported in art 13b.

Wind comment on paragraph 2.2.3 "Timing of the Communication and procedures"

With respect to paragraph 2.2.3,Wind opinion is that current guidance provided by BEREC with respect to the situations which should be treated according to the procedure set forth by Article 13b is misleading of the dictate of the Article and could result in jeopardizing the market analysis process by exposing it to the power of SMP operator to submit voluntarily undertakings with the scope of stopping already in course market analysis proceedings or re-open some market analysis as part of a delaying tactic.

Such a risk is fully acknowledged by BEREC which in fact sees the need to specify that:

> *"The NRA could carry out a preliminary assessment of the communication received aimed at avoiding that the SMP operator presents a voluntary separation plan that is manifestly unreasonable, which would require the NRA to start its activities uselessly."*

While on one hand Wind fully shares the above mentioned statement, on the other we strongly opposes the following part of the paragraph whereby such relevant preliminary assessment is described and simplified as follows:

> *"This first screening could assess the reliability/seriousness of the intended transaction and its suitability to improve the conditions of competition in the sector."* (Emphasis added)

In Wind view the dictate of the Article 13b is clear and only reduces the applicability of the procedure to two very relevant cases: the first is transfer of local access assets to a separate entity under different ownership, the second being the establishment of a separate business entity to provide fully equivalent access products to all retail providers including own retail divisions.

> *"Undertakings which have been designated as having significant market power in one or several relevant markets in accordance with Article 16 of Directive 2002/21/EC(Framework Directive) shall inform the national regulatory authority in advance and in a timely manner, in order to allow the national regulatory authority to assess the effect of the intended transaction, when they intend to transfer their local access network assets or a substantial part thereof to a separate legal entity under different ownership, or to establish a separate*

business entity in order to provide to all retail providers, including its own retail divisions, fully equivalent access products." (Emphasis added)

Given the statement regarding **"Functional Separation" at least implies "EoI" to deliver "full EoA"**, it seems more than logic that the NRAs assessment with respect to the second case (the first case being very easy to judge) shall then be with respect to the capability of the proposed transaction to deliver EoI and not to just assess whether the transaction is suitable to improve competitive conditions which seems rather generic and arbitrary.

According to the above Wind opinion is that the Italian case should exactly be seen as an example of a transaction that, in light of Article 13b dictate and the fact that Telecom Italia did not propose a functional separation neither to deliver EoI, would not be considered applicable for the Art. 13b procedure.

With respect to the relevance of minimizing applicability of the Art. 13b procedure to real "EoI functional separation cases" Wind wishes to bring to the attention of the BEREC the Italian experience of dealing with TI undertakings.

Please note that Wind would be happy to expand on any of the points above.
Any question regarding these comments may be addressed to:

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