

- Its suggestion to balance the costs and benefits of structural separation still holds, as does the view that the costs and benefits will differ based on the economic characteristics of the industry in the country under review; and
- The Council Recommendation should remain in place as it is.³

4. This second report provides an update on experiences with structural separation in Member countries with respect to four industries: gas, electricity, telecommunications and rail.⁴ Ten years on from the adoption of the Recommendation, the conclusions remain broadly the same. Structural separation is a remedy of continued relevance, which can both advance the process of market liberalisation and address some of the difficulties inherent to behavioural remedies and more complex and intensive sector regulation. Nevertheless, structural separation may not be necessary or appropriate in all industries or markets. In particular, the impact of structural separation or the lack thereof on corporate incentives to invest in network industries has become a prominent issue. The choice of structural versus behavioural measures, in a given set of circumstances, therefore remains a matter that requires careful evaluation.

5. Structural solutions to competition problems differ from behavioural measures insofar as structural policies modify the incentives, whereas behavioural remedies try to redress specific conduct in a context where incentives remain essentially unchanged.⁵ The Recommendation elaborates upon this distinction, noting that *“behavioural policies, unlike structural policies, do not eliminate the incentive of the regulated firm to restrict competition”* and that *“despite the best efforts of regulators, regulatory controls of a behavioural nature, which are intended to control the ability of an integrated regulated firm to restrict competition, may result in less competition than would be the case if the regulated firm did not have the incentive to restrict competition”*. It further emphasizes that *“certain forms of partial separation of a regulated firm (such as accounting separation or functional separation) may not eliminate the incentive of the regulated firm to restrict competition and therefore may be less effective in general at facilitating competition than structural policies”*. While structural remedies are frequently viewed as more intrusive upon property rights than behavioural remedies,⁶ in the longer run the “clean break” offered by structural solutions may prove to be less intrusive than requiring a firm to adhere to detailed, prescriptive behavioural commitments that are unending in nature.

³ OECD Competition Committee, *Report on Experiences with Structural Separation*, published 7 June 2006, p.6.

⁴ With respect to Member countries that have joined the OECD since the publication of the 2006 report, information of a more general nature is provided, not being limited to recent developments.

⁵ The 2001 report describes the distinction between these two types of measures as *“those that primarily address the incentives on the incumbent to restrict competition (“structural”) approaches, and those that primarily control the ability of the incumbent to restrict competition (“behavioural”) approaches”*, and emphasises that *“[u]nder behavioural approaches, the regulator must struggle against the incentives of the incumbent to deny, delay or restrict access. Compared to the incumbent firm the regulator is usually at a disadvantage with respect to information and to the possible instruments of control. As a result, the level of competition under behavioural approaches is less than if the incumbent did not have the incentive to restrict competition. Certain tools, such as accounting separation, management separation or corporate separation, are not effective on their own, but may support other approaches, such as access regulation”*; see OECD, *Restructuring Public Utilities for Competition* (2001), at p.53. See also P. Hellström, F. Maier-Rigaud & F. Wenzel Bulst, “Remedies in European Antitrust Law” (2009) 76 *Antitrust law Journal* 43 for further discussion of the incentive-based distinction between behavioural and structural remedies. Of course, structural remedies may not only change the incentives but may simply take away the ability of the firm to influence the network.

⁶ Under EU competition law, for example, structural remedies can be imposed for breaches of the competition rules only where there are no equally effective behavioural remedies available, or where any equally effective behavioural remedy would be more burdensome than the structural remedy.