Working Party No. 2 on Competition and Regulation

STRUCTURAL SEPARATION IN TELECOMMUNICATIONS

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The attached document is submitted to Working Party No. 2 of the Competition Committee FOR DISCUSSION under item III of the agenda at its meeting on 14 June 2010.

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Structural separation in telecommunications

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“The views expressed are purely those of the speaker and may not in any circumstances be regarded as stating an official position of the European Commission”.

European Commission
DG Competition, Antitrust - Telecoms
Outline

- Why may separation be needed?
- If separation is needed, what is it that should be separated? – And how?
- Which instrument to apply? (interaction between competition and regulation in telecoms)
- Conclusion

Why may separation be needed?
Vertical integration – there are positive aspects...

- Integration along a « value chain » often concerns complementary products or services.
- Provides substantial scope for efficiencies.

Vertical integration is generally deemed to be less harmful to competition than horizontal integration:

- « For most vertical restraints, competition concerns can only arise if there is insufficient competition at one or more levels… » (Vertical Guidelines)
- « Non-horizontal mergers are generally less likely to significantly impede effective competition than horizontal mergers » (Non-horizontal merger Guidelines)
...but also concerns

- Increase in market power
- Larger scope for abusive behaviour
  - refusal to supply
  - Use of market power in one market to foreclose competition in another (bundling, tying)
Proportionality of remedies under EU antitrust law: structural remedies can only be imposed “where there is no equally effective behavioural remedy” – or if there was but it would be more burdensome for the company than the structural remedy.

Specificities of telecoms sector

- Rapidly evolving technology.
- Possibility to “work around” bottlenecks (e.g., VoIP).
- Platform competition is paramount: where there are alternative platforms to the incumbent’s, need to avoid that separation impacts negatively on innovation and incentives to invest in other platforms.
If separation is needed, what is it that should be separated? – And how?

- Wholesale/retail
- Two or three legs?
- Equivalence of input
- Need to remove possibilities for circumvention – incentives, governance
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- Does a structural remedy necessarily imply different ownership?
- New telecoms regulatory framework: functional separation of an independently operating business entity.

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Interaction between competition and regulation in telecoms
Regulation and competition

- Go hand in hand: ex-ante regulation and ex-post application of competition rules should support each other.
- Pro-competitive Regulation: Commission ensures that competition law principles are correctly applied by regulators
- Deutsche Telekom, Telefónica

The New Access Directive

- Art 13a – Functional Separation – an «exceptional measure» if regulatory obligations «have failed to achieve effective competition» and «there are important and persisting competition problems and/or market failures».
- Art 13b – Voluntary separation
Conclusions