

Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) (Text with EEA relevance)

PART II

NETWORKS

TITLE II

ACCESS

CHAPTER IV

*Access remedies imposed on undertakings with significant market power*

*Article 77*

**Functional separation**

1 Where the national regulatory authority concludes that the appropriate obligations imposed under Articles 69 to 74 have failed to achieve effective competition and that there are important and persisting competition problems or market failures identified in relation to the wholesale provision of certain access product markets, it may, on an exceptional basis, in accordance with the second subparagraph of Article 68(3), impose an obligation on vertically integrated undertakings to place activities related to the wholesale provision of relevant access products in a business entity operating independently.

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.

2 When a national regulatory authority intends to impose an obligation of functional separation, it shall submit a request to the Commission that includes:

- a evidence justifying the conclusions of the national regulatory authority as referred to in paragraph 1;
- b a reasoned assessment concluding that there is no or little prospect of effective and sustainable infrastructure-based competition within a reasonable time-frame;
- c an analysis of the expected impact on the national regulatory authority, on the undertaking, in particular on the workforce of the separated undertaking, and on the electronic communications sector as a whole, and on incentives to invest therein, in particular with regard to the need to ensure social and territorial cohesion, and on other stakeholders including, in particular, the expected impact on competition and any potential resulting effects on consumers;

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- d an analysis of the reasons justifying that this obligation would be the most efficient means to enforce remedies aimed at addressing the competition problems or the markets failures identified.
- 3 The draft measure shall include the following elements:
- a the precise nature and level of separation, specifying in particular the legal status of the separate business entity;
  - b an identification of the assets of the separate business entity, and the products or services to be supplied by that entity;
  - c the governance arrangements to ensure the independence of the staff employed by the separate business entity, and the corresponding incentive structure;
  - d rules for ensuring compliance with the obligations;
  - e rules for ensuring transparency of operational procedures, in particular towards other stakeholders;
  - f a monitoring programme to ensure compliance, including the publication of an annual report.

Following the Commission's decision taken in accordance with Article 68(3) on that draft measure, the national regulatory authority shall conduct a coordinated analysis of the different markets related to the access network in accordance with the procedure set out in Article 67. On the basis of that analysis, the national regulatory authority shall impose, maintain, amend or withdraw obligations, in accordance with the procedures set out in Articles 23 and 32.

- 4 An undertaking on which functional separation has been imposed may be subject to any of the obligations referred to in Articles 69 to 74 in any specific market where it has been designated as having significant market power in accordance with Article 67, or any other obligations authorised by the Commission pursuant to Article 68(3).