



European
Commission

Regulatory framework for **electronic communications** in the **European Union**

Situation in December 2009

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By the Commission of the European Union, Directorate-General for Communication Networks, Content and Technology.

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Preface to the February 2010 edition

The adoption of the EU electronic communications reform package in November 2009 paved the way towards strengthening the European electronic communications market by revising rules to ensure more effective competition and better rights for consumers.

Much has been accomplished already: the market has become more competitive, generating investment, innovation and growth in all 27 EU Member States. New communication services have emerged and EU citizens now benefit from lower prices, better quality and increased transparency. However, the common rules for the regulation of electronic communications networks and services are being implemented in the Member States with different degrees of effectiveness. As a result, many operators and citizens still perceive Europe as being a patchwork of different regulatory regimes. More efforts are therefore still needed to move towards a single market for electronic communications.

The revised EU framework constitutes the basis for a supportive and consistent regulatory environment targeting remaining challenges. They reinforce competition while enhancing incentives to invest. New provisions on freeing radio spectrum will improve the availability of new wireless services, including wireless broadband, at reasonable costs. The new body of European regulators (BEREC) will improve cooperation between national regulators and the European Commission. This will lead to the creation of a common "regulatory culture", to more consistency, and to a real single market for electronic communications networks and services.

The revised EU framework will thus better meet the future challenges arising from a rapidly evolving sector. Its timely implementation is essential and will ultimately benefit the European economy and society by providing it with the advanced electronic communications infrastructure it needs for its growth.

This collection of texts, which includes a consolidated version of the electronic communications reform package as amended in 2009, will prove a very useful resource for all those concerned with the application of law in the electronic communications sector.

Fabio Colasanti
Director General
Information Society and Media Directorate General



I – REGULATORY FRAMEWORK FOR NETWORKS AND SERVICES

DIRECTIVE 2009/140/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 25 November 2009

amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (*)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission, Having regard to the Opinion of the European Economic and Social Committee ⁽¹⁾,

Having regard to the Opinion of the Committee of the Regions ⁽²⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty, in the light of the joint text approved by the Conciliation Committee on 13 November 2009 ⁽³⁾,

Whereas:

- (1) The functioning of the five directives comprising the existing EU regulatory framework for electronic communications networks and services (Directive 2002/21/EC (Framework Directive) ⁽⁴⁾, Directive 2002/19/EC (Access Directive) ⁽⁵⁾, Directive 2002/20/EC (Authorisation Directive) ⁽⁶⁾, Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) ⁽⁷⁾, and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) ⁽⁸⁾ (together referred to as 'the Framework Directive and the Specific Directives') is subject to periodic review by the Commission, with a view in particular to determining the need for modification in the light of technological and market developments.
- (2) In that regard, the Commission presented its initial findings in its Communication of 29 June 2006 on the review of the EU regulatory

framework for electronic communications networks and services. On the basis of these initial findings, a public consultation was held, which identified the continued lack of an internal market for electronic communications as the most important aspect needing to be addressed. In particular, regulatory fragmentation and inconsistencies between the activities of the national regulatory authorities were found to jeopardise not only the competitiveness of the sector, but also the substantial consumer benefits from cross-border competition.

- (3) The EU regulatory framework for electronic communications networks and services should therefore be reformed in order to complete the internal market for electronic communications by strengthening the Community mechanism for regulating operators with significant market power in the key markets. This is complemented by Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office ⁽⁹⁾. The reform also includes the definition of an efficient and coordinated spectrum management strategy in order to achieve a single European information space and the reinforcement of provisions for users with disabilities in order to obtain an inclusive information society.
- (4) Recognising that the Internet is essential for education and for the practical exercise of freedom of expression and access to information, any restriction imposed on the exercise of these fundamental rights should be in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms. Concerning these issues, the Commission should undertake a wide public consultation.
- (5) The aim is progressively to reduce ex-ante sector specific rules as competition in the markets develops and, ultimately, for electronic communications to be governed by competition law only. Considering that the markets for electronic communications have shown strong competitive dynamics in recent years, it is essential that ex-ante regulatory obligations only be imposed where there is no effective and sustainable competition.
- (6) In carrying out its reviews of the functioning of the Framework Directive and the Specific Directives, the Commission should assess whether, in the light of developments in the market and with regard to both competition and consumer protection, there is a continued need for the provisions on sector specific ex-ante

(*) OJ L 337, 18.12.2009, p. 37.

⁽¹⁾ OJ C 224, 30.8.2008, p. 50.

⁽²⁾ OJ C 257, 9.10.2008, p. 51.

⁽³⁾ Opinion of the European Parliament of 24 September 2008 (not yet published in the Official Journal), Council Common Position of 16 February 2009 (OJ C 103 E, 5.5.2009, p. 1), Position of the European Parliament of 6 May 2009, Council Decision of 20 November 2009 and Legislative Resolution of the European Parliament of 24 November 2009.

⁽⁴⁾ OJ L 108, 24.4.2002, p. 33.

⁽⁵⁾ OJ L 108, 24.4.2002, p. 7.

⁽⁶⁾ OJ L 108, 24.4.2002, p. 21.

⁽⁷⁾ OJ L 108, 24.4.2002, p. 51.

⁽⁸⁾ OJ L 201, 31.7.2002, p. 37.

⁽⁹⁾ See page 1 of this Official Journal. [L 337, 18/12/2009]

regulation laid down in Articles 8 to 13a of Directive 2002/19/EC (Access Directive) and Article 17 of Directive 2002/22/EC (Universal Service Directive) or whether those provisions should be amended or repealed.

- (7) In order to ensure a proportionate and adaptable approach to varying competitive conditions, national regulatory authorities should be able to define markets on a sub-national basis and to lift regulatory obligations in markets and/or geographic areas where there is effective infrastructure competition.
- (8) In order to achieve the goals of the Lisbon Agenda, it is necessary to give appropriate incentives for investment in new high-speed networks that will support innovation in content-rich Internet services and strengthen the international competitiveness of the European Union. Such networks have enormous potential to deliver benefits to consumers and businesses across the European Union. It is therefore vital to promote sustainable investment in the development of these new networks, while safeguarding competition and boosting consumer choice through regulatory predictability and consistency.
- (9) In its Communication of 20 March 2006 entitled "Bridging the Broadband Gap", the Commission acknowledged that there is a territorial divide in the European Union regarding access to high-speed broadband services. Easier access to radio spectrum facilitates the development of high-speed broadband services in remote regions. Despite the general increase in broadband connectivity, access in various regions is limited on account of high costs resulting from low population densities and remoteness. In order to ensure investment in new technologies in underdeveloped regions, electronic communications regulation should be consistent with other policies, such as State aid policy, cohesion policy or the aims of wider industrial policy.
- (10) Public investment in networks should be made in accordance with the principle of non-discrimination. To this end, public support should be given by means of open, transparent and competitive procedures.
- (11) In order to allow national regulatory authorities to meet the objectives set out in the Framework Directive and the Specific Directives, in particular concerning end-to-end interoperability, the scope of the Framework Directive should be extended to cover certain aspects of radio equipment and telecommunications terminal equipment as defined in Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity⁽¹⁰⁾ and consumer equipment used for digital television, in order to facilitate access for disabled users.
- (12) Certain definitions should be clarified or changed to take account of market and technological

developments and to eliminate ambiguities identified in implementing the regulatory framework.

- (13) The independence of the national regulatory authorities should be strengthened in order to ensure a more effective application of the regulatory framework and to increase their authority and the predictability of their decisions. To this end, express provision should be made in national law to ensure that, in the exercise of its tasks, a national regulatory authority responsible for ex-ante market regulation or for resolution of disputes between undertakings is protected against external intervention or political pressure liable to jeopardise its independent assessment of matters coming before it. Such outside influence makes a national legislative body unsuited to act as a national regulatory authority under the regulatory framework. For that purpose, rules should be laid down at the outset regarding the grounds for the dismissal of the head of the national regulatory authority in order to remove any reasonable doubt as to the neutrality of that body and its imperviousness to external factors. It is important that national regulatory authorities responsible for ex-ante market regulation should have their own budget allowing them, in particular, to recruit a sufficient number of qualified staff. In order to ensure transparency, this budget should be published annually.
- (14) In order to ensure legal certainty for market players, appeal bodies should carry out their functions effectively; in particular, appeals proceedings should not be unduly lengthy. Interim measures suspending the effect of the decision of a national regulatory authority should be granted only in urgent cases in order to prevent serious and irreparable damage to the party applying for those measures and if the balance of interests so requires.
- (15) There has been a wide divergence in the manner in which appeal bodies have applied interim measures to suspend the decisions of the national regulatory authorities. In order to achieve greater consistency of approach common standards should be applied in line with Community case-law. Appeal bodies should also be entitled to request available information published by BEREC. Given the importance of appeals for the overall operation of the regulatory framework, a mechanism should be set up for collecting information on appeals and decisions to suspend decisions taken by the regulatory authorities in all the Member States and for the reporting of that information to the Commission.
- (16) In order to ensure that national regulatory authorities carry out their regulatory tasks in an effective manner, the data which they gather should include accounting data on the retail markets that are associated with wholesale markets where an operator has significant market power and as such are regulated by the national regulatory authority. The data should also include data which enables the national regulatory authority to assess the possible impact of planned upgrades or changes to network topology on the development of competition or on wholesale products made available to other parties.

⁽¹⁰⁾ OJ L 91, 7.4.1999, p. 10.

- (17) The national consultation provided for under Article 6 of Directive 2002/21/EC (Framework Directive) should be conducted prior to the Community consultation provided for under Articles 7 and 7a of that Directive, in order to allow the views of interested parties to be reflected in the Community consultation. This would also avoid the need for a second Community consultation in the event of changes to a planned measure as a result of the national consultation.
- (18) The discretion of national regulatory authorities needs to be reconciled with the development of consistent regulatory practices and the consistent application of the regulatory framework in order to contribute effectively to the development and completion of the internal market. National regulatory authorities should therefore support the internal market activities of the Commission and those of BEREC.
- (19) The Community mechanism allowing the Commission to require national regulatory authorities to withdraw planned measures concerning market definition and the designation of operators having significant market power has contributed significantly to a consistent approach in identifying the circumstances in which ex-ante regulation may be applied and those in which the operators are subject to such regulation. Monitoring of the market by the Commission and, in particular, the experience of the procedure under Article 7 of Directive 2002/21/EC (Framework Directive), has shown that inconsistencies in the national regulatory authorities' application of remedies, even under similar market conditions, could undermine the internal market in electronic communications. Therefore the Commission may participate in ensuring a higher level of consistency in the application of remedies by adopting opinions on draft measures proposed by national regulatory authorities. In order to benefit from the expertise of national regulatory authorities on the market analysis, the Commission should consult BEREC prior to adoption of its decisions and/or opinion.
- (20) It is important that the regulatory framework is implemented in a timely manner. When the Commission has taken a decision requiring a national regulatory authority to withdraw a planned measure, national regulatory authorities should submit a revised measure to the Commission. A deadline should be laid down for the notification of the revised measure to the Commission under Article 7 of Directive 2002/21/EC (Framework Directive) in order to allow market players to know the duration of the market review and in order to increase legal certainty.
- (21) Having regard to the short time limits in the Community consultation mechanism, powers should be conferred on the Commission to adopt recommendations and/or guidelines to simplify the procedures for exchanging information between the Commission and national regulatory authorities, for example in cases concerning stable markets, or involving only minor changes to previously notified measures. Powers should also be conferred on the Commission in order to allow for the introduction of a notification exemption so as to streamline procedures in certain cases.
- (22) In line with the objectives of the Charter of Fundamental Rights of the European Union and the United Nations Convention on the Rights of Persons with Disabilities, the regulatory framework should ensure that all users, including disabled end-users, the elderly, and users with special social needs, have easy access to affordable high quality services. Declaration 22 annexed to the final Act of Amsterdam provides that the institutions of the Community shall take account of the needs of persons with a disability in drawing up measures under Article 95 of the Treaty.
- (23) A competitive market provides users with a wide choice of content, applications and services. National regulatory authorities should promote users' ability to access and distribute information and to run applications and services.
- (24) Radio frequencies should be considered a scarce public resource that has an important public and market value. It is in the public interest that spectrum is managed as efficiently and effectively as possible from an economic, social and environmental perspective, taking account of the important role of radio spectrum for electronic communications, of the objectives of cultural diversity and media pluralism, and of social and territorial cohesion. Obstacles to its efficient use should therefore be gradually withdrawn.
- (25) Radio spectrum policy activities in the Community should be without prejudice to measures taken at Community or national level, in accordance with Community law, to pursue general interest objectives, in particular with regard to content regulation and audiovisual and media policies, and the right of Member States to organise and use their radio spectrum for the purposes of public order, public security and defence.
- (26) Taking into account the different situation in Member States, the switchover from analogue to digital terrestrial television would, as a result of the superior transmission efficiency of digital technology, increase the availability of valuable spectrum in the Community (known as the "digital dividend").
- (27) Before a specific harmonisation measure under Decision No 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision) ⁽¹¹⁾ is proposed, the Commission should carry out an impact assessment on the costs and benefits of the proposed measure, such as the realisation of economies of scale and the interoperability of services for the benefit of consumers, the impact on efficiency of spectrum use, or the demand for harmonised use in the different parts of the European Union.
- (28) Although spectrum management remains within the competence of the Member States, strategic

⁽¹¹⁾ OJ L 108, 24.4.2002, p. 1.

- planning, coordination and, where appropriate, harmonisation at Community level can help ensure that spectrum users derive the full benefits of the internal market and that EU interests can be effectively defended globally. For these purposes, where appropriate, legislative multiannual radio spectrum policy programmes should be established to set out the policy orientations and objectives for the strategic planning and harmonisation of the use of radio spectrum in the Community. These policy orientations and objectives may refer to the availability and efficient use of radio spectrum necessary for the establishment and functioning of the internal market and may also refer, in appropriate cases, to the harmonisation of procedures for the granting of general authorisations or individual rights of use for radio frequencies where necessary to overcome barriers to the internal market. These policy orientations and objectives should be in accordance with this Directive and the Specific Directives.
- (29) The Commission has indicated its intention to amend, before the entry into force of this Directive, Commission Decision 2002/622/EC of 26 July 2002 establishing a Radio Spectrum Policy Group ⁽¹²⁾ in order to provide a mechanism for the European Parliament and the Council to request opinions or reports, either orally or in writing, from the Radio Spectrum Policy Group (RSPG) on spectrum policy relating to electronic communications, and in order for RSPG to advise the Commission on the proposed content of the radio spectrum policy programmes.
- (30) The spectrum management provisions of this Directive should be consistent with the work of international and regional organisations dealing with radio spectrum management, such as the International Telecommunications Union (ITU) and the European Conference of Postal and Telecommunications Administrations (CEPT), so as to ensure the efficient management of and harmonisation of the use of spectrum across the Community and between the Member States and other members of the ITU.
- (31) Radio frequencies should be managed so as to ensure that harmful interference is avoided. This basic concept of harmful interference should therefore be properly defined to ensure that regulatory intervention is limited to the extent necessary to prevent such interference.
- (32) The current spectrum management and distribution system is generally based on administrative decisions that are insufficiently flexible to cope with technological and economic evolution, in particular with the rapid development of wireless technology and the increasing demand for bandwidth. The undue fragmentation amongst national policies results in increased costs and lost market opportunities for spectrum users, and slows down innovation, to the detriment of the internal market, consumers and the economy as a whole. Moreover, the conditions for access to, and use of, radio frequencies may vary according to the type of operator, while electronic services provided by these operators increasingly overlap,
- thereby creating tensions between rights holders, discrepancies in the cost of access to spectrum, and potential distortions in the functioning of the internal market.
- (33) National borders are increasingly irrelevant in determining optimal radio spectrum use. Fragmentation of the management of access to spectrum rights limits investment and innovation and does not allow operators and equipment manufacturers to realise economies of scale, thereby hindering the development of an internal market for electronic communications networks and services using radio spectrum.
- (34) Flexibility in spectrum management and access to spectrum should be increased through technology and service-neutral authorisations to allow spectrum users to choose the best technologies and services to apply in frequency bands declared available for electronic communications services in the relevant national frequency allocation plans in accordance with Community law (the "principles of technology and service neutrality"). The administrative determination of technologies and services should apply when general interest objectives are at stake and should be clearly justified and subject to regular periodic review.
- (35) Restrictions on the principle of technology neutrality should be appropriate and justified by the need to avoid harmful interference, for example by imposing emission masks and power levels, to ensure the protection of public health by limiting public exposure to electromagnetic fields, to ensure the proper functioning of services through an adequate level of technical quality of service, while not necessarily precluding the possibility of using more than one service in the same frequency band, to ensure proper sharing of spectrum, in particular where its use is only subject to general authorisations, to safeguard efficient use of spectrum, or to fulfil a general interest objective in conformity with Community law.
- (36) Spectrum users should also be able to freely choose the services they wish to offer over the spectrum subject to transitional measures to deal with previously acquired rights. On the other hand, measures should be allowed which require the provision of a specific service to meet clearly defined general interest objectives such as safety of life, the need to promote social, regional and territorial cohesion, or the avoidance of the inefficient use of spectrum to be permitted where necessary and proportionate. Those objectives should include the promotion of cultural and linguistic diversity and media pluralism as defined by Member States in conformity with Community law. Except where necessary to protect safety of life or, exceptionally, to fulfil other general interest objectives as defined by Member States in accordance with Community law, exceptions should not result in certain services having exclusive use, but should rather grant them priority so that, in so far as possible, other services or technologies may coexist in the same band.
- (37) It lies within the competence of the Member States to define the scope and nature of any

⁽¹²⁾ OJ L 198, 27.7.2002, p. 49.

exception regarding the promotion of cultural and linguistic diversity and media pluralism.

- (38) As the allocation of spectrum to specific technologies or services is an exception to the principles of technology and service neutrality and reduces the freedom to choose the service provided or technology used, any proposal for such allocation should be transparent and subject to public consultation.
- (39) In the interests of flexibility and efficiency, national regulatory authorities may allow spectrum users freely to transfer or lease their usage rights to third parties. This would allow spectrum valuation by the market. In view of their power to ensure effective use of spectrum, national regulatory authorities should take action so as to ensure that trading does not lead to a distortion of competition where spectrum is left unused.
- (40) The introduction of technology and service neutrality and trading for existing spectrum usage rights may require transitional rules, including measures to ensure fair competition, as the new system may entitle certain spectrum users to start competing with spectrum users having acquired their spectrum rights under more burdensome terms and conditions. Conversely, where rights have been granted as a derogation from the general rules or according to criteria other than those which are objective, transparent, proportionate and non-discriminatory with a view to achieving a general interest objective, the situation of the holders of such rights should not in an unjustified manner be to the detriment of their new competitors beyond what is necessary to achieve that general interest objective or another related general interest objective.
- (41) In order to promote the functioning of the internal market and to support the development of cross-border services, the Commission should be given the power to adopt technical implementing measures in the field of numbering.
- (42) Permits issued to undertakings providing electronic communications networks and services allowing them to gain access to public or private property are essential factors for the establishment of electronic communications networks or new network elements. Unnecessary complexity and delay in the procedures for granting rights of way may therefore represent important obstacles to the development of competition. Consequently, the acquisition of rights of way by authorised undertakings should be simplified. National regulatory authorities should be able to coordinate the acquisition of rights of way, making relevant information accessible on their websites.
- (43) It is necessary to strengthen the powers of the Member States as regards holders of rights of way to ensure the entry or roll-out of a new network in a fair, efficient and environmentally responsible way and independently of any obligation on an operator with significant market power to grant access to its electronic communications network. Improving facility sharing can significantly improve competition and lower the overall

financial and environmental cost of deploying electronic communications infrastructure for undertakings, particularly of new access networks. National regulatory authorities should be empowered to require that the holders of the rights to install facilities on, over or under public or private property share such facilities or property (including physical co-location) in order to encourage efficient investment in infrastructure and the promotion of innovation, after an appropriate period of public consultation, during which all interested parties should be given the opportunity to state their views. Such sharing or coordination arrangements may include rules for apportioning the costs of the facility or property sharing and should ensure that there is an appropriate reward of risk for the undertakings concerned. National regulatory authorities should in particular be able to impose the sharing of network elements and associated facilities, such as ducts, conduits, masts, manholes, cabinets, antennae, towers and other supporting constructions, buildings or entries into buildings, and a better coordination of civil works. The competent authorities, particularly local authorities, should also establish appropriate coordination procedures, in cooperation with national regulatory authorities, with respect to public works and other appropriate public facilities or property which may include procedures that ensure that interested parties have information concerning appropriate public facilities or property and on-going and planned public works, that they are notified in a timely manner of such works, and that sharing is facilitated to the maximum extent possible.

- (44) Reliable and secure communication of information over electronic communications networks is increasingly central to the whole economy and society in general. System complexity, technical failure or human mistake, accidents or attacks may all have consequences for the functioning and availability of the physical infrastructures that deliver important services to EU citizens, including e-Government services. National regulatory authorities should therefore ensure that the integrity and security of public communications networks are maintained. The European Network and Information Security Agency (ENISA) ⁽¹³⁾ should contribute to the enhanced level of security of electronic communications by, among other things, providing expertise and advice, and promoting the exchange of best practices. Both ENISA and the national regulatory authorities should have the necessary means to perform their duties, including powers to obtain sufficient information in order to assess the level of security of networks or services as well as comprehensive and reliable data about actual security incidents that have had a significant impact on the operation of networks or services. Bearing in mind that the successful application of adequate security is not a one-off exercise but a continuous process of implementation, review and updating, the providers of electronic communications networks and services should be required to take measures to safeguard their integrity and security

⁽¹³⁾ Regulation (EC) No 460/2004 of the European Parliament and of the Council (OJ L 77, 13.3.2004, p. 1).

in accordance with the assessed risks, taking into account the state of the art of such measures.

- (45) Member States should allow an appropriate period of public consultation before the adoption of specific measures to ensure that undertakings providing public communications networks or publicly available electronic communications services take the necessary technical and organisational measures to appropriately manage risk to security of networks and services or to ensure the integrity of their networks.
- (46) Where there is a need to agree on a common set of security requirements, power should be conferred on the Commission to adopt technical implementing measures to achieve an adequate level of security of electronic communications networks and services in the internal market. ENISA should contribute to the harmonisation of appropriate technical and organisational security measures by providing expert advice. National regulatory authorities should have the power to issue binding instructions relating to technical implementing measures adopted pursuant to Directive 2002/21/EC (Framework Directive). In order to perform their duties, they should have the power to investigate cases of non-compliance and to impose penalties.
- (47) For the purposes of ensuring that there is no distortion or restriction of competition in the electronic communications markets, national regulatory authorities should be able to impose remedies aimed at preventing leverage of significant market power from one market to another closely related market. It should be clear that the undertaking which has significant market power on the first market may be designated as having significant market power on the second market only if the links between the two markets are such as to allow the market power held in the first market to be leveraged into the second market and if the second market is susceptible to ex-ante regulation in accordance with the criteria defined in the Recommendation on relevant product and service markets⁽¹⁴⁾.
- (48) In order to provide market players with certainty as to regulatory conditions, a time limit for market reviews is necessary. It is important to conduct a market analysis on a regular basis and within a reasonable and appropriate time-frame. The time-frame should take account of whether the particular market has previously been subject to market analysis and duly notified. Failure by a national regulatory authority to analyse a market within the time limit may jeopardise the internal market, and normal infringement proceedings may not produce their desired effect on time. Alternatively, the national regulatory authority concerned should be able to request the assistance of BEREC to complete the market

analysis. For instance, this assistance could take the form of a specific task force composed of representatives of other national regulatory authorities.

- (49) Due to the high level of technological innovation and highly dynamic markets in the electronic communications sector, there is a need to adapt regulation rapidly in a coordinated and harmonised way at Community level, as experience has shown that divergence among the national regulatory authorities in the implementation of the EU regulatory framework may create a barrier to the development of the internal market.
- (50) One important task assigned to BEREC is to adopt opinions in relation to cross-border disputes where appropriate. National regulatory authorities should therefore take account of any opinions of BEREC in such cases.
- (51) Experience in the implementation of the EU regulatory framework indicates that existing provisions empowering national regulatory authorities to impose fines have failed to provide an adequate incentive to comply with regulatory requirements. Adequate enforcement powers can contribute to the timely implementation of the EU regulatory framework and therefore foster regulatory certainty, which is an important driver for investment. The lack of effective powers in the event of non-compliance applies across the regulatory framework. The introduction of a new provision in Directive 2002/21/EC (Framework Directive) to deal with breaches of obligations under the Framework Directive and Specific Directives should therefore ensure the application of consistent and coherent principles to enforcement and penalties for the whole EU regulatory framework.
- (52) The existing EU regulatory framework includes certain provisions to facilitate the transition from the old regulatory framework of 1998 to the new 2002 framework. This transition has been completed in all Member States and these measures should be repealed as they are now redundant.
- (53) Both efficient investment and competition should be encouraged in tandem, in order to increase economic growth, innovation and consumer choice.
- (54) Competition can best be fostered through an economically efficient level of investment in new and existing infrastructure, complemented by regulation, wherever necessary, to achieve effective competition in retail services. An efficient level of infrastructure-based competition is the extent of infrastructure duplication at which investors can reasonably be expected to make a fair return based on reasonable expectations about the evolution of market shares.
- (55) National regulatory authorities should, when imposing obligations for access to new and enhanced infrastructures, ensure that access conditions reflect the circumstances underlying the investment decision, taking into account, inter alia, the roll-out costs, the expected rate of take

⁽¹⁴⁾ Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services 2007/879/EC (OJ L 344, 28.12.2007, p. 65).

- up of the new products and services and the expected retail price levels. Moreover, in order to provide planning certainty to investors, national regulatory authorities should be able to set, if applicable, terms and conditions for access which are consistent over appropriate review periods. Such terms and conditions may include pricing arrangements which depend on volumes or length of contract in accordance with Community law and provided they have no discriminatory effect. Any access conditions imposed should respect the need to preserve effective competition in services to consumers and businesses.
- (56) When assessing the proportionality of the obligations and conditions to be imposed, national regulatory authorities should take into account the different competitive conditions existing in the different areas within their Member States.
- (57) When imposing remedies to control prices, national regulatory authorities should seek to allow a fair return for the investor on a particular new investment project. In particular, there may be risks associated with investment projects specific to new access networks which support products for which demand is uncertain at the time the investment is made.
- (58) Any Commission decision under Article 19(1) of Directive 2002/21/EC (Framework Directive) should be limited to regulatory principles, approaches and methodologies. For the avoidance of doubt, it should not prescribe detail which will normally need to reflect national circumstances, and it should not prohibit alternative approaches which can reasonably be expected to have equivalent effect. Such a decision should be proportionate and should not have an effect on decisions taken by national regulatory authorities that do not create a barrier to the internal market.
- (59) Annex I to Directive 2002/21/EC (Framework Directive) identified the list of markets to be included in the Recommendation on relevant product and service markets which may warrant ex-ante regulation. This Annex should be repealed since its purpose of serving as a basis for drawing up the initial version of the Recommendation on Relevant Product and Service Markets has been fulfilled.
- (60) It may not be economically viable for new entrants to duplicate the incumbent's local access network in part or in its entirety within a reasonable period of time. In this context, mandating unbundled access to the local loop or sub-loop of operators enjoying significant market power may facilitate market entry and increase competition in retail broadband access markets. In circumstances where unbundled access to local loop or sub-loop is not technically or economically feasible, relevant obligations for the provision of non-physical or virtual network access offering equivalent functionality may apply.
- (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. Functional separation has the capacity to improve competition in several relevant markets by significantly reducing the incentive for discrimination and by making it easier to verify and enforce compliance with non-discrimination obligations. In exceptional cases, functional separation may be justified as a remedy where there has been persistent failure to achieve effective non-discrimination in several of the markets concerned, and where there is little or no prospect of infrastructure competition within a reasonable time-frame after recourse to one or more remedies previously considered to be appropriate. However, it is very important to ensure that its imposition preserves the incentives of the concerned undertaking to invest in its network and that it does not entail any potential negative effects on consumer welfare. Its imposition requires a coordinated analysis of different relevant markets related to the access network, in accordance with the market analysis procedure set out in Article 16 of Directive 2002/21/EC (Framework Directive). When undertaking the market analysis and designing the details of this remedy, national regulatory authorities should pay particular attention to the products to be managed by the separate business entities, taking into account the extent of network roll-out and the degree of technological progress, which may affect the substitutability of fixed and wireless services. In order to avoid distortions of competition in the internal market, proposals for functional separation should be approved in advance by the Commission.
- (62) The implementation of functional separation should not prevent appropriate coordination mechanisms between the different separate business entities in order to ensure that the economic and management supervision rights of the parent company are protected.
- (63) Continued integration of the internal market for electronic communications networks and services requires better coordination in the application of the ex-ante regulation provided for under the EU regulatory framework for electronic communications.
- (64) Where a vertically integrated undertaking chooses to transfer a substantial part or all of its local access network assets to a separate legal entity under different ownership or by establishing a separate business entity for dealing with access products, the national regulatory authority should assess the effect of the intended transaction on all existing regulatory obligations imposed on the vertically integrated operator in order to ensure the compatibility of any new arrangements with Directive 2002/19/EC (Access Directive) and Directive 2002/22/EC (Universal Service Directive). The national regulatory authority concerned should undertake a new analysis of the markets in which the segregated entity operates, and impose, maintain, amend or withdraw obligations accordingly. To this end, the national regulatory authority should be able to request information from the undertaking.
- (65) While it is appropriate in some circumstances for a national regulatory authority to impose obligations on operators that do not have significant market

- power in order to achieve goals such as end-to-end connectivity or interoperability of services, it is however necessary to ensure that such obligations are imposed in conformity with the EU regulatory framework and, in particular, its notification procedures.
- (66) The Commission should be empowered to adopt implementing measures with a view to adapting the conditions for access to digital television and radio services set out in Annex I to Directive 2002/19/EC (Access Directive) to market and technological developments. This is also the case for the minimum list of items in Annex II to Directive 2002/19/EC (Access Directive) that must be made public to meet the obligation of transparency.
- (67) Facilitating access to radio frequency resources for market players will contribute to removing the barriers to market entry. Moreover, technological progress is reducing the risk of harmful interference in certain frequency bands and therefore reducing the need for individual rights of use. Conditions for the use of spectrum to provide electronic communication services should therefore normally be laid down in general authorisations unless individual rights are necessary, considering the use of the spectrum, to protect against harmful interference, to ensure technical quality of service, to safeguard efficient use of the spectrum or to meet a specific general interest objective. Decisions on the need for individual rights should be made in a transparent and proportionate manner.
- (68) The introduction of the requirements of service and technology neutrality in granting rights of use, together with the increased possibility to transfer rights between undertakings, should increase the freedom and means to deliver electronic communications services to the public, thereby also facilitating the achievement of general interest objectives. However, certain general interest obligations imposed on broadcasters for the delivery of audiovisual media services may require the use of specific criteria for the granting of rights of use when it appears to be essential to meet a specific general interest objective set out by Member States in conformity with Community law. Procedures associated with the pursuit of general interest objectives should in all circumstances be transparent, objective, proportionate and non-discriminatory.
- (69) Considering its restrictive impact on free access to radio frequencies, the validity of an individual right of use that is not tradable should be limited in time. Where rights of use contain provision for renewing their validity, competent national authorities should first carry out a review, including a public consultation, taking into account market, coverage and technological developments. In view of spectrum scarcity, individual rights granted to undertakings should be regularly reviewed. In carrying out this review, competent national authorities should balance the interests of the rights holders with the need to foster the introduction of spectrum trading as well as the more flexible use of spectrum through general authorisations where possible.
- (70) Minor amendments to rights and obligations are those amendments which are mainly administrative, do not change the substantial nature of the general authorisations and the individual rights of use and thus cannot cause any comparative advantage to the other undertakings.
- (71) Competent national authorities should have the power to ensure effective use of spectrum and, where spectrum resources are left unused, to take action to prevent anti-competitive hoarding, which can hinder new market entry.
- (72) National regulatory authorities should be able to take effective action to monitor and secure compliance with the terms and conditions of the general authorisation or of rights of use, including the power to impose effective financial or administrative penalties in the event of breaches of those terms and conditions.
- (73) The conditions that may be attached to authorisations should cover specific conditions governing accessibility for users with disabilities and the need of public authorities and emergency services to communicate between themselves and with the general public before, during and after major disasters. Also, considering the importance of technical innovation, Member States should be able to issue authorisations to use spectrum for experimental purposes, subject to specific restrictions and conditions strictly justified by the experimental nature of such rights.
- (74) Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop⁽¹⁵⁾ has proved to be effective in the initial stage of market opening. Directive 2002/21/EC (Framework Directive) calls upon the Commission to monitor the transition from the regulatory framework of 1998 to the 2002 framework and to bring forward proposals to repeal that Regulation at an appropriate time. Under the 2002 framework, national regulatory authorities have a duty to analyse the market for wholesale unbundled access to metallic loops and sub-loops for the purpose of providing broadband and voice services as defined in the Recommendation on Relevant Product and Service Markets. Since all Member States have analysed this market at least once and the appropriate obligations based on the 2002 framework are in place, Regulation (EC) No 2887/2000 has become unnecessary and should therefore be repealed.
- (75) Measures necessary for the implementation of Directive 2002/21/EC (Framework Directive), Directive 2002/19/EC (Access Directive) and Directive 2002/20/EC (Authorisation Directive) should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission⁽¹⁶⁾.
- (76) In particular, the Commission should be empowered to adopt Recommendations and/or implementing measures in relation to the

⁽¹⁵⁾ OJ L 336, 30.12.2000, p. 4.

⁽¹⁶⁾ OJ L 184, 17.7.1999, p. 23.

notifications under Article 7 of Directive 2002/21/EC (Framework Directive); harmonisation in the fields of spectrum and numbering as well as in matters related to security of networks and services; the identification of the relevant product and service markets; the identification of transnational markets; the implementation of standards and the harmonised application of the provisions of the regulatory framework. Power should also be conferred on the Commission to adopt implementing measures to update Annexes I and II to the Access Directive to market and technological developments. Since those measures are of general scope and are designed to amend non-essential elements of these Directives, inter alia, by supplementing them with new non-essential elements, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 2002/21/EC (Framework Directive)

Directive 2002/21/EC is hereby amended as follows:

[see consolidated version of Directive 2002/21/EC]

Article 2

Amendments to Directive 2002/19/EC (Access Directive)

Directive 2002/19/EC is hereby amended as follows:

[see consolidated version of the Directive 2002/19/EC]

Article 3

Amendments to Directive 2002/20/EC (Authorisation Directive)

Directive 2002/20/EC is hereby amended as follows:

[see consolidated version of Directive 2002/20/EC]

Article 4

Repeal

Regulation (EC) No 2887/2000 is hereby repealed.

Article 5

Transposition

1. Member States shall adopt and publish by 25 May 2011 the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of such provisions.

They shall apply those measures from 26 May 2011.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 6

Entry into force

This Directive shall enter into force on the day following its publication in the Official Journal of the European Union.

Article 7

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 25 November 2009.

For the European Parliament

For the Council

The President

The President

J. BUZEK

Å. TORSTENSSON

DIRECTIVE 2009/136/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 25 November 2009

amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (*)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,

Having regard to the opinion of the Committee of the Regions ⁽²⁾,

Having regard to the opinion of the European Data Protection Supervisor ⁽³⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽⁴⁾,

Whereas:

- (1) The functioning of the five directives comprising the existing regulatory framework for electronic communications networks and services (Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) ⁽⁵⁾, Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) ⁽⁶⁾, Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) ⁽⁷⁾, Directive 2002/22/EC (Universal Service Directive) ⁽⁸⁾ and Directive 2002/58/EC (Directive on privacy and electronic communications) ⁽⁹⁾ (together referred to as "the Framework Directive and the Specific Directives") is subject to periodic review by the Commission, with a view, in particular, to determining the need for modification in the light of technological and market developments.

(2) In that regard, the Commission presented its findings in its Communication to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 29 June 2006 on the review of the EU regulatory framework for electronic communications networks and services.

(3) The reform of the EU regulatory framework for electronic communications networks and services, including the reinforcement of provisions for end-users with disabilities, represents a key step towards simultaneously achieving a Single European Information Space and an inclusive information society. These objectives are included in the strategic framework for the development of the information society as described in the Commission Communication to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 1 June 2005 entitled "i2010 – A European Information Society for growth and employment".

(4) A fundamental requirement of universal service is to provide users on request with a connection to the public communications network at a fixed location and at an affordable price. The requirement is for the provision of local, national and international telephone calls, facsimile communications and data services, the provision of which may be restricted by Member States to the end-user's primary location or residence. There should be no constraints on the technical means by which this is provided, allowing for wired or wireless technologies, nor any constraints on which operators provide part or all of universal service obligations.

(5) Data connections to the public communications network at a fixed location should be capable of supporting data communications at rates sufficient for access to online services such as those provided via the public Internet. The speed of Internet access experienced by a given user may depend on a number of factors, including the provider(s) of Internet connectivity as well as the given application for which a connection is being used. The data rate that can be supported by a connection to the public communications network depends on the capabilities of the subscriber's terminal equipment as well as the connection. For this reason, it is not appropriate to mandate a specific data or bit rate at Community level. Flexibility is required to allow Member States to take measures, where necessary, to ensure that a data connection is capable of supporting satisfactory data rates which are sufficient to permit functional Internet access, as defined by the Member States, taking due account of specific

(*) OJ L 337, 18.12.2009, p.11.

⁽¹⁾ OJ C 224, 30.8.2008, p. 50.

⁽²⁾ OJ C 257, 9.10.2008, p. 51.

⁽³⁾ OJ C 181, 18.7.2008, p. 1.

⁽⁴⁾ Opinion of the European Parliament of 24 September 2008 (not yet published in the Official Journal), Council Common Position of 16 February 2009 (OJ C 103 E, 5.5.2009, p. 40), Position of the European Parliament of 6 May 2009 and Council Decision of 26 October 2009.

⁽⁵⁾ OJ L 108, 24.4.2002, p. 7.

⁽⁶⁾ OJ L 108, 24.4.2002, p. 21.

⁽⁷⁾ OJ L 108, 24.4.2002, p. 33.

⁽⁸⁾ OJ L 108, 24.4.2002, p. 51.

⁽⁹⁾ OJ L 201, 31.7.2002, p. 37.

circumstances in national markets, for instance the prevailing bandwidth used by the majority of subscribers in that Member State, and technological feasibility, provided that these measures seek to minimise market distortion. Where such measures result in an unfair burden on a designated undertaking, taking due account of the costs and revenues as well as the intangible benefits resulting from the provision of the services concerned, this may be included in any net cost calculation of universal obligations. Alternative financing of underlying network infrastructure, involving Community funding or national measures in accordance with Community law, may also be implemented.

- (6) This is without prejudice to the need for the Commission to conduct a review of the universal service obligations, which may include the financing of such obligations, in accordance with Article 15 of Directive 2002/22/EC (Universal Service Directive), and, if appropriate, to present proposals for reform to meet public interest objectives.
- (7) For the sake of clarity and simplicity, this Directive only deals with amendments to Directives 2002/22/EC (Universal Service Directive) and 2002/58/EC (Directive on privacy and electronic communications).
- (8) Without prejudice to Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity⁽¹⁰⁾, and in particular the disability requirements laid down in Article 3(3)(f) thereof, certain aspects of terminal equipment, including consumer premises equipment intended for disabled end-users, whether their special needs are due to disability or related to ageing, should be brought within the scope of Directive 2002/22/EC (Universal Service Directive) in order to facilitate access to networks and the use of services. Such equipment currently includes receive-only radio and television terminal equipment as well as special terminal devices for hearing-impaired end-users.
- (9) Member States should introduce measures to promote the creation of a market for widely available products and services incorporating facilities for disabled end-users. This can be achieved, inter alia, by referring to European standards, introducing electronic accessibility (eAccessibility) requirements for public procurement procedures and calls for tender relating to the provision of services, and by implementing legislation upholding the rights of disabled end-users.
- (10) When an undertaking designated to provide universal service, as identified in Article 4 of Directive 2002/22/EC (Universal Service Directive), chooses to dispose of a substantial part, viewed in light of its universal service obligation, or all, of its local access network assets in the national territory to a separate legal entity under different ultimate ownership, the national regulatory authority should assess the effects of

the transaction in order to ensure the continuity of universal service obligations in all or parts of the national territory. To this end, the national regulatory authority which imposed the universal service obligations should be informed by the undertaking in advance of the disposal. The assessment of the national regulatory authority should not prejudice the completion of the transaction.

- (11) Technological developments have led to substantial reductions in the number of public pay telephones. In order to ensure technological neutrality and continued access by the public to voice telephony, national regulatory authorities should be able to impose obligations on undertakings to ensure not only that public pay telephones are provided to meet the reasonable needs of end-users, but also that alternative public voice telephony access points are provided for that purpose, if appropriate.
- (12) Equivalence in disabled end-users' access to services should be guaranteed to the level available to other end-users. To this end, access should be functionally equivalent, such that disabled end-users benefit from the same usability of services as other end-users, but by different means.
- (13) Definitions need to be adjusted so as to conform to the principle of technology neutrality and to keep pace with technological development. In particular, conditions for the provision of a service should be separated from the actual definitional elements of a publicly available telephone service, i.e. an electronic communications service made available to the public for originating and receiving, directly or indirectly, national or international calls through a number or numbers in a national or international telephone numbering plan, whether such a service is based on circuit switching or packet switching technology. It is the nature of such a service that it is bidirectional, enabling both the parties to communicate. A service which does not fulfil all these conditions, such as for example a "click-through" application on a customer service website, is not a publicly available telephone service. Publicly available telephone services also include means of communication specifically intended for disabled end-users using text relay or total conversation services.
- (14) It is necessary to clarify that the indirect provision of services could include situations where originating is made via carrier selection or pre-selection or where a service provider resells or re-brands publicly available telephone services provided by another undertaking.
- (15) As a result of technological and market evolution, networks are increasingly moving to "Internet Protocol" (IP) technology, and consumers are increasingly able to choose between a range of competing voice service providers. Therefore, Member States should be able to separate universal service obligations concerning the provision of a connection to the public communications network at a fixed location from the provision of a publicly available telephone service. Such separation should not affect the

⁽¹⁰⁾ OJ L 91, 7.4.1999, p. 10.

- scope of universal service obligations defined and reviewed at Community level.
- (16) In accordance with the principle of subsidiarity, it is for the Member States to decide on the basis of objective criteria which undertakings are designated as universal service providers, where appropriate taking into account the ability and the willingness of undertakings to accept all or part of the universal service obligations. This does not preclude that Member States may include, in the designation process, specific conditions justified on grounds of efficiency, including, *inter alia*, grouping geographical areas or components or setting minimum periods for the designation.
- (17) National regulatory authorities should be able to monitor the evolution and level of retail tariffs for services that fall under the scope of universal service obligations, even where a Member State has not yet designated an undertaking to provide universal service. In such a case, the monitoring should be carried out in such a way that it would not represent an excessive administrative burden for either national regulatory authorities or undertakings providing such service.
- (18) Redundant obligations designed to facilitate the transition from the regulatory framework of 1998 to that of 2002 should be deleted, together with other provisions that overlap with and duplicate those laid down in Directive 2002/21/EC (Framework Directive).
- (19) The requirement to provide a minimum set of leased lines at retail level, which was necessary to ensure the continued application of provisions of the regulatory framework of 1998 in the field of leased lines, which was not sufficiently competitive at the time the 2002 framework entered into force, is no longer necessary and should be repealed.
- (20) To continue to impose carrier selection and carrier pre-selection directly in Community legislation could hamper technological progress. These remedies should rather be imposed by national regulatory authorities as a result of market analysis carried out in accordance with the procedures set out in Directive 2002/21/EC (Framework Directive) and through the obligations referred to in Article 12 of Directive 2002/19/EC (Access Directive).
- (21) Provisions on contracts should apply not only to consumers but also to other end-users, primarily micro enterprises and small and medium-sized enterprises (SMEs), which may prefer a contract adapted to consumer needs. To avoid unnecessary administrative burdens for providers and the complexity related to the definition of SMEs, the provisions on contracts should not apply automatically to those other end-users, but only where they so request. Member States should take appropriate measures to promote awareness amongst SMEs of this possibility.
- (22) As a consequence of technological developments, other types of identifiers may be used in the future, in addition to ordinary forms of numbering identification.
- (23) Providers of electronic communications services that allow calls should ensure that their customers are adequately informed as to whether or not access to emergency services is provided and of any limitation on service (such as a limitation on the provision of caller location information or the routing of emergency calls). Such providers should also provide their customers with clear and transparent information in the initial contract and in the event of any change in the access provision, for example in billing information. This information should include any limitations on territorial coverage, on the basis of the planned technical operating parameters of the service and the available infrastructure. Where the service is not provided over a switched telephony network, the information should also include the level of reliability of the access and of caller location information compared to a service that is provided over a switched telephony network, taking into account current technology and quality standards, as well as any quality of service parameters specified under Directive 2002/22/EC (Universal Service Directive).
- (24) With respect to terminal equipment, the customer contract should specify any restrictions imposed by the provider on the use of the equipment, such as by way of "SIM-locking" mobile devices, if such restrictions are not prohibited under national legislation, and any charges due on termination of the contract, whether before or on the agreed expiry date, including any cost imposed in order to retain the equipment.
- (25) Without imposing any obligation on the provider to take action over and above what is required under Community law, the customer contract should also specify the type of action, if any, the provider might take in case of security or integrity incidents, threats or vulnerabilities.
- (26) In order to address public interest issues with respect to the use of communications services and to encourage protection of the rights and freedoms of others, the relevant national authorities should be able to produce and have disseminated, with the aid of providers, public interest information related to the use of such services. This could include public interest information regarding copyright infringement, other unlawful uses and the dissemination of harmful content, and advice and means of protection against risks to personal security, which may for example arise from disclosure of personal information in certain circumstances, as well as risks to privacy and personal data, and the availability of easy-to-use and configurable software or software options allowing protection for children or vulnerable persons. The information could be coordinated by way of the cooperation procedure established in Article 33(3) of Directive 2002/22/EC (Universal Service Directive). Such public interest information should be updated whenever necessary and should be presented in easily comprehensible printed and electronic formats, as determined by each Member State, and on national public authority websites. National regulatory authorities should be able to oblige providers to disseminate this standardised information to all their customers in a manner deemed appropriate by the national

regulatory authorities. When required by Member States, the information should also be included in contracts. Dissemination of such information should however not impose an excessive burden on undertakings. Member States should require this dissemination by the means used by undertakings in communications with subscribers made in the ordinary course of business.

- (27) The right of subscribers to withdraw from their contracts without penalty refers to modifications in contractual conditions which are imposed by the providers of electronic communications networks and/or services.
- (28) End-users should be able to decide what content they want to send and receive, and which services, applications, hardware and software they want to use for such purposes, without prejudice to the need to preserve the integrity and security of networks and services. A competitive market will provide users with a wide choice of content, applications and services. National regulatory authorities should promote users' ability to access and distribute information and to run applications and services of their choice, as provided for in Article 8 of Directive 2002/21/EC (Framework Directive). Given the increasing importance of electronic communications for consumers and businesses, users should in any case be fully informed of any limiting conditions imposed on the use of electronic communications services by the service and/or network provider. Such information should, at the option of the provider, specify the type of content, application or service concerned, individual applications or services, or both. Depending on the technology used and the type of limitation, such limitations may require user consent under Directive 2002/58/EC (Directive on privacy and electronic communications).
- (29) Directive 2002/22/EC (Universal Service Directive) neither mandates nor prohibits conditions imposed by providers, in accordance with national law, limiting end-users' access to and/or use of services and applications, but lays down an obligation to provide information regarding such conditions. Member States wishing to implement measures regarding end-users' access to and/or use of services and applications must respect the fundamental rights of citizens, including in relation to privacy and due process, and any such measures should take full account of policy goals defined at Community level, such as furthering the development of the Community information society.
- (30) Directive 2002/22/EC (Universal Service Directive) does not require providers to monitor information transmitted over their networks or to bring legal proceedings against their customers on grounds of such information, nor does it make providers liable for that information. Responsibility for punitive action or criminal prosecution is a matter for national law, respecting fundamental rights and freedoms, including the right to due process.
- (31) In the absence of relevant rules of Community law, content, applications and services are deemed lawful or harmful in accordance with national substantive and procedural law. It is a

task for the Member States, not for providers of electronic communications networks or services, to decide, in accordance with due process, whether content, applications or services are lawful or harmful. The Framework Directive and the Specific Directives are without prejudice to Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) ⁽¹¹⁾, which, inter alia, contains a "mere conduit" rule for intermediary service providers, as defined therein.

- (32) The availability of transparent, up-to-date and comparable information on offers and services is a key element for consumers in competitive markets where several providers offer services. End-users and consumers of electronic communications services should be able to easily compare the prices of various services offered on the market based on information published in an easily accessible form. In order to allow them to make price comparisons easily, national regulatory authorities should be able to require from undertakings providing electronic communications networks and/or services greater transparency as regards information (including tariffs, consumption patterns and other relevant statistics) and to ensure that third parties have the right to use, without charge, publicly available information published by such undertakings. National regulatory authorities should also be able to make price guides available, in particular where the market has not provided them free of charge or at a reasonable price. Undertakings should not be entitled to any remuneration for the use of information where it has already been published and thus belongs in the public domain. In addition, end-users and consumers should be adequately informed of the price and the type of service offered before they purchase a service, in particular if a freephone number is subject to additional charges. National regulatory authorities should be able to require that such information is provided generally, and, for certain categories of services determined by them, immediately prior to connecting the call, unless otherwise provided for by national law. When determining the categories of call requiring pricing information prior to connection, national regulatory authorities should take due account of the nature of the service, the pricing conditions which apply to it and whether it is offered by a provider who is not a provider of electronic communications services. Without prejudice to Directive 2000/31/EC (Directive on electronic commerce), undertakings should also, if required by Member States, provide subscribers with public interest information produced by the relevant public authorities regarding, inter alia, the most common infringements and their legal consequences.
- (33) Customers should be informed of their rights with respect to the use of their personal information in subscriber directories and in particular of the purpose or purposes of such directories, as well as their right, free of charge, not to be included in a public subscriber directory, as provided for in

⁽¹¹⁾ OJ L 178, 17.7.2000, p. 1.

Directive 2002/58/EC (Directive on privacy and electronic communications). Customers should also be informed of systems which allow information to be included in the directory database but which do not disclose such information to users of directory services.

- (34) A competitive market should ensure that end-users enjoy the quality of service they require, but in particular cases it may be necessary to ensure that public communications networks attain minimum quality levels so as to prevent degradation of service, the blocking of access and the slowing of traffic over networks. In order to meet quality of service requirements, operators may use procedures to measure and shape traffic on a network link so as to avoid filling the link to capacity or overflowing the link, which would result in network congestion and poor performance. Those procedures should be subject to scrutiny by the national regulatory authorities, acting in accordance with the Framework Directive and the Specific Directives and in particular by addressing discriminatory behaviour, in order to ensure that they do not restrict competition. If appropriate, national regulatory authorities may also impose minimum quality of service requirements on undertakings providing public communications networks to ensure that services and applications dependent on the network are delivered at a minimum quality standard, subject to examination by the Commission. National regulatory authorities should be empowered to take action to address degradation of service, including the hindering or slowing down of traffic, to the detriment of consumers. However, since inconsistent remedies can impair the functioning of the internal market, the Commission should assess any requirements intended to be set by national regulatory authorities for possible regulatory intervention across the Community and, if necessary, issue comments or recommendations in order to achieve consistent application.
- (35) In future IP networks, where provision of a service may be separated from provision of the network, Member States should determine the most appropriate steps to be taken to ensure the availability of publicly available telephone services provided using public communications networks and uninterrupted access to emergency services in the event of catastrophic network breakdown or in cases of force majeure, taking into account the priorities of different types of subscriber and technical limitations.
- (36) In order to ensure that disabled end-users benefit from competition and the choice of service providers enjoyed by the majority of end-users, relevant national authorities should specify, where appropriate and in light of national conditions, consumer protection requirements to be met by undertakings providing publicly available electronic communications services. Such requirements may include, in particular, that undertakings ensure that disabled end-users take advantage of their services on equivalent terms and conditions, including prices and tariffs, as those offered to their other end-users, irrespective of any additional costs incurred by them. Other

requirements may relate to wholesale arrangements between undertakings.

- (37) Operator assistance services cover a range of different services for end-users. The provision of such services should be left to commercial negotiations between providers of public communications networks and operator assistance services, as is the case for any other customer support service, and it is not necessary to continue to mandate their provision. The corresponding obligation should therefore be repealed.
- (38) Directory enquiry services should be, and frequently are, provided under competitive market conditions, pursuant to Article 5 of Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and service ⁽¹²⁾. Wholesale measures ensuring the inclusion of end-user data (both fixed and mobile) in databases should comply with the safeguards for the protection of personal data, including Article 12 of Directive 2002/58/EC (Directive on privacy and electronic communications). The cost-oriented supply of that data to service providers, with the possibility for Member States to establish a centralised mechanism for providing comprehensive aggregated information to directory providers, and the provision of network access under reasonable and transparent conditions, should be put in place in order to ensure that end-users benefit fully from competition, with the ultimate aim of enabling the removal of retail regulation from these services and the provision of offers of directory services under reasonable and transparent conditions.
- (39) End-users should be able to call and access the emergency services using any telephone service capable of originating voice calls through a number or numbers in national telephone numbering plans. Member States that use national emergency numbers besides "112" may impose on undertakings similar obligations for access to such national emergency numbers. Emergency authorities should be able to handle and answer calls to the number "112" at least as expeditiously and effectively as calls to national emergency numbers. It is important to increase awareness of "112" in order to improve the level of protection and security of citizens travelling in the European Union. To this end, citizens should be made fully aware, when travelling in any Member State, in particular through information provided in international bus terminals, train stations, ports or airports and in telephone directories, payphone kiosks, subscriber and billing material, that "112" can be used as a single emergency number throughout the Community. This is primarily the responsibility of the Member States, but the Commission should continue both to support and to supplement initiatives of the Member States to heighten awareness of "112" and periodically to evaluate the public's awareness of it. The obligation to provide caller location information should be strengthened so as to increase the protection of citizens. In particular, undertakings should make caller location information available

⁽¹²⁾ OJ L 249, 17.9.2002, p. 21.

to emergency services as soon as the call reaches that service independently of the technology used. In order to respond to technological developments, including those leading to increasingly accurate caller location information, the Commission should be empowered to adopt technical implementing measures to ensure effective access to "112" services in the Community for the benefit of citizens. Such measures should be without prejudice to the organisation of emergency services of Member States.

- (40) Member States should ensure that undertakings providing end-users with an electronic communications service designed for originating calls through a number or numbers in a national telephone numbering plan provide reliable and accurate access to emergency services, taking into account national specifications and criteria. Network-independent undertakings may not have control over networks and may not be able to ensure that emergency calls made through their service are routed with the same reliability, as they may not be able to guarantee service availability, given that problems related to infrastructure are not under their control. For network-independent undertakings, caller location information may not always be technically feasible. Once internationally-recognised standards ensuring accurate and reliable routing and connection to the emergency services are in place, network-independent undertakings should also fulfil the obligations related to caller location information at a level comparable to that required of other undertakings.
- (41) Member States should take specific measures to ensure that emergency services, including "112", are equally accessible to disabled end-users, in particular deaf, hearing-impaired, speech-impaired and deaf-blind users. This could involve the provision of special terminal devices for hearing-impaired users, text relay services, or other specific equipment.
- (42) Development of the international code "3883" (the European Telephony Numbering Space (ETNS)) is currently hindered by insufficient awareness, overly bureaucratic procedural requirements and, in consequence, lack of demand. In order to encourage the development of ETNS, the Member States to which the International Telecommunications Union has assigned the international code "3883" should, following the example of the implementation of the ".eu" top-level domain, delegate responsibility for its management, number assignment and promotion to an existing separate organisation, designated by the Commission on the basis of an open, transparent and non-discriminatory selection procedure. That organisation should also have the task of developing proposals for public service applications using ETNS for common European services, such as a common number for reporting thefts of mobile terminals.
- (43) Considering the particular aspects related to reporting missing children and the currently limited availability of such a service, Member States should not only reserve a number, but also make every effort to ensure that a service for

reporting missing children is actually available in their territories under the number "116000", without delay. To that end, Member States should, if appropriate, inter alia, organise tendering procedures in order to invite interested parties to provide that service.

- (44) Voice calls remain the most robust and reliable form of access to emergency services. Other means of contact, such as text messaging, may be less reliable and may suffer from lack of immediacy. Member States should, however, if they deem it appropriate, be free to promote the development and implementation of other means of access to emergency services which are capable of ensuring access equivalent to voice calls.
- (45) Pursuant to its Decision 2007/116/EC of 15 February 2007 on reserving the national numbering range beginning with "116" for harmonised numbers for harmonised services of social value⁽¹³⁾, the Commission has asked Member States to reserve numbers in the "116" numbering range for certain services of social value. The appropriate provisions of that Decision should be reflected in Directive 2002/22/EC (Universal Service Directive) in order to integrate them more firmly into the regulatory framework for electronic communications networks and services and to facilitate access by disabled end-users.
- (46) A single market implies that end-users are able to access all numbers included in the national numbering plans of other Member States and to access services using non-geographic numbers within the Community, including, among others, freephone and premium rate numbers. End-users should also be able to access numbers from the European Telephone Numbering Space (ETNS) and Universal International Freephone Numbers (UIFN). Cross-border access to numbering resources and associated services should not be prevented, except in objectively justified cases, for example to combat fraud or abuse (e.g. in connection with certain premium-rate services), when the number is defined as having a national scope only (e.g. a national short code) or when it is technically or economically unfeasible. Users should be fully informed in advance and in a clear manner of any charges applicable to freephone numbers, such as international call charges for numbers accessible through standard international dialling codes.
- (47) In order to take full advantage of the competitive environment, consumers should be able to make informed choices and to change providers when it is in their interests. It is essential to ensure that they can do so without being hindered by legal, technical or practical obstacles, including contractual conditions, procedures, charges and so on. This does not preclude the imposition of reasonable minimum contractual periods in consumer contracts. Number portability is a key facilitator of consumer choice and effective competition in competitive markets for electronic communications and should be implemented with the minimum delay, so that the number is

(13) OJ L 49, 17.2.2007, p. 30.

- functionally activated within one working day and the user does not experience a loss of service lasting longer than one working day. Competent national authorities may prescribe the global process of the porting of numbers, taking into account national provisions on contracts and technological developments. Experience in certain Member States has shown that there is a risk of consumers being switched to another provider without having given their consent. While that is a matter that should primarily be addressed by law enforcement authorities, Member States should be able to impose such minimum proportionate measures regarding the switching process, including appropriate sanctions, as are necessary to minimise such risks, and to ensure that consumers are protected throughout the switching process without making the process less attractive for them.
- (48) Legal "must-carry" obligations may be applied to specified radio and television broadcast channels and complementary services supplied by a specified media service provider. Member States should provide a clear justification for the "must carry" obligations in their national law so as to ensure that such obligations are transparent, proportionate and properly defined. In that regard, "must carry" rules should be designed in a way which provides sufficient incentives for efficient investment in infrastructure. "Must carry" rules should be periodically reviewed in order to keep them up-to-date with technological and market evolution and in order to ensure that they continue to be proportionate to the objectives to be achieved. Complementary services include, but are not limited to, services designed to improve accessibility for end-users with disabilities, such as videotext, subtitling, audio description and sign language.
- (49) In order to overcome existing shortcomings in terms of consumer consultation and to appropriately address the interests of citizens, Member States should put in place an appropriate consultation mechanism. Such a mechanism could take the form of a body which would, independently of the national regulatory authority and service providers, carry out research into consumer-related issues, such as consumer behaviour and mechanisms for changing suppliers, and which would operate in a transparent manner and contribute to the existing mechanisms for stakeholder consultation. Furthermore, a mechanism could be established for the purpose of enabling appropriate cooperation on issues relating to the promotion of lawful content. Any cooperation procedures agreed pursuant to such a mechanism should, however, not allow for the systematic surveillance of Internet usage.
- (50) Universal service obligations imposed on an undertaking designated as having universal service obligations should be notified to the Commission.
- (51) Directive 2002/58/EC (Directive on privacy and electronic communications) provides for the harmonisation of the provisions of the Member States required to ensure an equivalent level of protection of fundamental rights and freedoms, in particular the right to privacy and the right to confidentiality, with respect to the processing of personal data in the electronic communications sector, and to ensure the free movement of such data and of electronic communications equipment and services in the Community. Where measures aiming to ensure that terminal equipment is constructed so as to safeguard the protection of personal data and privacy are adopted pursuant to Directive 1999/5/EC or Council Decision 87/95/EEC of 22 December 1986 on standardization in the field of information technology and telecommunications⁽¹⁴⁾, such measures should respect the principle of technology neutrality.
- (52) Developments concerning the use of IP addresses should be followed closely, taking into consideration the work already done by, among others, the Working Party on the Protection of Individuals with regard to the Processing of Personal Data established by Article 29 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data⁽¹⁵⁾, and in the light of such proposals as may be appropriate.
- (53) The processing of traffic data to the extent strictly necessary for the purposes of ensuring network and information security, i.e. the ability of a network or an information system to resist, at a given level of confidence, accidental events or unlawful or malicious actions that compromise the availability, authenticity, integrity and confidentiality of stored or transmitted data, and the security of the related services offered by, or accessible via, these networks and systems, by providers of security technologies and services when acting as data controllers is subject to Article 7(f) of Directive 95/46/EC. This could, for example, include preventing unauthorised access to electronic communications networks and malicious code distribution and stopping "denial of service" attacks and damage to computer and electronic communication systems.
- (54) The liberalisation of electronic communications networks and services markets and rapid technological development have combined to boost competition and economic growth and resulted in a rich diversity of end-user services accessible via public electronic communications networks. It is necessary to ensure that consumers and users are afforded the same level of protection of privacy and personal data, regardless of the technology used to deliver a particular service.
- (55) In line with the objectives of the regulatory framework for electronic communications networks and services and with the principles of proportionality and subsidiarity, and for the purposes of legal certainty and efficiency for European businesses and national regulatory authorities alike, Directive 2002/58/EC (Directive on privacy and electronic communications) focuses on public electronic communications

⁽¹⁴⁾ OJ L 36, 7.2.1987, p. 31.

⁽¹⁵⁾ OJ L 281, 23.11.1995, p. 31.

networks and services, and does not apply to closed user groups and corporate networks.

- (56) Technological progress allows the development of new applications based on devices for data collection and identification, which could be contactless devices using radio frequencies. For example, Radio Frequency Identification Devices (RFIDs) use radio frequencies to capture data from uniquely identified tags which can then be transferred over existing communications networks. The wide use of such technologies can bring considerable economic and social benefit and thus make a powerful contribution to the internal market, if their use is acceptable to citizens. To achieve this aim, it is necessary to ensure that all fundamental rights of individuals, including the right to privacy and data protection, are safeguarded. When such devices are connected to publicly available electronic communications networks or make use of electronic communications services as a basic infrastructure, the relevant provisions of Directive 2002/58/EC (Directive on privacy and electronic communications), including those on security, traffic and location data and on confidentiality, should apply.
- (57) The provider of a publicly available electronic communications service should take appropriate technical and organisational measures to ensure the security of its services. Without prejudice to Directive 95/46/EC, such measures should ensure that personal data can be accessed only by authorised personnel for legally authorised purposes, and that the personal data stored or transmitted, as well as the network and services, are protected. Moreover, a security policy with respect to the processing of personal data should be established in order to identify vulnerabilities in the system, and monitoring and preventive, corrective and mitigating action should be regularly carried out.
- (58) The competent national authorities should promote the interests of citizens by, inter alia, contributing to ensuring a high level of protection of personal data and privacy. To this end, competent national authorities should have the necessary means to perform their duties, including comprehensive and reliable data about security incidents that have led to the personal data of individuals being compromised. They should monitor measures taken and disseminate best practices among providers of publicly available electronic communications services. Providers should therefore maintain an inventory of personal data breaches to enable further analysis and evaluation by the competent national authorities.
- (59) Community law imposes duties on data controllers regarding the processing of personal data, including an obligation to implement appropriate technical and organisational protection measures against, for example, loss of data. The data breach notification requirements contained in Directive 2002/58/EC (Directive on privacy and electronic communications) provide a structure for notifying the competent authorities and individuals concerned when personal data has nevertheless been compromised. Those notification requirements are limited to security breaches which occur in the electronic communications sector. However, the notification of security breaches reflects the general interest of citizens in being informed of security failures which could result in their personal data being lost or otherwise compromised, as well as of available or advisable precautions that they could take in order to minimise the possible economic loss or social harm that could result from such failures. The interest of users in being notified is clearly not limited to the electronic communications sector, and therefore explicit, mandatory notification requirements applicable to all sectors should be introduced at Community level as a matter of priority. Pending a review to be carried out by the Commission of all relevant Community legislation in this field, the Commission, in consultation with the European Data Protection Supervisor, should take appropriate steps without delay to encourage the application throughout the Community of the principles embodied in the data breach notification rules contained in Directive 2002/58/EC (Directive on privacy and electronic communications), regardless of the sector, or the type, of data concerned.
- (60) Competent national authorities should monitor measures taken and disseminate best practices among providers of publicly available electronic communications services.
- (61) A personal data breach may, if not addressed in an adequate and timely manner, result in substantial economic loss and social harm, including identity fraud, to the subscriber or individual concerned. Therefore, as soon as the provider of publicly available electronic communications services becomes aware that such a breach has occurred, it should notify the breach to the competent national authority. The subscribers or individuals whose data and privacy could be adversely affected by the breach should be notified without delay in order to allow them to take the necessary precautions. A breach should be considered as adversely affecting the data or privacy of a subscriber or individual where it could result in, for example, identity theft or fraud, physical harm, significant humiliation or damage to reputation in connection with the provision of publicly available communications services in the Community. The notification should include information about measures taken by the provider to address the breach, as well as recommendations for the subscriber or individual concerned.
- (62) When implementing measures transposing Directive 2002/58/EC (Directive on privacy and electronic communications), the authorities and courts of the Member States should not only interpret their national law in a manner consistent with that Directive, but should also ensure that they do not rely on an interpretation of it which would conflict with fundamental rights or general principles of Community law, such as the principle of proportionality.
- (63) Provision should be made for the adoption of technical implementing measures concerning the circumstances, format and procedures applicable to information and notification requirements in

- order to achieve an adequate level of privacy protection and security of personal data transmitted or processed in connection with the use of electronic communications networks in the internal market.
- (64) In setting detailed rules concerning the format and procedures applicable to the notification of personal data breaches, due consideration should be given to the circumstances of the breach, including whether or not personal data had been protected by appropriate technical protection measures, effectively limiting the likelihood of identity fraud or other forms of misuse. Moreover, such rules and procedures should take into account the legitimate interests of law enforcement authorities in cases where early disclosure could unnecessarily hamper the investigation of the circumstances of a breach.
- (65) Software that surreptitiously monitors the actions of the user or subverts the operation of the user's terminal equipment to the benefit of a third party (spyware) poses a serious threat to the privacy of users, as do viruses. A high and equal level of protection of the private sphere of users needs to be ensured, regardless of whether unwanted spying programmes or viruses are inadvertently downloaded via electronic communications networks or are delivered and installed in software distributed on other external data storage media, such as CDs, CD-ROMs or USB keys. Member States should encourage the provision of information to end-users about available precautions, and should encourage them to take the necessary steps to protect their terminal equipment against viruses and spyware.
- (66) Third parties may wish to store information on the equipment of a user, or gain access to information already stored, for a number of purposes, ranging from the legitimate (such as certain types of cookies) to those involving unwarranted intrusion into the private sphere (such as spyware or viruses). It is therefore of paramount importance that users be provided with clear and comprehensive information when engaging in any activity which could result in such storage or gaining of access. The methods of providing information and offering the right to refuse should be as user-friendly as possible. Exceptions to the obligation to provide information and offer the right to refuse should be limited to those situations where the technical storage or access is strictly necessary for the legitimate purpose of enabling the use of a specific service explicitly requested by the subscriber or user. Where it is technically possible and effective, in accordance with the relevant provisions of Directive 95/46/EC, the user's consent to processing may be expressed by using the appropriate settings of a browser or other application. The enforcement of these requirements should be made more effective by way of enhanced powers granted to the relevant national authorities.
- (67) Safeguards provided for subscribers against intrusion into their privacy by unsolicited communications for direct marketing purposes by means of electronic mail should also be applicable to SMS, MMS and other kinds of similar applications.
- (68) Electronic communications service providers make substantial investments in order to combat unsolicited commercial communications (spam). They are also in a better position than end-users in that they possess the knowledge and resources necessary to detect and identify spammers. E-mail service providers and other service providers should therefore be able to initiate legal action against spammers, and thus defend the interests of their customers, as part of their own legitimate business interests.
- (69) The need to ensure an adequate level of protection of privacy and personal data transmitted and processed in connection with the use of electronic communications networks in the Community calls for effective implementation and enforcement powers in order to provide adequate incentives for compliance. Competent national authorities and, where appropriate, other relevant national bodies should have sufficient powers and resources to investigate cases of non-compliance effectively, including powers to obtain any relevant information they might need, to decide on complaints and to impose sanctions in cases of non-compliance.
- (70) The implementation and enforcement of the provisions of this Directive often require cooperation between the national regulatory authorities of two or more Member States, for example in combating cross-border spam and spyware. In order to ensure smooth and rapid cooperation in such cases, procedures relating for example to the quantity and format of information exchanged between authorities, or deadlines to be complied with, should be defined by the relevant national authorities, subject to examination by the Commission. Such procedures will also allow the resulting obligations of market actors to be harmonised, contributing to the creation of a level playing field in the Community.
- (71) Cross-border cooperation and enforcement should be reinforced in line with existing Community cross-border enforcement mechanisms, such as that laid down in Regulation (EC) No 2006/2004 (the Regulation on consumer protection cooperation) ⁽¹⁶⁾, by way of an amendment to that Regulation.
- (72) The measures necessary for the implementation of Directives 2002/22/EC (Universal Service Directive) and 2002/58/EC (Directive on privacy and electronic communications) should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission ⁽¹⁷⁾.
- (73) In particular, the Commission should be empowered to adopt implementing measures on effective access to "112" services, as well as to adapt the Annexes to technical progress or changes in market demand. It should also be empowered to adopt implementing measures concerning information and notification requirements and security of processing. Since

⁽¹⁶⁾ OJ L 364, 9.12.2004, p. 1.

⁽¹⁷⁾ OJ L 184, 17.7.1999, p. 23.

those measures are of general scope and are designed to amend non-essential elements of Directives 2002/22/EC (Universal Service Directive) and 2002/58/EC (Directive on privacy and electronic communications) by supplementing them with new non-essential elements, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC. Given that the conduct of the regulatory procedure with scrutiny within the normal time limits could, in certain exceptional situations, impede the timely adoption of implementing measures, the European Parliament, the Council and the Commission should act speedily in order to ensure the timely adoption of those measures.

- (74) When adopting implementing measures on security of processing, the Commission should consult all relevant European authorities and organisations (the European Network and Information Security Agency (ENISA), the European Data Protection Supervisor and the Working Party on the Protection of Individuals with regard to the Processing of Personal Data established by Article 29 of Directive 95/46/EC), as well as all other relevant stakeholders, particularly in order to be informed of the best available technical and economic means of improving the implementation of Directive 2002/58/EC (Directive on privacy and electronic communications).
- (75) Directives 2002/22/EC (Universal Service Directive) and 2002/58/EC (Directive on privacy and electronic communications) should therefore be amended accordingly.
- (76) In accordance with point 34 of the Interinstitutional Agreement on better law-making⁽¹⁸⁾, Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables illustrating, as far as possible, the correlation between Directives 2002/22/EC (Universal Service Directive) and 2002/58/EC (Directive on privacy and electronic communications) and the transposition measures, and to make them public,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 2002/22/EC (Universal Service Directive)

Directive 2002/22/EC (Universal Service Directive) is hereby amended as follows:

[see consolidated text of Directive 2002/22/EC]

Article 2

Amendments to Directive 2002/58/EC (Directive on privacy and electronic communications)

Directive 2002/58/EC (Directive on privacy and electronic communications) is hereby amended as follows:

⁽¹⁸⁾ OJ C 321, 31.12.2003, p. 1.

[see consolidated text of Directive 2002/58/EC]

Article 3

Amendment to Regulation (EC) No 2006/2004

In the Annex to Regulation (EC) No 2006/2004 (the Regulation on consumer protection cooperation), the following point shall be added:

'17. Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications): Article 13 (OJ L 201, 31.7.2002, p. 37).'

Article 4

Transposition

1. Member States shall adopt and publish by 25 May 2011 the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those measures.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 5

Entry into force

This Directive shall enter into force on the day following its publication in the Official Journal of the European Union.

Article 6

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 25 November 2009.

For the European Parliament

For the Council

The President

The President

J. BUZEK

Å. TORSTENSSON

I

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is obligatory)

REGULATIONS

REGULATION (EC) No 1211/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 25 November 2009
establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office
(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,

Having regard to the opinion of the Committee of the Regions ⁽²⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽³⁾,

Whereas:

(1) Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) ⁽⁴⁾, Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) ⁽⁵⁾, Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) ⁽⁶⁾, Directive

2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) ⁽⁷⁾ and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) ⁽⁸⁾ (together referred to as the Framework Directive and the Specific Directives) aim to create an internal market for electronic communications within the Community while ensuring a high level of investment, innovation and consumer protection through enhanced competition.

(2) Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile communications networks within the Community ⁽⁹⁾ complements and supports, in so far as Community-wide roaming is concerned, the rules provided for by the EU regulatory framework for electronic communications.

(3) The need for the EU regulatory framework to be consistently applied in all Member States is essential for the successful development of an internal market for electronic communications networks and services. The EU regulatory framework sets out objectives to be achieved and provides a framework for action by national regulatory authorities (NRAs), whilst granting them flexibility in certain areas to apply the rules in the light of national conditions.

⁽¹⁾ OJ C 224, 30.8.2008, p. 50.

⁽²⁾ OJ C 257, 9.10.2008, p. 51.

⁽³⁾ Opinion of the European Parliament of 24 September 2008 (not yet published in the Official Journal), Council Common Position of 16 February 2009 (OJ C 75 E, 31.3.2009, p. 67), Position of the European Parliament of 6 May 2009 and Council Decision of 26 October 2009.

⁽⁴⁾ OJ L 108, 24.4.2002, p. 33.

⁽⁵⁾ OJ L 108, 24.4.2002, p. 7.

⁽⁶⁾ OJ L 108, 24.4.2002, p. 21.

⁽⁷⁾ OJ L 108, 24.4.2002, p. 51.

⁽⁸⁾ OJ L 201, 31.7.2002, p. 37.

⁽⁹⁾ OJ L 171, 29.6.2007, p. 32.

- (4) In view of the need to ensure the development of consistent regulatory practice and the consistent application of the EU regulatory framework, the Commission established the European Regulators Group (ERG) pursuant to Commission Decision 2002/627/EC of 29 July 2002 establishing the European Regulators Group for Electronic Communications Networks and Services ⁽¹⁾ to advise and assist the Commission in the development of the internal market and, more generally, to provide an interface between NRAs and the Commission.
- (5) The ERG has made a positive contribution towards consistent regulatory practice by facilitating cooperation among NRAs, and between NRAs and the Commission. This approach to developing greater consistency among NRAs by exchanging information and knowledge on practical experience has proved successful in the short period following its deployment. Continued and intensified cooperation and coordination among NRAs will be required to develop further the internal market in electronic communication networks and services.
- (6) This calls for the strengthening of the ERG and its recognition in the EU regulatory framework as the Body of European Regulators for Electronic Communications (BEREC). BEREC should neither be a Community agency nor have legal personality. BEREC should replace the ERG and act as an exclusive forum for cooperation among NRAs, and between NRAs and the Commission, in the exercise of the full range of their responsibilities under the EU regulatory framework. BEREC should provide expertise and establish confidence by virtue of its independence, the quality of its advice and information, the transparency of its procedures and methods of operation, and its diligence in performing its tasks.
- (7) BEREC should, through the pooling of expertise, assist NRAs without replacing the existing functions or duplicating work already being undertaken, and assist the Commission in the execution of its responsibilities.
- (8) BEREC should continue the work of the ERG, developing cooperation among NRAs, and between NRAs and the Commission, so as to ensure the consistent application in all Member States of the EU regulatory framework for electronic communications networks and services, and thereby contributing to the development of the internal market.
- (9) BEREC should also serve as a body for reflection, debate and advice for the European Parliament, the Council and the Commission in the electronic communications field. BEREC should accordingly advise the European Parliament, the Council and the Commission, at their request or on its own initiative.
- (10) BEREC should pursue its tasks in cooperation with, and without prejudice to the role of, existing groups and committees such as the Communications Committee, established under Directive 2002/21/EC (Framework Directive), the Radio Spectrum Committee established under Decision No 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision) ⁽²⁾, the Radio Spectrum Policy Group established under Commission Decision 2002/622/EC of 26 July 2002 establishing a Radio Spectrum Policy Group ⁽³⁾, and the Contact Committee established under Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities ⁽⁴⁾.
- (11) In order to provide BEREC with professional and administrative support, the Office should be established as a Community body with legal personality and should exercise the tasks conferred on it by this Regulation. In order to efficiently support BEREC, the Office should have legal, administrative and financial autonomy. The Office should comprise a Management Committee and an Administrative Manager.
- (12) The organisational structures of BEREC and of the Office should be lean and suitable for the tasks they are to perform.
- (13) The Office should be a Community body within the meaning of Article 185 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities ⁽⁵⁾ (Financial Regulation). The Interinstitutional Agreement of 17 May 2006 between the European Parliament, the Council and the Commission on budgetary discipline and sound financial management ⁽⁶⁾ (IIA of 17 May 2006), and in particular point 47 thereof, should apply to the Office.

⁽²⁾ OJ L 108, 24.4.2002, p. 1.

⁽³⁾ OJ L 198, 27.7.2002, p. 49.

⁽⁴⁾ OJ L 202, 30.7.1997, p. 60.

⁽⁵⁾ OJ L 248, 16.9.2002, p. 1.

⁽⁶⁾ OJ C 139, 14.6.2006, p. 1.

⁽¹⁾ OJ L 200, 30.7.2002, p. 38.

- (14) Since the objectives of the proposed action, namely the further development of consistent regulatory practice through intensified cooperation and coordination among NRAs, and between NRAs and the Commission, cannot be sufficiently achieved by the Member States in view of the EU-wide scope of this Regulation, and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity, as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives,

HAVE ADOPTED THIS REGULATION:

CHAPTER I

ESTABLISHMENT

Article 1

Establishment

1. The Body of European Regulators for Electronic Communications (BEREC) is hereby established with the responsibilities laid down in this Regulation.

2. BEREC shall act within the scope of Directive 2002/21/EC (Framework Directive) and Directives 2002/19/EC, 2002/20/EC, 2002/22/EC and 2002/58/EC (Specific Directives), and of Regulation (EC) No 717/2007.

3. BEREC shall carry out its tasks independently, impartially and transparently. In all its activities, BEREC shall pursue the same objectives as those of the national regulatory authorities (NRAs), as set out in Article 8 of Directive 2002/21/EC (Framework Directive). In particular, BEREC shall contribute to the development and better functioning of the internal market for electronic communications networks and services, by aiming to ensure a consistent application of the EU regulatory framework for electronic communications.

4. BEREC shall draw upon expertise available in the NRAs and shall carry out its tasks in cooperation with NRAs and the Commission. BEREC shall promote cooperation between NRAs, and between NRAs and the Commission. Furthermore, BEREC shall advise the Commission, and upon request, the European Parliament and the Council.

CHAPTER II

ORGANISATION OF BEREC

Article 2

Role of BEREC

BEREC shall:

- (a) develop and disseminate among NRAs regulatory best practice, such as common approaches, methodologies or guidelines on the implementation of the EU regulatory framework;
- (b) on request, provide assistance to NRAs on regulatory issues;
- (c) deliver opinions on the draft decisions, recommendations and guidelines of the Commission, referred to in this Regulation, the Framework Directive and the Specific Directives;
- (d) issue reports and provide advice, upon a reasoned request of the Commission or on its own initiative, and deliver opinions to the European Parliament and the Council, upon a reasoned request or on its own initiative, on any matter regarding electronic communications within its competence;
- (e) on request, assist the European Parliament, the Council, the Commission and the NRAs in relations, discussions and exchanges with third parties; and assist the Commission and NRAs in the dissemination of regulatory best practices to third parties.

Article 3

Tasks of BEREC

1. The tasks of BEREC shall be:
 - (a) to deliver opinions on draft measures of NRAs concerning market definition, the designation of undertakings with significant market power and the imposition of remedies, in accordance with Articles 7 and 7a of Directive 2002/21/EC (Framework Directive); and to cooperate and work together with the NRAs in accordance with Articles 7 and 7a of Directive 2002/21/EC (Framework Directive);
 - (b) to deliver opinions on draft recommendations and/or guidelines on the form, content and level of details to be given in notifications, in accordance with Article 7b of Directive 2002/21/EC (Framework Directive);
 - (c) to be consulted on draft recommendations on relevant product and service markets, in accordance with Article 15 of Directive 2002/21/EC (Framework Directive);

- (d) to deliver opinions on draft decisions on the identification of transnational markets, in accordance with Article 15 of Directive 2002/21/EC (Framework Directive);
 - (e) on request, to provide assistance to NRAs, in the context of the analysis of the relevant market in accordance with Article 16 of Directive 2002/21/EC (Framework Directive);
 - (f) to deliver opinions on draft decisions and recommendations on harmonisation, in accordance with Article 19 of Directive 2002/21/EC (Framework Directive);
 - (g) to be consulted and to deliver opinions on cross-border disputes in accordance with Article 21 of Directive 2002/21/EC (Framework Directive);
 - (h) to deliver opinions on draft decisions authorising or preventing an NRA from taking exceptional measures, in accordance with Article 8 of Directive 2002/19/EC (Access Directive);
 - (i) to be consulted on draft measures relating to effective access to the emergency call number 112, in accordance with Article 26 of Directive 2002/22/EC (Universal Service Directive);
 - (j) to be consulted on draft measures relating to the effective implementation of the 116 numbering range, in particular the missing children hotline number 116000, in accordance with Article 27a of Directive 2002/22/EC (Universal Service Directive);
 - (k) to assist the Commission with the updating of Annex II to Directive 2002/19/EC (Access Directive), in accordance with Article 9 of that Directive;
 - (l) on request, to provide assistance to NRAs on issues relating to fraud or the misuse of numbering resources within the Community, in particular for cross-border services;
 - (m) to deliver opinions aiming to ensure the development of common rules and requirements for providers of cross-border business services;
 - (n) to monitor and report on the electronic communications sector, and publish an annual report on developments in that sector.
2. BEREC may, upon a reasoned request from the Commission, decide unanimously to take on other specific tasks necessary for the accomplishment of its role within the scope defined in Article 1(2).

3. NRAs and the Commission shall take the utmost account of any opinion, recommendation, guidelines, advice or regulatory best practice adopted by BEREC. BEREC may, where appropriate, consult the relevant national competition authorities before issuing its opinion to the Commission.

Article 4

Composition and organisation of BEREC

1. BEREC shall be composed of the Board of Regulators.
2. The Board of Regulators shall be composed of one member per Member State who shall be the head or nominated high-level representative of the NRA established in each Member State with primary responsibility for overseeing the day-to-day operation of the markets for electronic communications networks and services.

When carrying out the tasks conferred upon it by this Regulation, BEREC shall act independently.

The members of the Board of Regulators shall neither seek nor accept any instruction from any government, from the Commission, or from any other public or private entity.

NRAs shall nominate one alternate member per Member State.

The Commission shall attend BEREC meetings as observer and shall be represented at an appropriate level.

3. NRAs from European Economic Area (EEA) States and from those States that are candidates for accession to the European Union shall have observer status and shall be represented at an appropriate level. BEREC may invite other experts and observers to attend its meetings.

4. The Board of Regulators shall appoint its Chair and Vice-Chair(s) from among its members, subject to the rules of procedure of BEREC. The Vice-Chair(s) shall automatically assume the duties of the Chair if the latter is not in a position to perform those duties. The term of office of the Chair and of the Vice-Chair(s) shall be one year.

5. Without prejudice to the role of the Board of Regulators in relation to the tasks of the Chair, the Chair shall neither seek nor accept any instruction from any government or NRA, from the Commission, or from any other public or private entity.

6. Plenary meetings of the Board of Regulators shall be convened by its Chair and shall occur at least four times a year in ordinary session. Extraordinary meetings shall also be convened at the initiative of the Chair, at the request of the Commission or at the request of at least one third of the Board's members. The agenda of the meeting shall be set by the Chair and shall be made public.

7. The work of BEREC may be organised into Expert Working Groups.

8. The Commission shall be invited to all plenary meetings of the Board of Regulators.

9. The Board of Regulators shall act by a two-thirds majority of its all members unless otherwise provided for in this Regulation, in the Framework Directive or in the Specific Directives. Each member or alternate member shall have one vote. The decisions of the Board of Regulators shall be made public, and shall indicate the reservations of an NRA at its request.

10. The Board of Regulators shall adopt and make publicly available the rules of procedure of BEREC. The rules of procedure shall set out in detail the arrangements governing voting, including the conditions under which one member may act on behalf of another member, the rules governing quorums, and the notification deadlines for meetings. Furthermore, the rules of procedure shall guarantee that the members of the Board of Regulators are always provided with full agendas and draft proposals in advance of each meeting so that they have the opportunity to propose amendments prior to the vote. The rules of procedure may, *inter alia*, also set out urgent voting procedures.

11. The Office referred to Article 6 shall provide administrative and professional support services to BEREC.

Article 5

Tasks of the Board of Regulators

1. The Board of Regulators shall fulfil the tasks of BEREC set out in Article 3 and take all decisions relating to the performance of its functions.

2. The Board of Regulators shall approve the voluntary financial contribution from Member States or NRAs before they are made in accordance with Article 11(1)(b) subject to the following arrangements:

- (a) by unanimity where all Member States or NRAs have decided to make a contribution;
- (b) by simple majority where a number of Member States or NRAs acting unanimously have decided to make a contribution.

3. The Board of Regulators shall adopt, on behalf of BEREC, the special provisions on right of access to documents held by BEREC, in accordance with Article 22.

4. The Board of Regulators shall, after consulting interested parties in accordance with Article 17, adopt the annual work programme of BEREC before the end of each year preceding that to which the work programme relates. The Board of Regulators shall transmit the annual work programme to the European Parliament, the Council and the Commission as soon as it is adopted.

5. The Board of Regulators shall adopt the annual report on the activities of BEREC and shall transmit it to the European Parliament, the Council, the Commission, the European Economic and Social Committee and the Court of Auditors annually by 15 June. The European Parliament may request the Chair of the Board of Regulators to address it on relevant issues relating to the activities of BEREC.

Article 6

The Office

1. The Office is hereby established as a Community body with legal personality within the meaning of Article 185 of the Financial Regulation. Point 47 of the IIA of 17 May 2006 shall apply to the Office.

2. Under the guidance of the Board of Regulators, the Office shall in particular:

- provide professional and administrative support services to BEREC,
- collect information from NRAs and exchange and transmit information in relation to the role and tasks set out in Articles 2(a) and 3,
- disseminate regulatory best practices among NRAs, in accordance with Article 2(a),
- assist the Chair in the preparation of the work of the Board of Regulators,
- set up Expert Working Groups, upon request of the Board of Regulators, and provide support to ensure the smooth functioning of those Groups.

3. The Office shall comprise:

- (a) a Management Committee;
- (b) an Administrative Manager.

4. In every Member State the Office shall enjoy the most extensive legal capacity accorded to legal persons under national law. The Office may, in particular, acquire and dispose of movable and immovable property and be a party to legal proceedings.

5. The Office shall be managed by the Administrative Manager and shall have staff strictly limited to the number required to carry out its duties. The number of staff shall be proposed by members of the Management Committee and the Administrative Manager in accordance with Article 11. Any proposal to increase the number of staff may only be taken by unanimous decision of the Management Committee.

Article 7

Management Committee

1. The Management Committee shall be composed of one member per Member State who shall be the head or nominated high level representative of the independent NRA established in each Member State with primary responsibility for overseeing the day-to-day operation of the markets for electronic communications networks and services, and one member representing the Commission.

Each Member shall have one vote.

The provisions of Article 4 shall apply, *mutatis mutandis*, to the Management Committee.

2. The Management Committee shall appoint the Administrative Manager. The Administrative Manager designated shall not participate in the preparation of, or vote on, such a decision.
3. The Management Committee shall provide guidance to the Administrative Manager in the execution of the Administrative Manager's tasks.
4. The Management Committee shall be responsible for the appointment of staff.
5. The Management Committee shall assist in the work of the Expert Working Groups.

Article 8

The Administrative Manager

1. The Administrative Manager shall be accountable to the Management Committee. In the performance of his or her functions, the Administrative Manager shall neither seek nor accept any instruction from any Member State, any NRA, the Commission or any third party.
2. The Administrative Manager shall be appointed by the Management Committee, by means of an open competition, on the basis of merit and the skills and experience relevant to electronic communications networks and services. Before appointment, the suitability of the candidate selected by the Management Committee may be subject to a non-binding opinion of the European Parliament. To this end, the candidate shall be invited to make a statement before the responsible committee of the European Parliament and answer questions put by its members.

3. The Administrative Manager's term of office shall be three years.

4. The Management Committee may extend the term of office of the Administrative Manager once for not more than three years, taking into account the evaluation report undertaken by the Chair and only in those cases where it can be justified by the duties and requirements of BEREK.

The Management Committee shall inform the European Parliament of any intention to extend the Administrative Manager's term of office.

Where the term of office is not extended, the Administrative Manager shall remain in office until the appointment of a successor.

Article 9

Tasks of the Administrative Manager

1. The Administrative Manager shall be responsible for heading the Office.
2. The Administrative Manager shall assist with the preparation of the agenda of the Board of Regulators, the Management Committee and the Expert Working Groups. The Administrative Manager shall participate, without having the right to vote, in the work of the Board of Regulators and the Management Committee.
3. Every year the Administrative Manager shall assist the Management Committee with the preparation of the draft work programme of the Office for the following year. The draft work programme for the following year shall be submitted to the Management Committee by 30 June, and shall be adopted by the Management Committee by 30 September without pre-empting the final decision on the subsidy taken by the European Parliament and the Council (together referred to as the budgetary authority).
4. The Administrative Manager shall, under the guidance of the Board of Regulators, supervise the implementation of the annual work programme of the Office.
5. The Administrative Manager shall, under the supervision of the Management Committee, take the necessary measures, notably the adoption of internal administrative instructions and the publication of notices, to ensure the functioning of the Office in accordance with this Regulation.
6. The Administrative Manager shall, under the supervision of the Management Committee, implement the budget of the Office pursuant to Article 13.
7. Each year, the Administrative Manager shall assist with the preparation of the draft annual report on the activities of BEREK referred to in Article 5(5).

Article 10

Staff

1. The Staff Regulations of officials of the European Communities and the Conditions of employment of other servants of the European Communities, laid down by Council Regulation (EEC, Euratom, ECSC) No 259/68⁽¹⁾ and the rules adopted jointly by the European Community institutions for the purpose of applying these Staff Regulations and Conditions of employment shall apply to the staff of the Office, including to the Administrative Manager.

2. The Management Committee, in agreement with the Commission, shall adopt the necessary implementing measures, in accordance with the arrangements provided for in Article 110 of the Staff Regulations of Officials of the European Communities.

⁽¹⁾ OJ L 56, 4.3.1968, p. 1.

3. The powers conferred on the appointing authority by the Staff Regulations of Officials of the European Communities and the powers conferred on the authority entitled to conclude contracts by the Conditions of employment of other servants of the European Communities, shall be exercised by the Vice-Chair of the Management Committee.

4. The Management Committee may adopt provisions to allow national experts from Member States to be appointed on secondment to the Office on a temporary basis and for a maximum of three years.

CHAPTER III

FINANCIAL PROVISIONS

Article 11

Budget of the Office

1. The revenues and resources of the Office shall consist, in particular, of:

- (a) a subsidy from the Community, entered under the appropriate headings of the general budget of the European Union (Commission Section), as decided by the budgetary authority and in accordance with Point 47 of the IIA of 17 May 2006;
- (b) financial contributions from Member States or from their NRAs made on a voluntary basis in accordance with Article 5(2). These contributions shall be used to finance specific items of operational expenditure as defined in the agreement to be concluded between the Office and the Member States or their NRAs pursuant to Article 19(1)(b) of Commission Regulation (EC, Euratom) No 2343/2002 of 19 November 2002 on the framework Financial Regulation for the bodies referred to in Article 185 of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities ⁽¹⁾. Each Member State shall ensure that NRAs have the adequate financial resources required to participate in the work of the Office. Before the establishment of the preliminary draft general budget of the European Union, the Office shall forward to the budgetary authority appropriate, timely and detailed documentation on assigned revenues under this Article.

2. The expenditure of the Office shall cover staff, administrative, infrastructure and operational expenses.

3. Revenue and expenditure shall be in balance.

4. All revenue and expenditure shall be the subject of forecasts for each financial year, coinciding with the calendar year, and shall be entered in the budget of the Office.

⁽¹⁾ OJ L 357, 31.12.2002, p. 72.

5. The organisational and financial structure of the Office shall be reviewed five years after the date of establishment of the Office.

Article 12

Establishment of the budget

1. By 15 February of each year, the Administrative Manager shall assist the Management Committee with the preparation of a preliminary draft budget covering the expenditure anticipated for the following financial year, together with a list of provisional posts. Each year the Management Committee shall, on the basis of the draft, make an estimate of revenue and expenditure of the Office for the following financial year. That estimate, including a draft establishment plan, shall be transmitted by the Management Committee to the Commission by 31 March.

2. The estimate shall be transmitted by the Commission to the budgetary authority together with the preliminary draft general budget of the European Union.

3. On the basis of the estimates, the Commission shall enter in the preliminary draft general budget of the European Union the forecasts it considers necessary in respect of the establishment plan and propose the amount of the subsidy.

4. The budgetary authority shall adopt the establishment plan for the Office.

5. The budget of the Office shall be drawn up by the Management Committee. It shall become final after the final adoption of the general budget of the European Union. Where necessary, it shall be adjusted accordingly.

6. The Management Committee shall, without delay, notify the budgetary authority of its intention to implement any project which may have significant financial implications for the funding of the budget, in particular any project relating to property such as the rental or purchase of buildings. It shall inform the Commission thereof. If either branch of the budgetary authority intends to issue an opinion, it shall, within two weeks after receipt of the information on the building project, notify the Management Committee of its intention to issue such an opinion. In the absence of a reply, the Management Committee may proceed with the planned operation.

Article 13

Implementation and control of the budget

1. The Administrative Manager shall act as authorising officer and shall implement the Office's budget under the supervision of the Management Committee.

2. The Management Committee shall draw up an annual activity report for the Office, together with a statement of assurance. Those documents shall be made public.

3. By 1 March following the completion of each financial year, the Office accounting officer shall forward to the Commission's accounting officer and the Court of Auditors the provisional accounts accompanied by the report on budgetary and financial management over the financial year. The Office accounting officer shall also send the report on budgetary and financial management to the European Parliament and the Council by 31 March of the following year. The Commission's accounting officer shall thereafter consolidate the provisional accounts of the institutions and decentralised bodies in accordance with Article 128 of Regulation (EC, Euratom) No 1605/2002.

4. By 31 March following the completion of each financial year, the Commission's accounting officer shall forward the provisional accounts of the Office accompanied by the report on the budgetary and financial management over the financial year to the Court of Auditors. The report on budgetary and financial management over the financial year shall also be forwarded to the European Parliament and the Council.

5. After receiving the observations of the Court of Auditors on the provisional accounts of the Office, in accordance with Article 129 of Regulation (EC, Euratom) No 1605/2002, the Administrative Manager shall, acting on his or her own responsibility, draw up the final accounts of the Office and transmit them, for opinion, to the Management Committee.

6. The Management Committee shall deliver an opinion on the final accounts of the Office.

7. The Administrative Manager shall transmit these final accounts, accompanied by the opinion of the Management Committee, by 1 July following the completion of the financial year, to the European Parliament, the Council, the Commission and the Court of Auditors.

8. The final accounts shall be published.

9. The Management Committee shall reply to the Court of Auditors' observations by 15 October. The Management Committee shall also send this reply to the European Parliament and the Commission.

10. The Management Committee shall submit to the European Parliament, at the latter's request, and as provided for in Article 146(3) of Regulation (EC, Euratom) No 1605/2002, any information necessary for the smooth application of the discharge procedure for the financial year in question.

11. The European Parliament shall, following a recommendation from the Council acting by a qualified majority, before 15 May of year $N + 2$, grant a discharge to the Management Committee for the implementation of the budget for the financial year N .

Article 14

Internal control systems

The Internal Auditor of the Commission shall be responsible for auditing the Office.

Article 15

Financial rules

Regulation (EC, Euratom) No 2343/2002 shall apply to the Office. Further financial rules applicable to the Office shall be drawn up by the Management Committee after consultation with the Commission. Those rules may deviate from Regulation (EC, Euratom) No 2343/2002 if the specific operational needs of the functioning of the Office so require and only with the prior agreement of the Commission.

Article 16

Anti-fraud measures

1. For the purpose of combating fraud, corruption and other illegal acts, the provisions of Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) ⁽¹⁾ shall apply without any restriction.

2. The Office shall accede to the Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-Fraud Office (OLAF) ⁽²⁾ and shall immediately adopt appropriate provisions for all staff of the Office.

3. The funding decisions and the agreements and implementing instruments resulting from them shall explicitly stipulate that the Court of Auditors and OLAF may, if necessary, carry out on-the-spot checks among the beneficiaries of monies disbursed by the Office and on the staff responsible for allocating these monies.

CHAPTER IV

GENERAL PROVISIONS

Article 17

Consultation

Where appropriate, BEREC shall, before adopting opinions, regulatory best practice or reports, consult interested parties and give them the opportunity to comment within a reasonable period. BEREC shall, without prejudice to Article 20, make the results of the consultation procedure publicly available.

⁽¹⁾ OJ L 136, 31.5.1999, p. 1.

⁽²⁾ OJ L 136, 31.5.1999, p. 15.

*Article 18***Transparency and accountability**

BEREC and the Office shall carry out their activities with a high level of transparency. BEREC and the Office shall ensure that the public and any interested parties are given objective, reliable and easily accessible information, in particular in relation to the results of their work.

*Article 19***Provision of information to BEREC and the Office**

The Commission and NRAs shall provide information requested by BEREC and the Office to enable BEREC and the Office to perform their tasks. This information shall be managed in accordance with the rules set out in Article 5 of Directive 2002/21/EC (Framework Directive).

*Article 20***Confidentiality**

Subject to Article 22, neither BEREC nor the Office shall publish or disclose to third parties information that they process or receive for which confidential treatment has been requested.

Members of the Board of Regulators and of the Management Committee, the Administrative Manager, external experts including the experts of the Expert Working Groups, and the staff of the Office shall be subject to the requirements of confidentiality pursuant to Article 287 of the Treaty, even after their duties have ceased.

BEREC and the Office shall lay down in their respective internal rules of procedure the practical arrangements for implementing the confidentiality rules referred to in paragraphs 1 and 2.

*Article 21***Declaration of interests**

Members of the Board of Regulators and of the Management Committee, the Administrative Manager and the staff of the Office shall make an annual declaration of commitments and a declaration of interests indicating any direct or indirect interests, which might be considered prejudicial to their independence. Such declarations shall be made in writing. The declaration of interests made by the members of the Board of Regulators and of the Management Committee, and by the Administrative Manager shall be made public.

*Article 22***Access to documents**

1. Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents ⁽¹⁾ shall apply to documents held by BEREC and the Office.

2. The Board of Regulators and the Management Committee shall adopt practical measures for applying Regulation (EC) No 1049/2001 within six months from the date of the effective start of operations of BEREC and the Office, respectively.

3. Decisions taken pursuant to Article 8 of Regulation (EC) No 1049/2001 may be the subject of a complaint to the Ombudsman or of proceedings before the Court of Justice of the European Communities, in accordance with the conditions laid down in Articles 195 and 230 of the Treaty respectively.

*Article 23***Privileges and immunities**

The Protocol on the privileges and immunities of the European Communities shall apply to the Office and its staff.

*Article 24***Liability of the Office**

1. In the case of non-contractual liability, the Office shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or its staff in the performance of their duties. The Court of Justice of the European Communities shall have jurisdiction in any dispute over the remedying of such damage.

2. The personal financial and disciplinary liability of the Office staff towards the Office shall be governed by the relevant provisions applying to the staff of the Office.

CHAPTER V

FINAL PROVISIONS

*Article 25***Evaluation and review**

Within three years of the effective start of operations of BEREC and the Office, respectively, the Commission shall publish an evaluation report on the experience acquired as a result of the operation of BEREC and the Office. The evaluation report shall cover the results achieved by BEREC and the Office and their respective working methods, in relation to their respective

⁽¹⁾ OJ L 145, 31.5.2001, p. 43.

objectives, mandates and tasks defined in this Regulation and in their respective annual work programmes. The evaluation report shall take into account the views of stakeholders, at both Community and national level and shall be forwarded to the European Parliament and to the Council. The European Parliament shall issue an opinion on the evaluation report.

Article 26

Entry into force

This Regulation shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Strasbourg, 25 November 2009.

For the European Parliament
The President
J. BUZEK

For the Council
The President
Å. TORSTENSSON

DIRECTIVE 2002/21/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 7 March 2002

**on a common regulatory framework for electronic communications networks and services
(Framework Directive) (*)**

as amended by Directive 2009/140/EC () and Regulation 544/2009 (***)
(unofficially consolidated version)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the Economic and Social Committee ⁽²⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽³⁾,

Whereas:

- (1) The current regulatory framework for telecommunications has been successful in creating the conditions for effective competition in the telecommunications sector during the transition from monopoly to full competition.
- (2) On 10 November 1999, the Commission presented a communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions entitled Towards a new framework for electronic communications infrastructure and associated services - the 1999 communications review. In that communication, the Commission reviewed the existing regulatory framework for telecommunications, in accordance with its obligation under Article 8 of Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision ⁽⁴⁾. It also presented a series of policy proposals for a new regulatory framework for electronic communications infrastructure and associated services for public consultation.
- (3) On 26 April 2000 the Commission presented a communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on the results of the

public consultation on the 1999 communications review and orientations for the new regulatory framework. The communication summarised the public consultation and set out certain key orientations for the preparation of a new framework for electronic communications infrastructure and associated services.

- (4) The Lisbon European Council of 23 and 24 March 2000 highlighted the potential for growth, competitiveness and job creation of the shift to a digital, knowledge-based economy. In particular, it emphasised the importance for Europe's businesses and citizens of access to an inexpensive, world-class communications infrastructure and a wide range of services.
- (5) The convergence of the telecommunications, media and information technology sectors means all transmission networks and services should be covered by a single regulatory framework. That regulatory framework consists of this Directive and four specific Directives: Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) ⁽⁵⁾, Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) ⁽⁶⁾, Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) ⁽⁷⁾, Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector ⁽⁸⁾, (hereinafter referred to as the Specific Directives). It is necessary to separate the regulation of transmission from the regulation of content. This framework does not therefore cover the content of services delivered over electronic communications networks using electronic communications services, such as broadcasting content, financial services and certain information society services, and is therefore without prejudice to measures taken at Community or national level in respect of such services, in compliance with Community law, in order to promote cultural and linguistic diversity and to ensure the defence of media pluralism. The content of television programmes is covered by Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down

(*) OJ L 108, 24.04.2002, p. 33.

(**) OJ L 337, 18.12.2009, p. 37.

(***) OJ L 167, 18.6.2009, p. 12.

⁽¹⁾ OJ C 365 E, 19.12.2000, p. 198 and OJ C 270 E, 25.9.2001, p. 199.

⁽²⁾ OJ C 123, 25.4.2001, p. 56.

⁽³⁾ Opinion of the European Parliament of 1 March 2001 (OJ C 277, 1.10.2001, p. 91), Council Common Position of 17 September 2001 (OJ C 337, 30.11.2001, p. 34) and Decision of the European Parliament of 12 December 2001 (not yet published in the Official Journal). Council Decision of 14 February 2002.

⁽⁴⁾ OJ L 192, 24.7.1990, p. 1. Directive as amended by Directive 97/51/EC of the European Parliament and of the Council (OJ L 295, 29.10.1997, p. 23).

⁽⁵⁾ See page 21 of this Official Journal. [L 108, 24.4.2002]

⁽⁶⁾ See page 7 of this Official Journal. [L 108, 24.4.2002]

⁽⁷⁾ See page 51 of this Official Journal. [L 108, 24.4.2002]

⁽⁸⁾ OJ L 24, 30.1.1998, p. 1.

by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities⁽⁹⁾. The separation between the regulation of transmission and the regulation of content does not prejudice the taking into account of the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection.

- (6) Audiovisual policy and content regulation are undertaken in pursuit of general interest objectives, such as freedom of expression, media pluralism, impartiality, cultural and linguistic diversity, social inclusion, consumer protection and the protection of minors. The Commission communication Principles and guidelines for the Community's audio-visual policy in the digital age, and the Council conclusions of 6 June 2000 welcoming this communication, set out the key actions to be taken by the Community to implement its audio-visual policy.
- (7) The provisions of this Directive and the Specific Directives are without prejudice to the possibility for each Member State to take the necessary measures to ensure the protection of its essential security interests, to safeguard public policy and public security, and to permit the investigation, detection and prosecution of criminal offences, including the establishment by national regulatory authorities of specific and proportional obligations applicable to providers of electronic communications services.
- (8) This Directive does not cover equipment within the scope of Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity⁽¹⁰⁾, but does cover consumer equipment used for digital television. It is important for regulators to encourage network operators and terminal equipment manufacturers to cooperate in order to facilitate access by disabled users to electronic communications services.
- (9) Information society services are covered by Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (Directive on electronic commerce)⁽¹¹⁾.
- (10) The definition of 'information society service' in Article 1 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules of information society services⁽¹²⁾ spans a wide range of economic activities which take place on-line. Most of these activities are not covered by the scope of this Directive because they do not consist wholly or

mainly in the conveyance of signals on electronic communications networks. Voice telephony and electronic mail conveyance services are covered by this Directive. The same undertaking, for example an Internet service provider, can offer both an electronic communications service, such as access to the Internet, and services not covered under this Directive, such as the provision of web-based content.

- (11) In accordance with the principle of the separation of regulatory and operational functions, Member States should guarantee the independence of the national regulatory authority or authorities with a view to ensuring the impartiality of their decisions. This requirement of independence is without prejudice to the institutional autonomy and constitutional obligations of the Member States or to the principle of neutrality with regard to the rules in Member States governing the system of property ownership laid down in Article 295 of the Treaty. National regulatory authorities should be in possession of all the necessary resources, in terms of staffing, expertise, and financial means, for the performance of their tasks.
- (12) Any party who is the subject of a decision by a national regulatory authority should have the right to appeal to a body that is independent of the parties involved. This body may be a court. Furthermore, any undertaking which considers that its applications for the granting of rights to install facilities have not been dealt with in accordance with the principles set out in this Directive should be entitled to appeal against such decisions. This appeal procedure is without prejudice to the division of competences within national judicial systems and to the rights of legal entities or natural persons under national law.
- (13) National regulatory authorities need to gather information from market players in order to carry out their tasks effectively. Such information may also need to be gathered on behalf of the Commission, to allow it to fulfil its obligations under Community law. Requests for information should be proportionate and not impose an undue burden on undertakings. Information gathered by national regulatory authorities should be publicly available, except in so far as it is confidential in accordance with national rules on public access to information and subject to Community and national law on business confidentiality.
- (14) Information that is considered confidential by a national regulatory authority, in accordance with Community and national rules on business confidentiality, may only be exchanged with the Commission and other national regulatory authorities where such exchange is strictly necessary for the application of the provisions of this Directive or the Specific Directives. The information exchanged should be limited to that which is relevant and proportionate to the purpose of such an exchange.
- (15) It is important that national regulatory authorities consult all interested parties on proposed decisions and take account of their comments before adopting a final decision. In order to ensure that decisions at national level do not have an adverse effect on the single market or other Treaty

⁽⁹⁾ OJ L 298, 17.10.1989, p. 23. Directive as amended by Directive 97/36/EC of the European Parliament and of the Council (OJ L 202, 30.7.1997, p. 60).

⁽¹⁰⁾ OJ L 91, 7.4.1999, p. 10.

⁽¹¹⁾ OJ L 178, 17.7.2000, p. 1.

⁽¹²⁾ OJ L 204, 21.7.1998, p. 37. Directive as amended by Directive 98/48/EC (OJ L 217, 5.8.1998, p. 18).

- objectives, national regulatory authorities should also notify certain draft decisions to the Commission and other national regulatory authorities to give them the opportunity to comment. It is appropriate for national regulatory authorities to consult interested parties on all draft measures which have an effect on trade between Member States. The cases where the procedures referred to in Articles 6 and 7 apply are defined in this Directive and in the Specific Directives. The Commission should be able, after consulting the Communications Committee, to require a national regulatory authority to withdraw a draft measure where it concerns definition of relevant markets or the designation or not of undertakings with significant market power, and where such decisions would create a barrier to the single market or would be incompatible with Community law and in particular the policy objectives that national regulatory authorities should follow. This procedure is without prejudice to the notification procedure provided for in Directive 98/34/EC and the Commission's prerogatives under the Treaty in respect of infringements of Community law.
- (16) National regulatory authorities should have a harmonised set of objectives and principles to underpin, and should, where necessary, coordinate their actions with the regulatory authorities of other Member States in carrying out their tasks under this regulatory framework.
- (17) The activities of national regulatory authorities established under this Directive and the Specific Directives contribute to the fulfilment of broader policies in the areas of culture, employment, the environment, social cohesion and town and country planning.
- (18) The requirement for Member States to ensure that national regulatory authorities take the utmost account of the desirability of making regulation technologically neutral, that is to say that it neither imposes nor discriminates in favour of the use of a particular type of technology, does not preclude the taking of proportionate steps to promote certain specific services where this is justified, for example digital television as a means for increasing spectrum efficiency.
- (19) Radio frequencies are an essential input for radio-based electronic communications services and, in so far as they relate to such services, should therefore be allocated and assigned by national regulatory authorities according to a set of harmonised objectives and principles governing their action as well as to objective, transparent and non-discriminatory criteria, taking into account the democratic, social, linguistic and cultural interests related to the use of frequency. It is important that the allocation and assignment of radio frequencies is managed as efficiently as possible. Transfer of radio frequencies can be an effective means of increasing efficient use of spectrum, as long as there are sufficient safeguards in place to protect the public interest, in particular the need to ensure transparency and regulatory supervision of such transfers. Decision No 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision)
- (¹³) establishes a framework for harmonisation of radio frequencies, and action taken under this Directive should seek to facilitate the work under that Decision.
- (20) Access to numbering resources on the basis of transparent, objective and non-discriminatory criteria is essential for undertakings to compete in the electronic communications sector. All elements of national numbering plans should be managed by national regulatory authorities, including point codes used in network addressing. Where there is a need for harmonisation of numbering resources in the Community to support the development of pan-European services, the Commission may take technical implementing measures using its executive powers. Where this is appropriate to ensure full global interoperability of services, Member States should coordinate their national positions in accordance with the Treaty in international organisations and fora where numbering decisions are taken. The provisions of this Directive do not establish any new areas of responsibility for the national regulatory authorities in the field of Internet naming and addressing.
- (21) Member States may use, *inter alia*, competitive or comparative selection procedures for the assignment of radio frequencies as well as numbers with exceptional economic value. In administering such schemes, national regulatory authorities should take into account the provisions of Article 8.
- (22) It should be ensured that procedures exist for the granting of rights to install facilities that are timely, non-discriminatory and transparent, in order to guarantee the conditions for fair and effective competition. This Directive is without prejudice to national provisions governing the expropriation or use of property, the normal exercise of property rights, the normal use of the public domain, or to the principle of neutrality with regard to the rules in Member States governing the system of property ownership.
- (23) Facility sharing can be of benefit for town planning, public health or environmental reasons, and should be encouraged by national regulatory authorities on the basis of voluntary agreements. In cases where undertakings are deprived of access to viable alternatives, compulsory facility or property sharing may be appropriate. It covers *inter alia*: physical co-location and duct, building, mast, antenna or antenna system sharing. Compulsory facility or property sharing should be imposed on undertakings only after full public consultation.
- (24) Where mobile operators are required to share towers or masts for environmental reasons, such mandated sharing may lead to a reduction in the maximum transmitted power levels allowed for each operator for reasons of public health, and this in turn may require operators to install more transmission sites to ensure national coverage.
- (25) There is a need for *ex ante* obligations in certain circumstances in order to ensure the development of a competitive market. The definition of

(¹³) See page 1 of this Official Journal. [L 108, 24.4.2002]

significant market power in the Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of open network provision (ONP) ⁽¹⁴⁾ has proved effective in the initial stages of market opening as the threshold for *ex ante* obligations, but now needs to be adapted to suit more complex and dynamic markets. For this reason, the definition used in this Directive is equivalent to the concept of dominance as defined in the case law of the Court of Justice and the Court of First Instance of the European Communities.

- (26) Two or more undertakings can be found to enjoy a joint dominant position not only where there exist structural or other links between them but also where the structure of the relevant market is conducive to coordinated effects, that is, it encourages parallel or aligned anti-competitive behaviour on the market.
- (27) It is essential that *ex ante* regulatory obligations should only be imposed where there is not effective competition, i.e. in markets where there are one or more undertakings with significant market power, and where national and Community competition law remedies are not sufficient to address the problem. It is necessary therefore for the Commission to draw up guidelines at Community level in accordance with the principles of competition law for national regulatory authorities to follow in assessing whether competition is effective in a given market and in assessing significant market power. National regulatory authorities should analyse whether a given product or service market is effectively competitive in a given geographical area, which could be the whole or a part of the territory of the Member State concerned or neighbouring parts of territories of Member States considered together. An analysis of effective competition should include an analysis as to whether the market is prospectively competitive, and thus whether any lack of effective competition is durable. Those guidelines will also address the issue of newly emerging markets, where *de facto* the market leader is likely to have a substantial market share but should not be subjected to inappropriate obligations. The Commission should review the guidelines regularly to ensure that they remain appropriate in a rapidly developing market. National regulatory authorities will need to cooperate with each other where the relevant market is found to be transnational.
- (28) In determining whether an undertaking has significant market power in a specific market, national regulatory authorities should act in accordance with Community law and take into the utmost account the Commission guidelines.
- (29) The Community and the Member States have entered into commitments in relation to standards and the regulatory framework of telecommunications networks and services in the World Trade Organisation.

- (30) Standardisation should remain primarily a market-driven process. However there may still be situations where it is appropriate to require compliance with specified standards at Community level to ensure interoperability in the single market. At national level, Member States are subject to the provisions of Directive 98/34/EC. Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals ⁽¹⁵⁾ did not mandate any specific digital television transmission system or service requirement. Through the Digital Video Broadcasting Group, European market players have developed a family of television transmission systems that have been standardised by the European Telecommunications Standards Institute (ETSI) and have become International Telecommunication Union recommendations. Any decision to make the implementation of such standards mandatory should follow a full public consultation. Standardisation procedures under this Directive are without prejudice to the provisions of Directive 1999/5/EC, Council Directive 73/23/EEC of 19 February 1973 on the harmonisation of the laws of Member States relating to electrical equipment designed for use within certain voltage limits ⁽¹⁶⁾ and Council Directive 89/336/EEC of 3 May 1989 on the approximation of the laws of the Member States relating to electromagnetic compatibility ⁽¹⁷⁾.
- (31) Interoperability of digital interactive television services and enhanced digital television equipment, at the level of the consumer, should be encouraged in order to ensure the free flow of information, media pluralism and cultural diversity. It is desirable for consumers to have the capability of receiving, regardless of the transmission mode, all digital interactive television services, having regard to technological neutrality, future technological progress, the need to promote the take-up of digital television, and the state of competition in the markets for digital television services. Digital interactive television platform operators should strive to implement an open application program interface (API) which conforms to standards or specifications adopted by a European standards organisation. Migration from existing APIs to new open APIs should be encouraged and organised, for example by Memoranda of Understanding between all relevant market players. Open APIs facilitate interoperability, i.e. the portability of interactive content between delivery mechanisms, and full functionality of this content on enhanced digital television equipment. However, the need not to hinder the functioning of the receiving equipment and to protect it from malicious attacks, for example from viruses, should be taken into account.
- (32) In the event of a dispute between undertakings in the same Member State in an area covered by this Directive or the Specific Directives, for example relating to obligations for access and interconnection or to the means of transferring

⁽¹⁴⁾ OJ L 199, 26.7.1997, p. 32. Directive as amended by Directive 98/61/EC (OJ L 268, 3.10.1998, p. 37).

⁽¹⁵⁾ OJ L 281, 23.11.1995, p. 51.

⁽¹⁶⁾ OJ L 77, 26.3.1973, p. 29.

⁽¹⁷⁾ OJ L 139, 23.5.1989, p. 19.

subscriber lists, an aggrieved party that has negotiated in good faith but failed to reach agreement should be able to call on the national regulatory authority to resolve the dispute. National regulatory authorities should be able to impose a solution on the parties. The intervention of a national regulatory authority in the resolution of a dispute between undertakings providing electronic communications networks or services in a Member State should seek to ensure compliance with the obligations arising under this Directive or the Specific Directives.

- (33) In addition to the rights of recourse granted under national or Community law, there is a need for a simple procedure to be initiated at the request of either party in a dispute, to resolve cross-border disputes which lie outside the competence of a single national regulatory authority.
- (34) A single Committee should replace the 'ONP Committee' instituted by Article 9 of Directive 90/387/EEC and the Licensing Committee instituted by Article 14 of Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services ⁽¹⁸⁾.
- (35) National regulatory authorities and national competition authorities should provide each other with the information necessary to apply the provisions of this Directive and the Specific Directives, in order to allow them to cooperate fully together. In respect of the information exchanged, the receiving authority should ensure the same level of confidentiality as the originating authority.
- (36) The Commission has indicated its intention to set up a European regulators group for electronic communications networks and services which would constitute a suitable mechanism for encouraging cooperation and coordination of national regulatory authorities, in order to promote the development of the internal market for electronic communications networks and services, and to seek to achieve consistent application, in all Member States, of the provisions set out in this Directive and the Specific Directives, in particular in areas where national law implementing Community law gives national regulatory authorities considerable discretionary powers in application of the relevant rules.
- (37) National regulatory authorities should be required to cooperate with each other and with the Commission in a transparent manner to ensure consistent application, in all Member States, of the provisions of this Directive and the Specific Directives. This cooperation could take place, *inter alia*, in the Communications Committee or in a group comprising European regulators. Member States should decide which bodies are national regulatory authorities for the purposes of this Directive and the Specific Directives.
- (38) Measures that could affect trade between Member States are measures that may have an influence, direct or indirect, actual or potential, on the

pattern of trade between Member States in a manner which might create a barrier to the single market. They comprise measures that have a significant impact on operators or users in other Member States, which include, *inter alia*: measures which affect prices for users in other Member States; measures which affect the ability of an undertaking established in another Member State to provide an electronic communications service, and in particular measures which affect the ability to offer services on a transnational basis; and measures which affect market structure or access, leading to repercussions for undertakings in other Member States.

- (39) The provisions of this Directive should be reviewed periodically, in particular with a view to determining the need for modification in the light of changing technological or market conditions.
- (40) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission ⁽¹⁹⁾.
- (41) Since the objectives of the proposed action, namely achieving a harmonised framework for the regulation of electronic communications services, electronic communications networks, associated facilities and associated services cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary for those objectives.
- (42) Certain directives and decisions in this field should be repealed.
- (43) The Commission should monitor the transition from the existing framework to the new framework, and may in particular, at an appropriate time, bring forward a proposal to repeal Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop ⁽²⁰⁾,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

SCOPE, AIM AND DEFINITIONS

Article 1

Scope and aim

1. This Directive establishes a harmonised framework for the regulation of electronic communications services, electronic communications networks, associated facilities

⁽¹⁸⁾ OJ L 117, 7.5.1997, p. 15.

⁽¹⁹⁾ OJ L 184, 17.7.1999, p. 23.

⁽²⁰⁾ OJ L 336, 30.12.2000, p. 4.

and associated services, and certain aspects of terminal equipment to facilitate access for disabled users. It lays down tasks of national regulatory authorities and establishes a set of procedures to ensure the harmonised application of the regulatory framework throughout the Community.

2. This Directive as well as the Specific Directives are without prejudice to obligations imposed by national law in accordance with Community law or by Community law in respect of services provided using electronic communications networks and services.

3. This Directive as well as the Specific Directives are without prejudice to measures taken at Community or national level, in compliance with Community law, to pursue general interest objectives, in particular relating to content regulation and audio-visual policy.

3a. Measures taken by Member States regarding end-users access to, or use of, services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law.

Any of these measures regarding end-users' access to, or use of, services and applications through electronic communications networks liable to restrict those fundamental rights or freedoms may only be imposed if they are appropriate, proportionate and necessary within a democratic society, and their implementation shall be subject to adequate procedural safeguards in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with general principles of Community law, including effective judicial protection and due process. Accordingly, these measures may only be taken with due respect for the principle of the presumption of innocence and the right to privacy. A prior, fair and impartial procedure shall be guaranteed, including the right to be heard of the person or persons concerned, subject to the need for appropriate conditions and procedural arrangements in duly substantiated cases of urgency in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The right to effective and timely judicial review shall be guaranteed.

4. This Directive and the Specific Directives are without prejudice to the provisions of Directive 1999/5/EC.

5. This Directive and the Specific Directives shall be without prejudice to any specific measure adopted for the regulation of international roaming on public mobile communications networks within the Community.

Article 2

Definitions

For the purposes of this Directive:

(a) 'electronic communications network' means transmission systems and, where applicable, switching or routing equipment and other resources, including network elements which are not active, which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and

mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed;

(b) 'transnational markets' means markets identified in accordance with Article 15(4) covering the Community or a substantial part thereof located in more than one Member State;

(c) 'electronic communications service' means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks;

(d) 'public communications network' means an electronic communications network used wholly or mainly for the provision of electronic communications services available to the public which support the transfer of information between network termination points;

(da) 'network termination point' (NTP) means the physical point at which a subscriber is provided with access to a public communications network; in the case of networks involving switching or routing, the NTP is identified by means of a specific network address, which may be linked to a subscriber number or name;

(e) 'associated facilities' means those associated services, physical infrastructures and other facilities or elements associated with an electronic communications network and/or an electronic communications service which enable and/or support the provision of services via that network and/or service or have the potential to do so, and include, inter alia, buildings or entries to buildings, building wiring, antennae, towers and other supporting constructions, ducts, conduits, masts, manholes, and cabinets;

(ea) 'associated services' means those services associated with an electronic communications network and/or an electronic communications service which enable and/or support the provision of services via that network and/or service or have the potential to do so and include, inter alia, number translation or systems offering equivalent functionality, conditional access systems and electronic programme guides, as well as other services such as identity, location and presence service;

(f) 'conditional access system' means any technical measure and/or arrangement whereby access to a protected radio or television broadcasting service in intelligible form is made conditional upon subscription or other form of prior individual authorisation;

- (g) 'national regulatory authority' means the body or bodies charged by a Member State with any of the regulatory tasks assigned in this Directive and the Specific Directives;
- (h) 'user' means a legal entity or natural person using or requesting a publicly available electronic communications service;
- (i) 'consumer' means any natural person who uses or requests a publicly available electronic communications service for purposes which are outside his or her trade, business or profession;
- (j) 'universal service' means the minimum set of services, defined in Directive 2002/22/EC (Universal Service Directive), of specified quality which is available to all users regardless of their geographical location and, in the light of specific national conditions, at an affordable price;
- (k) 'subscriber' means any natural person or legal entity who or which is party to a contract with the provider of publicly available electronic communications services for the supply of such services;
- (l) 'Specific Directives' means Directive 2002/20/EC (Authorisation Directive), Directive 2002/19/EC (Access Directive), Directive 2002/22/EC (Universal Service Directive) and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (*);
- (m) 'provision of an electronic communications network' means the establishment, operation, control or making available of such a network;
- (n) 'end-user' means a user not providing public communications networks or publicly available electronic communications services.
- (o) 'enhanced digital television equipment' means set-top boxes intended for connection to television sets or integrated digital television sets, able to receive digital interactive television services;
- (p) 'application program interface (API)' means the software interfaces between applications, made available by broadcasters or service providers, and the resources in the enhanced digital television equipment for digital television and radio services.
- (q) 'spectrum allocation' means the designation of a given frequency band for use by one or more types of radiocommunications services, where appropriate, under specified conditions;
- (r) 'harmful interference' means interference which endangers the functioning of a radio navigation service or of other safety services or which otherwise seriously degrades, obstructs or repeatedly interrupts a radiocommunications service operating in accordance with the applicable international, Community or national regulations;

- (s) 'call' means a connection established by means of a publicly available electronic communications service allowing two-way voice communication.

CHAPTER II

NATIONAL REGULATORY AUTHORITIES

Article 3

National regulatory authorities

1. Member States shall ensure that each of the tasks assigned to national regulatory authorities in this Directive and the Specific Directives is undertaken by a competent body.

2. Member States shall guarantee the independence of national regulatory authorities by ensuring that they are legally distinct from and functionally independent of all organisations providing electronic communications networks, equipment or services. Member States that retain ownership or control of undertakings providing electronic communications networks and/or services shall ensure effective structural separation of the regulatory function from activities associated with ownership or control.

3. Member States shall ensure that national regulatory authorities exercise their powers impartially, transparently and in a timely manner. Member States shall ensure that national regulatory authorities have adequate financial and human resources to carry out the task assigned to them.

3a. Without prejudice to the provisions of paragraphs 4 and 5, national regulatory authorities responsible for *ex-ante* market regulation or for the resolution of disputes between undertakings in accordance with Article 20 or 21 of this Directive shall act independently and shall not seek or take instructions from any other body in relation to the exercise of these tasks assigned to them under national law implementing Community law. This shall not prevent supervision in accordance with national constitutional law. Only appeal bodies set up in accordance with Article 4 shall have the power to suspend or overturn decisions by the national regulatory authorities.

Member States shall ensure that the head of a national regulatory authority, or where applicable, members of the collegiate body fulfilling that function within a national regulatory authority referred to in the first subparagraph or their replacements may be dismissed only if they no longer fulfil the conditions required for the performance of their duties which are laid down in advance in national law. The decision to dismiss the head of the national regulatory authority concerned, or where applicable members of the collegiate body fulfilling that function shall be made public at the time of dismissal. The dismissed head of the national regulatory authority, or where applicable, members of the collegiate body fulfilling that function shall receive a statement of reasons and shall have the right to request its publication, where this would not otherwise take place, in which case it shall be published.

Member States shall ensure that national regulatory authorities referred to in the first subparagraph have separate annual budgets. The budgets shall be made public. Member States shall also ensure that national regulatory authorities have adequate financial and human

(*) OJ L 201, 31.7.2002, p. 37.

resources to enable them to actively participate in and contribute to the Body of European Regulators for Electronic Communications (BEREC) (*).

3b. Member States shall ensure that the goals of BEREC of promoting greater regulatory coordination and coherence are actively supported by the respective national regulatory authorities.

3c. Member States shall ensure that national regulatory authorities take utmost account of opinions and common positions adopted by BEREC when adopting their own decisions for their national markets.

4. Member States shall publish the tasks to be undertaken by national regulatory authorities in an easily accessible form, in particular where those tasks are assigned to more than one body. Member States shall ensure, where appropriate, consultation and cooperation between those authorities, and between those authorities and national authorities entrusted with the implementation of competition law and national authorities entrusted with the implementation of consumer law, on matters of common interest. Where more than one authority has competence to address such matters, Member States shall ensure that the respective tasks of each authority are published in an easily accessible form.

5. National regulatory authorities and national competition authorities shall provide each other with the information necessary for the application of the provisions of this Directive and the Specific Directives. In respect of the information exchanged, the receiving authority shall ensure the same level of confidentiality as the originating authority.

6. Member States shall notify to the Commission all national regulatory authorities assigned tasks under this Directive and the Specific Directives, and their respective responsibilities.

Article 4

Right of appeal

1. Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise to enable it to carry out its functions effectively. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism.

Pending the outcome of the appeal, the decision of the national regulatory authority shall stand, unless interim measures are granted in accordance with national law.

2. Where the appeal body referred to in paragraph 1 is not judicial in character, written reasons for its decision shall always be given. Furthermore, in such a case, its decision shall be subject to review by a court or tribunal within the meaning of Article 234 of the Treaty.

(*) Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office.

3. Member States shall collect information on the general subject matter of appeals, the number of requests for appeal, the duration of the appeal proceedings and the number of decisions to grant interim measures. Member States shall provide such information to the Commission and BEREC after a reasoned request from either.

Article 5

Provision of information

1. Member States shall ensure that undertakings providing electronic communications networks and services provide all the information, including financial information, necessary for national regulatory authorities to ensure conformity with the provisions of, or decisions made in accordance with, this Directive and the Specific Directives. In particular, national regulatory authorities shall have the power to require those undertakings to submit information concerning future network or service developments that could have an impact on the wholesale services that they make available to competitors. Undertakings with significant market power on wholesale markets may also be required to submit accounting data on the retail markets that are associated with those wholesale markets.

Undertakings shall provide such information promptly upon request and in conformity with the timescales and level of detail required by the national regulatory authority. The information requested by the national regulatory authority shall be proportionate to the performance of that task. The national regulatory authority shall give the reasons justifying its request for information and shall treat the information in accordance with paragraph 3.

2. Member States shall ensure that national regulatory authorities provide the Commission, after a reasoned request, with the information necessary for it to carry out its tasks under the Treaty. The information requested by the Commission shall be proportionate to the performance of those tasks. Where the information provided refers to information previously provided by undertakings at the request of the national regulatory authority, such undertakings shall be informed thereof. To the extent necessary, and unless the authority that provides the information has made an explicit and reasoned request to the contrary, the Commission shall make the information provided available to another such authority in another Member State.

Subject to the requirements of paragraph 3, Member States shall ensure that the information submitted to one national regulatory authority can be made available to another such authority in the same or different Member State, after a substantiated request, where necessary to allow either authority to fulfil its responsibilities under Community law.

3. Where information is considered confidential by a national regulatory authority in accordance with Community and national rules on business confidentiality, the Commission and the national regulatory authorities concerned shall ensure such confidentiality.

4. Member States shall ensure that, acting in accordance with national rules on public access to information and subject to Community and national rules on business confidentiality, national regulatory authorities publish such information as would contribute to an open and competitive market.

5. National regulatory authorities shall publish the terms of public access to information as referred to in paragraph 4, including procedures for obtaining such access.

Article 6

Consultation and transparency mechanism

Except in cases falling within Articles 7(9), 20, or 21, Member States shall ensure that, where national regulatory authorities intend to take measures in accordance with this Directive or the Specific Directives, or where they intend to provide for restrictions in accordance with Article 9(3) and 9(4), 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.

National regulatory authorities shall publish their national consultation procedures.

Member States shall ensure the establishment of a single information point through which all current consultations can be accessed.

The results of the consultation procedure shall be made publicly available by the national regulatory authority, except in the case of confidential information in accordance with Community and national law on business confidentiality.

Article 7

Consolidating the internal market for electronic communications

1. In carrying out their tasks under this Directive and the Specific Directives, national regulatory authorities shall take the utmost account of the objectives set out in Article 8, including in so far as they relate to the functioning of the internal market.

2. National regulatory authorities shall contribute to the development of the internal market by working with each other and with the Commission and BEREC in a transparent manner so as to ensure the consistent application, in all Member States, of the provisions of this Directive and the Specific Directives. To this end, they shall, in particular, work with the Commission and BEREC to identify the types of instruments and remedies best suited to address particular types of situations in the marketplace.

3. Except where otherwise provided in recommendations or guidelines adopted pursuant to Article 7b upon completion of the consultation referred to in Article 6, where a national regulatory authority intends to take a measure which:

- (a) falls within the scope of Articles 15 or 16 of this Directive, or Articles 5 or 8 of Directive 2002/19/EC (Access Directive); and
- (b) would affect trade between Member States;

it shall make the draft measure accessible to the Commission, BEREC, and the national regulatory authorities in other Member States, at the same time, together with the reasoning on which the measure is based, in accordance with Article 5(3), and inform the

Commission, BEREC and other national regulatory authorities thereof. National regulatory authorities, BEREC and the Commission may make comments to the national regulatory authority concerned only within one month. The one-month period may not be extended.

4. Where an intended measure covered by paragraph 3 aims at:

- (a) defining a relevant market which differs from those defined in the Recommendation in accordance with Article 15(1); or
- (b) deciding whether or not to designate an undertaking as having, either individually or jointly with others, significant market power, under Article 16(3), (4) or (5);

and would affect trade between Member States, and the Commission has indicated to the national regulatory authority that it considers that the draft measure would create a barrier to the single market or if it has serious doubts as to its compatibility with Community law and in particular the objectives referred to in Article 8, the draft measure shall not be adopted for a further two months. This period may not be extended. The Commission shall inform other national regulatory authorities of its reservations in such a case.

5. Within the two-month period referred to in paragraph 4, the Commission may:

- (a) take a decision requiring the national regulatory authority concerned to withdraw the draft measure, and/or
- (b) take a decision to lift its reservations in relation to a draft measure referred to in paragraph 4.

The Commission shall take utmost account of the opinion of BEREC before issuing a decision. The decision shall be accompanied by a detailed and objective analysis of why the Commission considers that the draft measure should not be adopted, together with specific proposals for amending the draft measure.

6. Where the Commission has adopted a decision in accordance with paragraph 5, requiring the national regulatory authority to withdraw a draft measure, the national regulatory authority shall amend or withdraw the draft measure within six months of the date of the Commission's decision. When the draft measure is amended, the national regulatory authority shall undertake a public consultation in accordance with the procedures referred to in Article 6, and shall re-notify the amended draft measure to the Commission in accordance with the provisions of paragraph 3.

7. The national regulatory authority concerned shall take the utmost account of comments of other national regulatory authorities, BEREC and the Commission and may, except in cases covered by paragraphs 4 and 5(a), adopt the resulting draft measure and, where it does so, shall communicate it to the Commission.

8. The national regulatory authority shall communicate to the Commission and BEREC all adopted final measures which fall under Article 7(3)(a) and (b).

9. In exceptional circumstances, where a national regulatory authority considers that there is an urgent need to act, in order to safeguard competition and protect the

interests of users, by way of derogation from the procedure set out in paragraphs 3 and 4, it may immediately adopt proportionate and provisional measures. It shall, without delay, communicate those measures, with full reasons, to the Commission, the other national regulatory authority, and BEREC. A decision by the national regulatory authority to render such measures permanent or extend the time for which they are applicable shall be subject to the provisions of paragraphs 3 and 4.

Article 7a

Procedure for the consistent application of remedies

1. Where an intended measure covered by Article 7(3) aims at imposing, amending or withdrawing an obligation on an operator in application of Article 16 in conjunction with Article 5 and Articles 9 to 13 of Directive 2002/19/EC (Access Directive), and Article 17 of Directive 2002/22/EC (Universal Service Directive), the Commission may, within the period of one month provided for by Article 7(3) of this Directive, notify the national regulatory authority concerned and BEREC of its reasons for considering that the draft measure would create a barrier to the single market or its serious doubts as to its compatibility with Community law. In such a case, the draft measure shall not be adopted for a further three months following the Commission's notification.

In the absence of such notification, the national regulatory authority concerned may adopt the draft measure, taking utmost account of any comments made by the Commission, BEREC or any other national regulatory authority.

2. Within the three month period referred to in paragraph 1, the Commission, BEREC and the national regulatory authority concerned shall cooperate closely to identify the most appropriate and effective measure in the light of the objectives laid down in Article 8, whilst taking due account of the views of market participants and the need to ensure the development of consistent regulatory practice.

3. Within six weeks from the beginning of the three month period referred to in paragraph 1, BEREC shall, acting by a majority of its component members, issue an opinion on the Commission's notification referred to in paragraph 1, indicating whether it considers that the draft measure should be amended or withdrawn and, where appropriate, provide specific proposals to that end. This opinion shall be reasoned and made public.

4. If in its opinion, BEREC shares the serious doubts of the Commission, it shall cooperate closely with the national regulatory authority concerned to identify the most appropriate and effective measure. Before the end of the three month period referred in paragraph 1, the national regulatory authority may:

- (a) amend or withdraw its draft measure taking utmost account of the Commission's notification referred to in paragraph 1 and of BEREC's opinion and advice;
- (b) maintain its draft measure.

5. Where BEREC does not share the serious doubts of the Commission or does not issue an opinion, or where the national regulatory authority amends or maintains its draft

measure pursuant to paragraph 4, the Commission may, within one month following the end of the three month period referred to in paragraph 1 and taking utmost account of the opinion of BEREC if any:

- (a) issue a recommendation requiring the national regulatory authority concerned to amend or withdraw the draft measure, including specific proposals to that end and providing reasons justifying its recommendation, in particular where BEREC does not share the serious doubts of the Commission;
- (b) take a decision to lift its reservations indicated in accordance with paragraph 1.

6. Within one month of the Commission issuing the recommendation in accordance with paragraph 5(a) or lifting its reservations in accordance with paragraph 5(b), the national regulatory authority concerned shall communicate to the Commission and BEREC the adopted final measure.

This period may be extended to allow the national regulatory authority to undertake a public consultation in accordance with Article 6.

7. Where the national regulatory authority decides not to amend or withdraw the draft measure on the basis of the recommendation issued under paragraph 5(a), it shall provide a reasoned justification.

8. The national regulatory authority may withdraw the proposed draft measure at any stage of the procedure.

Article 7b

Implementing provisions

1. After public consultation and consultation with national regulatory authorities and taking utmost account of the opinion of BEREC, the Commission may adopt recommendations and/or guidelines in relation to Article 7 that define the form, content and level of detail to be given in the notifications required in accordance with Article 7(3), the circumstances in which notifications would not be required, and the calculation of the time limits.

2. The measures referred to in paragraph 1 shall be adopted in accordance with the advisory procedure referred to in Article 22(2).

CHAPTER III

TASKS OF NATIONAL REGULATORY AUTHORITIES

Article 8

Policy objectives and regulatory principles

1. Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, the national regulatory authorities take all reasonable measures which are aimed at achieving the objectives set out in paragraphs 2, 3 and 4. Such measures shall be proportionate to those objectives.

Unless otherwise provided for in Article 9 regarding radio frequencies, Member States shall take the utmost account

of the desirability of making regulations technologically neutral and shall ensure that, in carrying out the regulatory tasks specified in this Directive and the Specific Directives, in particular those designed to ensure effective competition, national regulatory authorities do likewise.

National regulatory authorities may contribute within their competencies to ensuring the implementation of policies aimed at the promotion of cultural and linguistic diversity, as well as media pluralism.

2. The national regulatory authorities shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by *inter alia*:

- (a) ensuring that users, including disabled users, elderly users, and users with special social needs derive maximum benefit in terms of choice, price, and quality;
- (b) ensuring that there is no distortion or restriction of competition in the electronic communications sector, including the transmission of content;
- (c) *[deleted by Directive 2009/140/EC]*
- (d) encouraging efficient use and ensuring the effective management of radio frequencies and numbering resources.

3. The national regulatory authorities shall contribute to the development of the internal market by *inter alia*:

- (a) removing remaining obstacles to the provision of electronic communications networks, associated facilities and services and electronic communications services at European level;
- (b) encouraging the establishment and development of trans-European networks and the interoperability of pan-European services, and end-to-end connectivity;
- (c) *[deleted by Directive 2009/140/EC]*
- (d) cooperating with each other, with the Commission and BEREC so as to ensure the development of consistent regulatory practice and the consistent application of this Directive and the Specific Directives.

4. The national regulatory authorities shall promote the interests of the citizens of the European Union by *inter alia*:

- (a) ensuring all citizens have access to a universal service specified in Directive 2002/22/EC (Universal Service Directive);
- (b) ensuring a high level of protection for consumers in their dealings with suppliers, in particular by ensuring the availability of simple and inexpensive dispute resolution procedures carried out by a body that is independent of the parties involved;
- (c) contributing to ensuring a high level of protection of personal data and privacy;
- (d) promoting the provision of clear information, in particular requiring transparency of tariffs and

conditions for using publicly available electronic communications services;

- (e) addressing the needs of specific social groups, in particular disabled users, elderly users and users with special social needs;
- (f) ensuring that the integrity and security of public communications networks are maintained.
- (g) promoting the ability of end-users to access and distribute information or run applications and services of their choice;

5. The national regulatory authorities shall, in pursuit of the policy objectives referred to in paragraphs 2, 3 and 4, apply objective, transparent, non-discriminatory and proportionate regulatory principles by, *inter alia*:

- (a) promoting regulatory predictability by ensuring a consistent regulatory approach over appropriate review periods;
- (b) ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks and services;
- (c) safeguarding competition to the benefit of consumers and promoting, where appropriate, infrastructure-based competition;
- (d) promoting efficient investment and innovation in new and enhanced infrastructures, including by ensuring that any access obligation takes appropriate account of the risk incurred by the investing undertakings and by permitting various cooperative arrangements between investors and parties seeking access to diversify the risk of investment, whilst ensuring that competition in the market and the principle of non discrimination are preserved;
- (e) taking due account of the variety of conditions relating to competition and consumers that exist in the various geographic areas within a Member State;
- (f) imposing *ex-ante* regulatory obligations only where there is no effective and sustainable competition and relaxing or lifting such obligations as soon as that condition is fulfilled.

Article 8a

Strategic planning and coordination of radio spectrum policy

1. Member States shall cooperate with each other and with the Commission in the strategic planning, coordination and harmonisation of the use of radio spectrum in the European Community. To this end, they shall take into consideration, *inter alia*, the economic, safety, health, public interest, freedom of expression, cultural, scientific, social and technical aspects of EU policies as well as the various interests of radio spectrum user communities with the aim of optimising the use of radio spectrum and avoiding harmful interference.

2. By cooperating with each other and with the Commission, Member States shall promote the

coordination of radio spectrum policy approaches in the European Community and, where appropriate, harmonised conditions with regard to the availability and efficient use of radio spectrum necessary for the establishment and functioning of the internal market in electronic communications.

3. The Commission, taking utmost account of the opinion of the Radio Spectrum Policy Group (RSPG), established by Commission Decision 2002/622/EC of 26 July 2002 establishing a Radio Spectrum Policy Group (*), may submit legislative proposals to the European Parliament and the Council for establishing multiannual radio spectrum policy programmes. Such programmes shall set out the policy orientations and objectives for the strategic planning and harmonisation of the use of radio spectrum in accordance with the provisions of this Directive and the Specific Directives.

4. Where necessary to ensure the effective coordination of the interests of the European Community in international organisations competent in radio spectrum matters, the Commission, taking utmost account of the opinion of the RSPG, may propose common policy objectives to the European Parliament and the Council.

Article 9

Management of radio frequencies for electronic communications services

1. Taking due account of the fact that radio frequencies are a public good that has an important social, cultural and economic value, Member States shall ensure the effective management of radio frequencies for electronic communication services in their territory in accordance with Articles 8 and 8a. They shall ensure that spectrum allocation used for electronic communications services and issuing general authorisations or individual rights of use of such radio frequencies by competent national authorities are based on objective, transparent, non-discriminatory and proportionate criteria.

In applying this Article, Member States shall respect relevant international agreements, including the ITU Radio Regulations, and may take public policy considerations into account.

2. Member States shall promote the harmonisation of use of radio frequencies across the Community, consistent with the need to ensure effective and efficient use thereof and in pursuit of benefits for the consumer such as economies of scale and interoperability of services. In so doing, they shall act in accordance with Article 8a and with the Decision No 676/2002/EC (Radio Spectrum Decision).

3. Unless otherwise provided in the second subparagraph, Member States shall ensure that all types of technology used for electronic communications services may be used in the radio frequency bands, declared available for electronic communications services in their National Frequency Allocation Plan in accordance with Community law.

Member States may, however, provide for proportionate and non discriminatory restrictions to the types of radio network or wireless access technology used for electronic communications services where this is necessary to:

- (a) avoid harmful interference;

(*) OJ L 198, 27.7.2002, p. 49.

- (b) protect public health against electromagnetic fields;
- (c) ensure technical quality of service;
- (d) ensure maximisation of radio frequency sharing;
- (e) safeguard efficient use of spectrum; or
- (f) ensure the fulfilment of a general interest objective in accordance with paragraph 4.

4. Unless otherwise provided in the second subparagraph, Member States shall ensure that all types of electronic communications services may be provided in the radio frequency bands, declared available for electronic communications services in their National Frequency Allocation Plan in accordance with Community law. Member States may, however, provide for proportionate and non discriminatory restrictions to the types of electronic communications services to be provided, including, where necessary, to fulfil a requirement under the ITU Radio Regulations.

Measures that require an electronic communications service to be provided in a specific band available for electronic communications services shall be justified in order to ensure the fulfilment of a general interest objective as defined by Member States in conformity with Community law, such as, and not limited to:

- (a) safety of life;
- (b) the promotion of social, regional or territorial cohesion;
- (c) the avoidance of inefficient use of radio frequencies; or
- (d) the promotion of cultural and linguistic diversity and media pluralism, for example by the provision of radio and television broadcasting services.

A measure which prohibits the provision of any other electronic communications service in a specific band may only be provided for where justified by the need to protect safety of life services. Member States may, exceptionally, also extend such a measure in order to fulfil other general interest objectives as defined by Member States in accordance with Community law.

5. Member States shall regularly review the necessity of the restrictions referred to in paragraphs 3 and 4, and shall make the results of these reviews public.

6. Paragraphs 3 and 4 shall apply to spectrum allocated to be used for electronic communications services, general authorisations issued and individual rights of use of radio frequencies granted after 25 May 2011.

Spectrum allocations, general authorisations and individual rights of use which existed by 25 May 2011 shall be subject to Article 9a.

7. Without prejudice to the provisions of the Specific Directives and taking into account the relevant national circumstances, Member States may lay down rules in order to prevent spectrum hoarding, in particular by setting out strict deadlines for the effective exploitation of the rights of use by the holder of the rights and by applying penalties, including financial penalties or the withdrawal of

the rights of use in case of non compliance with the deadlines. These rules shall be established and applied in a proportionate, non discriminatory and transparent manner.

Article 9a

Review of restrictions on existing rights

1. For a period of five years starting from 25 May 2011, Member States may allow holders of rights to use radio frequencies which were granted before that date and which will remain valid for a period of not less than five years after that date, to submit an application to the competent national authority for a reassessment of the restrictions on their rights in accordance with Article 9(3) and (4).

Before adopting its decision, the competent national authority shall notify the right holder of its reassessment of the restrictions, indicating the extent of the right after reassessment, and shall allow him a reasonable time limit to withdraw his application.

If the right holder withdraws his application, the right shall remain unchanged until its expiry or until the end of the five-year period, whichever is the earlier date.

2. After the five-year period referred to in paragraph 1, Member States shall take all appropriate measures to ensure that Article 9(3) and (4) apply to all remaining general authorisations or individual rights of use and spectrum allocations used for electronic communications services which existed on 25 May 2011.

3. In applying this Article, Member States shall take appropriate measures to promote fair competition.

4. Measures adopted in applying this Article do not constitute the granting of new rights of use and therefore are not subject to the relevant provisions of Article 5(2) of Directive 2002/20/EC (Authorisation Directive).

Article 9b

Transfer or lease of individual rights to use radio frequencies

1. Member States shall ensure that undertakings may transfer or lease to other undertakings in accordance with conditions attached to the rights of use of radio frequencies and in accordance with national procedures individual rights to use radio frequencies in the bands for which this is provided in the implementing measures adopted pursuant to paragraph 3.

In other bands, Member States may also make provision for undertakings to transfer or lease individual rights to use radio frequencies to other undertakings in accordance with national procedures.

Conditions attached to individual rights to use radio frequencies shall continue to apply after the transfer or lease, unless otherwise specified by the competent national authority.

Member States may also determine that the provisions of this paragraph shall not apply where the undertaking's individual right to use radio frequencies was initially obtained free of charge.

2. Member States shall ensure that an undertaking's intention to transfer rights to use radio frequencies, as well as the effective transfer thereof is notified in accordance with national procedures to the competent national authority responsible for granting individual rights of use and is made public. Where radio frequency use has been harmonised through the application of the Decision No 676/2002/EC (Radio Spectrum Decision) or other Community measures, any such transfer shall comply with such harmonised use.

3. The Commission may adopt appropriate implementing measures to identify the bands for which rights to use radio frequencies may be transferred or leased between undertakings. These measures shall not cover frequencies which are used for broadcasting.

These technical implementing measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 22(3).

Article 10

Numbering, naming and addressing

1. Member States shall ensure that national regulatory authorities control the granting of rights of use of all national numbering resources and the management of the national numbering plans. Member States shall ensure that adequate numbers and numbering ranges are provided for all publicly available electronic communications services. National regulatory authorities shall establish objective, transparent and non-discriminatory procedures for granting rights of use for national numbering resources.

2. National regulatory authorities shall ensure that national numbering plans and procedures are applied in a manner that gives equal treatment to all providers of publicly available electronic communications services. In particular, Member States shall ensure that an undertaking to which the right of use for a range of numbers has been granted does not discriminate against other providers of electronic communications services as regards the number sequences used to give access to their services.

3. Member States shall ensure that the national numbering plans, and all subsequent additions or amendments thereto, are published, subject only to limitations imposed on the grounds of national security.

4. Member States shall support the harmonisation of specific numbers or numbering ranges within the Community where it promotes both the functioning of the internal market and the development of pan-European services. The Commission may take appropriate technical implementing measures on this matter.

These measures designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 22(3).

5. Where this is appropriate in order to ensure full global interoperability of services, Member States shall coordinate their positions in international organisations and forums in which decisions are taken on issues relating to the numbering, naming and addressing of electronic communications networks and services.

Article 11

Rights of way

1. Member States shall ensure that when a competent authority considers:

- an application for the granting of rights to install facilities on, over or under public or private property to an undertaking authorised to provide public communications networks, or
- an application for the granting of rights to install facilities on, over or under public property to an undertaking authorised to provide electronic communications networks other than to the public,

the competent authority:

- acts on the basis of simple, efficient, transparent and publicly available procedures, applied without discrimination and without delay, and in any event makes its decision within six months of the application, except in cases of expropriation, and
- follows the principles of transparency and non-discrimination in attaching conditions to any such rights.

The abovementioned procedures can differ depending on whether the applicant is providing public communications networks or not.

2. Member States shall ensure that where public or local authorities retain ownership or control of undertakings operating public electronic communications networks and/or publicly available electronic communications services, there is an effective structural separation of the function responsible for granting the rights referred to in paragraph 1 from the activities associated with ownership or control.

3. Member States shall ensure that effective mechanisms exist to allow undertakings to appeal against decisions on the granting of rights to install facilities to a body that is independent of the parties involved.

Article 12

Co-location and sharing of network elements and associated facilities for providers of electronic communications networks

1. Where an undertaking providing electronic communications networks has the right under national legislation to install facilities on, over or under public or private property, or may take advantage of a procedure for the expropriation or use of property, national regulatory authorities shall, taking full account of the principle of proportionality, be able to impose the sharing of such facilities or property, including buildings, entries to buildings, building wiring, masts, antennae, towers and other supporting constructions, ducts, conduits, manholes, cabinets.

2. Member States may require holders of the rights referred to in paragraph 1 to share facilities or property (including physical co-location) or take measures to facilitate the coordination of public works in order to protect the environment, public health, public security or to meet town and country planning objectives and only

after an appropriate period of public consultation, during which all interested parties shall be given an opportunity to express their views. Such sharing or coordination arrangements may include rules for apportioning the costs of facility or property sharing.

3. Member States shall ensure that national authorities, after an appropriate period of public consultation during which all interested parties are given the opportunity to state their views, also have the power to impose obligations in relation to the sharing of wiring inside buildings or up to the first concentration or distribution point where this is located outside the building, on the holders of the rights referred to in paragraph 1 and/or on the owner of such wiring, where this is justified on the grounds that duplication of such infrastructure would be economically inefficient or physically impracticable. Such sharing or coordination arrangements may include rules for apportioning the costs of facility or property sharing adjusted for risk where appropriate.

4. Member States shall ensure that competent national authorities may require undertakings to provide the necessary information, if requested by the competent authorities, in order for these authorities, in conjunction with national regulatory authorities, to be able to establish a detailed inventory of the nature, availability and geographical location of the facilities referred to in paragraph 1 and make it available to interested parties.

5. Measures taken by a national regulatory authority in accordance with this Article shall be objective, transparent, non-discriminatory, and proportionate. Where relevant, these measures shall be carried out in coordination with local authorities.

Article 13

Accounting separation and financial reports

1. Member States shall require undertakings providing public communications networks or publicly available electronic communications services which have special or exclusive rights for the provision of services in other sectors in the same or another Member State to:

- (a) keep separate accounts for the activities associated with the provision of electronic communications networks or services, to the extent that would be required if these activities were carried out by legally independent companies, so as to identify all elements of cost and revenue, with the basis of their calculation and the detailed attribution methods used, related to their activities associated with the provision of electronic communications networks or services including an itemised breakdown of fixed asset and structural costs, or
- (b) have structural separation for the activities associated with the provision of electronic communications networks or services.

Member States may choose not to apply the requirements referred to in the first subparagraph to undertakings the annual turnover of which in activities associated with electronic communications networks or services in the Member States is less than EUR 50 million.

2. Where undertakings providing public communications networks or publicly available electronic communications

services are not subject to the requirements of company law and do not satisfy the small and medium-sized enterprise criteria of Community law accounting rules, their financial reports shall be drawn up and submitted to independent audit and published. The audit shall be carried out in accordance with the relevant Community and national rules.

This requirement shall also apply to the separate accounts required under paragraph 1(a).

CHAPTER IIIa

SECURITY AND INTEGRITY OF NETWORKS AND SERVICES

Article 13a

Security and integrity

1. Member States shall ensure that undertakings providing public communications networks or publicly available electronic communications services take appropriate technical and organisational measures to appropriately manage the risks posed to security of networks and services. Having regard to the state of the art, these measures shall ensure a level of security appropriate to the risk presented. In particular, measures shall be taken to prevent and minimise the impact of security incidents on users and interconnected networks.

2. Member States shall ensure that undertakings providing public communications networks take all appropriate steps to guarantee the integrity of their networks, and thus ensure the continuity of supply of services provided over those networks.

3. Member States shall ensure that undertakings providing public communications networks or publicly available electronic communications services notify the competent national regulatory authority of a breach of security or loss of integrity that has had a significant impact on the operation of networks or services.

Where appropriate, the national regulatory authority concerned shall inform the national regulatory authorities in other Member States and the European Network and Information Security Agency (ENISA). The national regulatory authority concerned may inform the public or require the undertakings to do so, where it determines that disclosure of the breach is in the public interest.

Once a year, the national regulatory authority concerned shall submit a summary report to the Commission and ENISA on the notifications received and the action taken in accordance with this paragraph.

4. The Commission, taking the utmost account of the opinion of ENISA, may adopt appropriate technical implementing measures with a view to harmonising the measures referred to in paragraphs 1, 2, and 3, including measures defining the circumstances, format and procedures applicable to notification requirements. These technical implementing measures shall be based on European and international standards to the greatest extent possible, and shall not prevent Member States from adopting additional requirements in order to pursue the objectives set out in paragraphs 1 and 2.

These implementing measures, designed to amend non essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 22(3).

Article 13b

Implementation and enforcement

1. Member States shall ensure that in order to implement Article 13a, competent national regulatory authorities have the power to issue binding instructions, including those regarding time limits for implementation, to undertakings providing public communications networks or publicly available electronic communications services.

2. Member States shall ensure that competent national regulatory authorities have the power to require undertakings providing public communications networks or publicly available electronic communications services to:

(a) provide information needed to assess the security and/or integrity of their services and networks, including documented security policies; and

(b) submit to a security audit carried out by a qualified independent body or a competent national authority and make the results thereof available to the national regulatory authority. The cost of the audit shall be paid by the undertaking.

3. Member States shall ensure that national regulatory authorities have all the powers necessary to investigate cases of non-compliance and the effects thereof on the security and integrity of the networks.

4. These provisions shall be without prejudice to Article 3 of this Directive.

CHAPTER IV

GENERAL PROVISIONS

Article 14

Undertakings with significant market power

1. Where the Specific Directives require national regulatory authorities to determine whether operators have significant market power in accordance with the procedure referred to in Article 16, paragraphs 2 and 3 of this Article shall apply.

2. An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.

In particular, national regulatory authorities shall, when assessing whether two or more undertakings are in a joint dominant position in a market, act in accordance with Community law and take into the utmost account the guidelines on market analysis and the assessment of significant market power published by the Commission pursuant to Article 15. Criteria to be used in making such an assessment are set out in Annex II.

3. Where an undertaking has significant market power on a specific market (the first market), it may also be designated as having significant market power on a closely related market (the second market), where the links between the two markets are such as to allow the market power held in the first market to be leveraged into the second market, thereby strengthening the market power of the undertaking. Consequently, remedies aimed at preventing such leverage may be applied in the second market pursuant to Articles 9, 10, 11 and 13 of Directive 2002/19/EC (Access Directive), and where such remedies prove to be insufficient, remedies pursuant to Article 17 of Directive 2002/22/EC (Universal Service Directive) may be imposed.

Article 15

Procedure for the identification and definition of markets

1. After public consultation including with national regulatory authorities and taking the utmost account of the opinion of BEREC, the Commission shall, in accordance with the advisory procedure referred to in Article 22(2), adopt a Recommendation on Relevant Product and Service Markets (the Recommendation). The Recommendation shall identify those product and service markets within the electronic communications sector the characteristics of which may be such as to justify the imposition of regulatory obligations set out in the Specific Directives, without prejudice to markets that may be defined in specific cases under competition law. The Commission shall define markets in accordance with the principles of competition law.

The Commission shall regularly review the recommendation.

2. The Commission shall publish, at the latest on the date of entry into force of this Directive, guidelines for market analysis and the assessment of significant market power (hereinafter "the guidelines") which shall be in accordance with the principles of competition law.

3. National regulatory authorities shall, taking the utmost account of the Recommendation and the Guidelines, define relevant markets appropriate to national circumstances, in particular relevant geographic markets within their territory, in accordance with the principles of competition law. National regulatory authorities shall follow the procedures referred to in Articles 6 and 7 before defining the markets that differ from those identified in the Recommendation.

4. After consultation including with national regulatory authorities the Commission may, taking the utmost account of the opinion of BEREC, adopt a Decision identifying transnational markets, acting in accordance with the regulatory procedure with scrutiny referred to in Article 22(3).

Article 16

Market analysis procedure

1. National regulatory authorities shall carry out an analysis of the relevant markets taking into account the markets identified in the Recommendation, and taking the utmost account of the Guidelines. Member States shall

ensure that this analysis is carried out, where appropriate, in collaboration with the national competition authorities.

2. Where a national regulatory authority is required under paragraphs 3 or 4 of this Article, Article 17 of Directive 2002/22/EC (Universal Service Directive), or Article 8 of Directive 2002/19/EC (Access Directive) to determine whether to impose, maintain, amend or withdraw obligations on undertakings, it shall determine on the basis of its market analysis referred to in paragraph 1 of this Article whether a relevant market is effectively competitive.

3. Where a national regulatory authority concludes that the market is effectively competitive, it shall not impose or maintain any of the specific regulatory obligations referred to in paragraph 2 of this Article. In cases where sector specific regulatory obligations already exist, it shall withdraw such obligations placed on undertakings in that relevant market. An appropriate period of notice shall be given to parties affected by such a withdrawal of obligations.

4. Where a national regulatory authority determines that a relevant market is not effectively competitive, it shall identify undertakings which individually or jointly have a significant market power on that market in accordance with Article 14 and the national regulatory authority shall on such undertakings impose appropriate specific regulatory obligations referred to in paragraph 2 of this Article or maintain or amend such obligations where they already exist.

5. In the case of transnational markets identified in the Decision referred to in Article 15(4), the national regulatory authorities concerned shall jointly conduct the market analysis taking the utmost account of the Guidelines and, in a concerted fashion, shall decide on any imposition, maintenance, amendment or withdrawal of regulatory obligations referred to in paragraph 2 of this Article.

6. Measures taken in accordance with the provisions of paragraphs 3 and 4 shall be subject to the procedures referred to in Articles 6 and 7. National regulatory authorities shall carry out an analysis of the relevant market and notify the corresponding draft measure in accordance with Article 7:

- (a) within three years from the adoption of a previous measure relating to that market. However, exceptionally, that period may be extended for up to three additional years, where the national regulatory authority has notified a reasoned proposed extension to the Commission and the Commission has not objected within one month of the notified extension;
- (b) within two years from the adoption of a revised Recommendation on relevant markets, for markets not previously notified to the Commission; or
- (c) within two years from their accession, for Member States which have newly joined the Union.

7. Where a national regulatory authority has not completed its analysis of a relevant market identified in the Recommendation within the time limit laid down in paragraph 6, BEREC shall, upon request, provide assistance to the national regulatory authority concerned in completing the analysis of the specific market and the specific obligations to be imposed. With this assistance,

the national regulatory authority concerned shall within six months notify the draft measure to the Commission in accordance with Article 7.

Article 17

Standardisation

1. The Commission, acting in accordance with the procedure referred to in Article 22(2), shall draw up and publish in the Official Journal of the European Communities a list of non-compulsory standards and/or specifications to serve as a basis for encouraging the harmonised provision of electronic communications networks, electronic communications services and associated facilities and services. Where necessary, the Commission may, acting in accordance with the procedure referred to in Article 22(2) and following consultation of the Committee established by Directive 98/34/EC, request that standards be drawn up by the European standards organisations (European Committee for Standardisation (CEN), European Committee for Electrotechnical Standardisation (CENELEC), and European Telecommunications Standards Institute (ETSI)).

2. Member States shall encourage the use of the standards and/or specifications referred to in paragraph 1, for the provision of services, technical interfaces and/or network functions, to the extent strictly necessary to ensure interoperability of services and to improve freedom of choice for users.

As long as standards and/or specifications have not been published in accordance with paragraph 1, Member States shall encourage the implementation of standards and/or specifications adopted by the European standards organisations.

In the absence of such standards and/or specifications, Member States shall encourage the implementation of international standards or recommendations adopted by the International Telecommunication Union (ITU), the European Conference of Postal and Telecommunications Administrations (CEPT), the International Organisation for Standardisation (ISO) and the International Electrotechnical Commission (IEC).

Where international standards exist, Member States shall encourage the European standards organisations to use them, or the relevant parts of them, as a basis for the standards they develop, except where such international standards or relevant parts would be ineffective.

3. If the standards and/or specifications referred to in paragraph 1 have not been adequately implemented so that interoperability of services in one or more Member States cannot be ensured, the implementation of such standards and/or specifications may be made compulsory under the procedure laid down in paragraph 4, to the extent strictly necessary to ensure such interoperability and to improve freedom of choice for users.

4. Where the Commission intends to make the implementation of certain standards and/or specifications compulsory, it shall publish a notice in the *Official Journal of the European Union* and invite public comment by all parties concerned. The Commission shall take appropriate implementing measures and make implementation of the relevant standards compulsory by making reference to them as compulsory standards in the list of standards

and/or specifications published in the *Official Journal of the European Union*.

5. Where the Commission considers that standards and/or specifications referred to in paragraph 1 no longer contribute to the provision of harmonised electronic communications services, or that they no longer meet consumers' needs or are hampering technological development, it shall, acting in accordance with the advisory procedure referred to in Article 22(2), remove them from the list of standards and/or specifications referred to in paragraph 1.

6. Where the Commission considers that standards and/or specifications referred to in paragraph 4 no longer contribute to the provision of harmonised electronic communications services, or that they no longer meet consumers' needs or are hampering technological development, it shall, take the appropriate implementing measures and remove those standards and/or specifications from the list of standards and/or specifications referred to in paragraph 1.

6a. The implementing measures designed to amend non-essential elements of this Directive by supplementing it, referred to in paragraphs 4 and 6, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 22(3).

7. This Article does not apply in respect of any of the essential requirements, interface specifications or harmonised standards to which the provisions of Directive 1999/5/EC apply.

Article 18

Interoperability of digital interactive television services

1. In order to promote the free flow of information, media pluralism and cultural diversity, Member States shall encourage, in accordance with the provisions of Article 17(2):

- (a) providers of digital interactive television services for distribution to the public in the Community on digital interactive television platforms, regardless of the transmission mode, to use an open API;
- (b) providers of all enhanced digital television equipment deployed for the reception of digital interactive television services on interactive digital television platforms to comply with an open API in accordance with the minimum requirements of the relevant standards or specifications.
- (c) providers of digital TV services and equipment to cooperate in the provision of interoperable TV services for disabled end-users.

2. Without prejudice to Article 5(1)(b) of Directive 2002/19/ EC (Access Directive), Member States shall encourage proprietors of APIs to make available on fair, reasonable and non-discriminatory terms, and against appropriate remuneration, all such information as is necessary to enable providers of digital interactive television services to provide all services supported by the API in a fully functional form.

3. *[deleted by Directive 2009/140/EC]*

Harmonisation procedures

1. Without prejudice to Article 9 of this Directive and Articles 6 and 8 of Directive 2002/20/EC (Authorisation Directive), where the Commission finds that divergences in the implementation by the national regulatory authorities of the regulatory tasks specified in this Directive and the Specific Directives may create a barrier to the internal market, the Commission may, taking the utmost account of the opinion of BEREC, issue a recommendation or a decision on the harmonised application of the provisions in this Directive and the Specific Directives in order to further the achievement of the objectives set out in Article 8.

2. Where the Commission issues a recommendation pursuant to paragraph 1, it shall act in accordance with the advisory procedure referred to in Article 22(2).

Member States shall ensure that national regulatory authorities take the utmost account of those recommendations in carrying out their tasks. Where a national regulatory authority chooses not to follow a recommendation, it shall inform the Commission, giving the reasons for its position.

3. The decisions adopted pursuant to paragraph 1 may include only the identification of a harmonised or coordinated approach for the purposes of addressing the following matters:

- (a) the inconsistent implementation of general regulatory approaches by national regulatory authorities on the regulation of electronic communication markets in the application of Articles 15 and 16, where it creates a barrier to the internal market. Such decisions shall not refer to specific notifications issued by the national regulatory authorities pursuant to Article 7a;

In such a case, the Commission shall propose a draft decision only:

- after at least two years following the adoption of a Commission Recommendation dealing with the same matter, and;
- taking utmost account of an opinion from BEREC on the case for adoption of such a decision, which shall be provided by BEREC within three months of the Commission's request;

- (b) numbering, including number ranges, portability of numbers and identifiers, number and address translation systems, and access to 112 emergency services.

4. The decision referred to in paragraph 1, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 22(3).

5. BEREC may on its own initiative advise the Commission on whether a measure should be adopted pursuant to paragraph 1.

Dispute resolution between undertakings

1. In the event of a dispute arising in connection with existing obligations under this Directive or the Specific Directives between undertakings providing electronic communications networks or services in a Member State, or between such undertakings and other undertakings in the Member State benefiting from obligations of access and/or interconnection arising under this Directive or the Specific Directives, the national regulatory authority concerned shall, at the request of either party, and without prejudice to the provisions of paragraph 2, issue a binding decision to resolve the dispute in the shortest possible time frame and in any case within four months, except in exceptional circumstances. The Member State concerned shall require that all parties cooperate fully with the national regulatory authority.

2. Member States may make provision for national regulatory authorities to decline to resolve a dispute through a binding decision where other mechanisms, including mediation, exist and would better contribute to resolution of the dispute in a timely manner in accordance with the provisions of Article 8. The national regulatory authority shall inform the parties without delay. If after four months the dispute is not resolved, and if the dispute has not been brought before the courts by the party seeking redress, the national regulatory authority shall issue, at the request of either party, a binding decision to resolve the dispute in the shortest possible time frame and in any case within four months.

3. In resolving a dispute, the national regulatory authority shall take decisions aimed at achieving the objectives set out in Article 8. Any obligations imposed on an undertaking by the national regulatory authority in resolving a dispute shall respect the provisions of this Directive or the Specific Directives.

4. The decision of the national regulatory authority shall be made available to the public, having regard to the requirements of business confidentiality. The parties concerned shall be given a full statement of the reasons on which it is based.

5. The procedure referred to in paragraphs 1, 3 and 4 shall not preclude either party from bringing an action before the courts.

Resolution of cross-border disputes

1. In the event of a cross-border dispute arising under this Directive or the Specific Directives between parties in different Member States, and where the dispute lies within the competence of national regulatory authorities from more than one Member State, the provisions set out in paragraphs 2, 3 and 4 shall be applicable.

2. Any party may refer the dispute to the national regulatory authorities concerned. The competent national regulatory authorities shall coordinate their efforts and shall have the right to consult BEREC in order to bring about a consistent resolution of the dispute, in accordance with the objectives set out in Article 8.

Any obligations imposed by the national regulatory authorities on undertakings as part of the resolution of a

dispute shall comply with this Directive and the Specific Directives.

Any national regulatory authority which has competence in such a dispute may request BEREC to adopt an opinion as to the action to be taken in accordance with the provisions of the Framework Directive and/or the Specific Directives to resolve the dispute.

Where such a request has been made to BEREC, any national regulatory authority with competence in any aspect of the dispute shall await BEREC's opinion before taking action to resolve the dispute. This shall not preclude national regulatory authorities from taking urgent measures where necessary.

Any obligations imposed on an undertaking by the national regulatory authority in resolving a dispute shall respect the provisions of this Directive or the Specific Directives and take the utmost account of the opinion adopted by BEREC.

3. Member States may make provision for the competent national regulatory authorities jointly to decline to resolve a dispute where other mechanisms, including mediation, exist and would better contribute to resolving the dispute in a timely manner in accordance with the provisions of Article 8.

They shall inform the parties without delay. If after four months the dispute is not resolved, where the dispute has not been brought before the courts by the party seeking redress and if either party requests it, the national regulatory authorities shall coordinate their efforts in order to resolve the dispute, in accordance with the provisions set out in Article 8 and taking the utmost account of any opinion adopted by BEREC.

4. The procedure referred to in paragraph 2 shall not preclude either party from bringing an action before the courts.

Article 21a

Penalties

Member States shall lay down rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and the Specific Directives and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be appropriate, effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 25 May 2011 and shall notify it without delay of any subsequent amendment affecting them.

Article 22

Committee

1. The Commission shall be assisted by a Committee ("the Communications Committee").

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

3. Where reference is made to this paragraph, Article 5a(1) to (4), and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

4. *[deleted by Directive 2009/140/EC]*

Article 23

Exchange of information

1. The Commission shall provide all relevant information to the Communications Committee on the outcome of regular consultations with the representatives of network operators, service providers, users, consumers, manufacturers and trade unions, as well as third countries and international organisations.

2. The Communications Committee shall, taking account of the Community's electronic communications policy, foster the exchange of information between the Member States and between the Member States and the Commission on the situation and the development of regulatory activities regarding electronic communications networks and services.

Article 24

Publication of information

1. Member States shall ensure that up-to-date information pertaining to the application of this Directive and the Specific Directives is made publicly available in a manner that guarantees all interested parties easy access to that information. They shall publish a notice in their national official gazette describing how and where the information is published. The first such notice shall be published before the date of application referred to in Article 28(1), second subparagraph, and thereafter a notice shall be published whenever there is any change in the information contained therein.

2. Member States shall send to the Commission a copy of all such notices at the time of publication. The Commission shall distribute the information to the Communications Committee as appropriate.

Article 25

Review procedures

1. The Commission shall periodically review the functioning of this Directive and report to the European Parliament and to the Council, on the first occasion not later than three years after the date of application referred to in Article 28(1), second subparagraph. For this purpose, the Commission may request information from the Member States, which shall be supplied without undue delay.

CHAPTER V

FINAL PROVISIONS

Article 26

Repeal

The following Directives and Decisions are hereby repealed with effect from the date of application referred to in Article 28(1), second subparagraph:

- Directive 90/387/EEC,

- Council Decision 91/396/EEC of 29 July 1991 on the introduction of a single European emergency call number ⁽²¹⁾,
- Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines ⁽²²⁾,
- Council Decision 92/264/EEC of 11 May 1992 on the introduction of a standard international telephone access code in the Community ⁽²³⁾,
- Directive 95/47/EC,
- Directive 97/13/EC,
- Directive 97/33/EC,
- Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment ⁽²⁴⁾.

Article 27

[deleted by Directive 2009/140/EC]

Article 28

Transposition

1. Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive not later than 24 July 2003. They shall forthwith inform the Commission thereof.

They shall apply those measures from 25 July 2003.

2. When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

3. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field governed by this Directive and of any subsequent amendments to those provisions.

Article 29

Entry into force

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Article 30

Addressees

This Directive is addressed to the Member States.

Done at Brussels, 7 March 2002.

For the European Parliament

For the Council

The President

The President

P. Cox

J. C. Aparicio

⁽²¹⁾ OJ L 217, 6.8.1991, p. 31.

⁽²²⁾ OJ L 165, 19.6.1992, p. 27. Directive as last amended by Commission Decision 98/80/EC (OJ L 14, 20.1.1998, p. 27).

⁽²³⁾ OJ L 137, 20.5.1992, p. 21.

⁽²⁴⁾ OJ L 101, 1.4.1998, p. 24.

ANNEX I

[deleted by Directive 2009/140/EC]

ANNEX II

Criteria to be used by national regulatory authorities in making an assessment of joint dominance in accordance with the second subparagraph of Article 14(2).

Two or more undertakings can be found to be in a joint dominant position within the meaning of Article 14 if, even in the absence of structural or other links between them, they operate in a market which is characterised by a lack of effective competition and in which no single undertaking has significant market power. In accordance with the applicable Community law and with the case-law of the Court of Justice of the European Communities on joint dominance, this is likely to be the case where the market is concentrated and exhibits a number of appropriate characteristics of which the following may be the most relevant in the context of electronic communications:

- low elasticity of demand;
- similar market shares;
- high legal or economic barriers to entry;
- vertical integration with collective refusal to supply;
- lack of countervailing buyer power;
- lack of potential competition.

The above is an indicative list and is not exhaustive, nor are the criteria cumulative. Rather, the list is intended to illustrate only the type of evidence that could be used to support assertions concerning the existence of joint dominance.

DIRECTIVE 2002/20/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 7 March 2002

**on the authorisation of electronic communications networks and services
(Authorisation Directive) (*)**

as amended by Directive 2009/140/EC ()
(unofficially consolidated version)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the Economic and Social Committee ⁽²⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽³⁾,

Whereas:

- (1) The outcome of the public consultation on the 1999 review of the regulatory framework for electronic communications, as reflected in the Commission communication of 26 April 2000, and the findings reported by the Commission in its communications on the fifth and sixth reports on the implementation of the telecommunications regulatory package, has confirmed the need for a more harmonised and less onerous market access regulation for electronic communications networks and services throughout the Community.
- (2) Convergence between different electronic communications networks and services and their technologies requires the establishment of an authorisation system covering all comparable services in a similar way regardless of the technologies used.
- (3) The objective of this Directive is to create a legal framework to ensure the freedom to provide electronic communications networks and services, subject only to the conditions laid down in this Directive and to any restrictions in conformity with Article 46(1) of the Treaty, in particular measures regarding public policy, public security and public health.
- (4) This Directive covers authorisation of all electronic communications networks and services whether they are provided to the public or not. This is important to ensure that both categories of providers may benefit from objective, transparent,

non-discriminatory and proportionate rights, conditions and procedures.

- (5) This Directive only applies to the granting of rights to use radio frequencies where such use involves the provision of an electronic communications network or service, normally for remuneration. The self-use of radio terminal equipment, based on the non-exclusive use of specific radio frequencies by a user and not related to an economic activity, such as use of a citizen's band by radio amateurs, does not consist of the provision of an electronic communications network or service and is therefore not covered by this Directive. Such use is covered by the Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity ⁽⁴⁾.
- (6) Provisions regarding the free movement of conditional access systems and the free provision of protected services based on such systems are laid down in Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access ⁽⁵⁾. The authorisation of such systems and services therefore does not need to be covered by this Directive.
- (7) The least onerous authorisation system possible should be used to allow the provision of electronic communications networks and services in order to stimulate the development of new electronic communications services and pan-European communications networks and services and to allow service providers and consumers to benefit from the economies of scale of the single market.
- (8) Those aims can be best achieved by general authorisation of all electronic communications networks and services without requiring any explicit decision or administrative act by the national regulatory authority and by limiting any procedural requirements to notification only. Where Member States require notification by providers of electronic communication networks or services when they start their activities, they may also require proof of such notification having been made by means of any legally recognised postal or electronic acknowledgement of receipt of the notification. Such acknowledgement should in any case not consist of or require an administrative act by the national regulatory authority to which the notification must be made.

(*) OJ L 108, 24.02.2002, p. 21.

(**) OJ L 337, 18.12.2009, p. 37.

⁽¹⁾ OJ C 365 E, 19.12.2000, p. 230 and OJ C 270 E, 25.9.2001, p. 182.

⁽²⁾ OJ C 123, 25.4.2001, p. 55.

⁽³⁾ Opinion of the European Parliament of 1 March 2001 (OJ C 277, 1.10.2001, p. 116), Council Common Position of 17 September 2001 (OJ C 337, 30.11.2001, p. 18) and Decision of the European Parliament of 12 December 2001 (not yet published in the Official Journal). Council Decision of 14 February 2002.

⁽⁴⁾ OJ L 91, 7.4.1999, p. 10.

⁽⁵⁾ OJ L 320, 28.11.1998, p. 54.

- (9) It is necessary to include the rights and obligations of undertakings under general authorisations explicitly in such authorisations in order to ensure a level playing field throughout the Community and to facilitate cross-border negotiation of interconnection between public communications networks.
- (10) The general authorisation entitles undertakings providing electronic communications networks and services to the public to negotiate interconnection under the conditions of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communication networks and associated facilities (Access Directive) ⁽⁶⁾. Undertakings providing electronic communications networks and services other than to the public can negotiate interconnection on commercial terms.
- (11) The granting of specific rights may continue to be necessary for the use of radio frequencies and numbers, including short codes, from the national numbering plan. Rights to numbers may also be allocated from a European numbering plan, including for example the virtual country code 3883 which has been attributed to member countries of the European Conference of Post and Telecommunications (CEPT). Those rights of use should not be restricted except where this is unavoidable in view of the scarcity of radio frequencies and the need to ensure the efficient use thereof.
- (12) This Directive does not prejudice whether radio frequencies are assigned directly to providers of electronic communication networks or services or to entities that use these networks or services. Such entities may be radio or television broadcast content providers. Without prejudice to specific criteria and procedures adopted by Member States to grant rights of use for radio frequencies to providers of radio or television broadcast content services, to pursue general interest objectives in conformity with Community law, the procedure for assignment of radio frequencies should in any event be objective, transparent, non-discriminatory and proportionate. In accordance with case law of the Court of Justice, any national restrictions on the rights guaranteed by Article 49 of the Treaty should be objectively justified, proportionate and not exceed what is necessary to achieve general interest objectives as defined by Member States in conformity with Community law. The responsibility for compliance with the conditions attached to the right to use a radio frequency and the relevant conditions attached to the general authorisation should in any case lie with the undertaking to whom the right of use for the radio frequency has been granted.
- (13) As part of the application procedure for granting rights to use a radio frequency, Member States may verify whether the applicant will be able to comply with the conditions attached to such rights. For this purpose the applicant may be requested to submit the necessary information to prove his ability to comply with these conditions. Where such information is not provided, the application for the right to use a radio frequency may be rejected.
- (14) Member States are neither obliged to grant nor prevented from granting rights to use numbers from the national numbering plan or rights to install facilities to undertakings other than providers of electronic communications networks or services.
- (15) The conditions, which may be attached to the general authorisation and to the specific rights of use, should be limited to what is strictly necessary to ensure compliance with requirements and obligations under Community law and national law in accordance with Community law.
- (16) In the case of electronic communications networks and services not provided to the public it is appropriate to impose fewer and lighter conditions than are justified for electronic communications networks and services provided to the public.
- (17) Specific obligations which may be imposed on providers of electronic communications networks and services in accordance with Community law by virtue of their significant market power as defined in Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) ⁽⁷⁾ should be imposed separately from the general rights and obligations under the general authorisation.
- (18) The general authorisation should only contain conditions which are specific to the electronic communications sector. It should not be made subject to conditions which are already applicable by virtue of other existing national law which is not specific to the electronic communications sector. Nevertheless, the national regulatory authorities may inform network operators and service providers about other legislation concerning their business, for instance through references on their websites.
- (19) The requirement to publish decisions on the granting of rights to use frequencies or numbers may be fulfilled by making these decisions publicly accessible via a website.
- (20) The same undertaking, for example a cable operator, can offer both an electronic communications service, such as the conveyance of television signals, and services not covered under this Directive, such as the commercialisation of an offer of sound or television broadcasting content services, and therefore additional obligations can be imposed on this undertaking in relation to its activity as a content provider or distributor, according to provisions other than those of this Directive, without prejudice to the list of conditions laid in the Annex to this Directive.
- (21) When granting rights of use for radio frequencies, numbers or rights to install facilities, the relevant authorities may inform the undertakings to whom they grant such rights of the relevant conditions in the general authorisation.

⁽⁶⁾ See page 7 of this Official Journal. [L 108, 24.4.2002]

⁽⁷⁾ See page 33 of this Official Journal. [L 108, 24.4.2002]

- (22) Where the demand for radio frequencies in a specific range exceeds their availability, appropriate and transparent procedures should be followed for the assignment of such frequencies in order to avoid any discrimination and optimise use of those scarce resources.
- (23) National regulatory authorities should ensure, in establishing criteria for competitive or comparative selection procedures, that the objectives in Article 8 of Directive 2002/21/EC (Framework Directive) are met. It would therefore not be contrary to this Directive if the application of objective, non-discriminatory and proportionate selection criteria to promote the development of competition would have the effect of excluding certain undertakings from a competitive or comparative selection procedure for a particular radio frequency.
- (24) Where the harmonised assignment of radio frequencies to particular undertakings has been agreed at European level, Member States should strictly implement such agreements in the granting of rights of use of radio frequencies from the national frequency usage plan.
- (25) Providers of electronic communications networks and services may need a confirmation of their rights under the general authorisation with respect to interconnection and rights of way, in particular to facilitate negotiations with other, regional or local, levels of government or with service providers in other Member States. For this purpose the national regulatory authorities should provide declarations to undertakings either upon request or alternatively as an automatic response to a notification under the general authorisation. Such declarations should not by themselves constitute entitlements to rights nor should any rights under the general authorisation or rights of use or the exercise of such rights depend upon a declaration.
- (26) Where undertakings find that their applications for rights to install facilities have not been dealt with in accordance with the principles set out in Directive 2002/21/EC (Framework Directive) or where such decisions are unduly delayed, they should have the right to appeal against decisions or delays in such decisions in accordance with that Directive.
- (27) The penalties for non-compliance with conditions under the general authorisation should be commensurate with the infringement. Save in exceptional circumstances, it would not be proportionate to suspend or withdraw the right to provide electronic communications services or the right to use radio frequencies or numbers where an undertaking did not comply with one or more of the conditions under the general authorisation. This is without prejudice to urgent measures which the relevant authorities of the Member States may need to take in case of serious threats to public safety, security or health or to economic and operational interests of other undertakings. This Directive should also be without prejudice to any claims between undertakings for compensation for damages under national law.
- (28) Subjecting service providers to reporting and information obligations can be cumbersome, both for the undertaking and for the national regulatory authority concerned. Such obligations should therefore be proportionate, objectively justified and limited to what is strictly necessary. It is not necessary to require systematic and regular proof of compliance with all conditions under the general authorisation or attached to rights of use. Undertakings have a right to know the purposes for which the information they should provide will be used. The provision of information should not be a condition for market access. For statistical purposes a notification may be required from providers of electronic communication networks or services when they cease activities.
- (29) This Directive should be without prejudice to Member States' obligations to provide any information necessary for the defence of Community interests within the context of international agreements. This Directive should also be without prejudice to any reporting obligations under legislation which is not specific to the electronic communications sector such as competition law.
- (30) Administrative charges may be imposed on providers of electronic communications services in order to finance the activities of the national regulatory authority in managing the authorisation system and for the granting of rights of use. Such charges should be limited to cover the actual administrative costs for those activities. For this purpose transparency should be created in the income and expenditure of national regulatory authorities by means of annual reporting about the total sum of charges collected and the administrative costs incurred. This will allow undertakings to verify that administrative costs and charges are in balance.
- (31) Systems for administrative charges should not distort competition or create barriers for entry into the market. With a general authorisation system it will no longer be possible to attribute administrative costs and hence charges to individual undertakings except for the granting of rights to use numbers, radio frequencies and for rights to install facilities. Any applicable administrative charges should be in line with the principles of a general authorisation system. An example of a fair, simple and transparent alternative for these charge attribution criteria could be a turnover related distribution key. Where administrative charges are very low, flat rate charges, or charges combining a flat rate basis with a turnover related element could also be appropriate.
- (32) In addition to administrative charges, usage fees may be levied for the use of radio frequencies and numbers as an instrument to ensure the optimal use of such resources. Such fees should not hinder the development of innovative services and competition in the market. This Directive is without prejudice to the purpose for which fees for rights of use are employed. Such fees may for instance be used to finance activities of national regulatory authorities that cannot be covered by administrative charges. Where, in the case of competitive or comparative selection procedures, fees for rights of use for radio frequencies consist entirely or partly of a one-off amount, payment

arrangements should ensure that such fees do not in practice lead to selection on the basis of criteria unrelated to the objective of ensuring optimal use of radio frequencies. The Commission may publish on a regular basis benchmark studies with regard to best practices for the assignment of radio frequencies, the assignment of numbers or the granting of rights of way.

- (33) Member States may need to amend rights, conditions, procedures, charges and fees relating to general authorisations and rights of use where this is objectively justified. Such changes should be duly notified to all interested parties in good time, giving them adequate opportunity to express their views on any such amendments.
- (34) The objective of transparency requires that service providers, consumers and other interested parties have easy access to any information regarding rights, conditions, procedures, charges, fees and decisions concerning the provision of electronic communications services, rights of use of radio frequencies and numbers, rights to install facilities, national frequency usage plans and national numbering plans. The national regulatory authorities have an important task in providing such information and keeping it up to date. Where such rights are administered by other levels of government the national regulatory authorities should endeavour to create a user-friendly instrument for access to information regarding such rights.
- (35) The proper functioning of the single market on the basis of the national authorisation regimes under this Directive should be monitored by the Commission.
- (36) In order to arrive at a single date of application of all elements of the new regulatory framework for the electronic communications sector, it is important that the process of national transposition of this Directive and of alignment of the existing licences with the new rules take place in parallel. However, in specific cases where the replacement of authorisations existing on the date of entry into force of this Directive by the general authorisation and the individual rights of use in accordance with this Directive would lead to an increase in the obligations for service providers operating under an existing authorisation or to a reduction of their rights, Member States may avail themselves of an additional nine months after the date of application of this Directive for alignment of such licences, unless this would have a negative effect on the rights and obligations of other undertakings.
- (37) There may be circumstances under which the abolition of an authorisation condition regarding access to electronic communications networks would create serious hardship for one or more undertakings that have benefited from the condition. In such cases further transitional arrangements may be granted by the Commission, upon request by a Member State.
- (38) Since the objectives of the proposed action, namely the harmonisation and simplification of electronic communications rules and conditions for the authorisation of networks and services cannot

be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary for those objectives,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Objective and scope

1. The aim of this Directive is to implement an internal market in electronic communications networks and services through the harmonisation and simplification of authorisation rules and conditions in order to facilitate their provision throughout the Community.
2. This Directive shall apply to authorisations for the provision of electronic communications networks and services.

Article 2

Definitions

1. For the purposes of this Directive, the definitions set out in Article 2 of Directive 2002/21/EC (Framework Directive) shall apply.
2. The following definition shall also apply:

'general authorisation' means a legal framework established by the Member State ensuring rights for the provision of electronic communications networks or services and laying down sector specific obligations that may apply to all or to specific types of electronic communications networks and services, in accordance with this Directive.

Article 3

General authorisation of electronic communications networks and services

1. Member States shall ensure the freedom to provide electronic communications networks and services, subject to the conditions set out in this Directive. To this end, Member States shall not prevent an undertaking from providing electronic communications networks or services, except where this is necessary for the reasons set out in Article 46(1) of the Treaty.
2. The provision of electronic communications networks or the provision of electronic communications services may, without prejudice to the specific obligations referred to in Article 6(2) or rights of use referred to in Article 5, only be subject to a general authorisation. The undertaking concerned may be required to submit a notification but may not be required to obtain an explicit decision or any other administrative act by the national regulatory authority before exercising the rights stemming from the authorisation. Upon notification, when required, an undertaking may begin activity, where necessary subject to the provisions on rights of use in Articles 5, 6 and 7.

Undertakings providing cross-border electronic communications services to undertakings located in several Member States shall not be required to submit more than one notification per Member State concerned.

3. The notification referred to in paragraph 2 shall not entail more than a declaration by a legal or natural person to the national regulatory authority of the intention to commence the provision of electronic communication networks or services and the submission of the minimal information which is required to allow the national regulatory authority to keep a register or list of providers of electronic communications networks and services. This information must be limited to what is necessary for the identification of the provider, such as company registration numbers, and the provider's contact persons, the provider's address, a short description of the network or service, and an estimated date for starting the activity.

Article 4

Minimum list of rights derived from the general authorisation

1. Undertakings authorised pursuant to Article 3, shall have the right to:

- (a) provide electronic communications networks and services;
- (b) have their application for the necessary rights to install facilities considered in accordance with Article 11 of Directive 2002/21/EC (Framework Directive).

2. When such undertakings provide electronic communications networks or services to the public the general authorisation shall also give them the right to:

- (a) negotiate interconnection with and where applicable obtain access to or interconnection from other providers of publicly available communications networks and services covered by a general authorisation anywhere in the Community under the conditions of and in accordance with Directive 2002/19/EC (Access Directive);
- (b) be given an opportunity to be designated to provide different elements of a universal service and/or to cover different parts of the national territory in accordance with Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) ⁽⁸⁾.

Article 5

Rights of use for radio frequencies and numbers

1. Member States shall facilitate the use of radio frequencies under general authorisations. Where necessary, Member States may grant individual rights of use in order to:

- avoid harmful interference,
- ensure technical quality of service,

- safeguard efficient use of spectrum, or
- fulfil other objectives of general interest as defined by Member States in conformity with Community law.

2. Where it is necessary to grant individual rights of use for radio frequencies and numbers, Member States shall grant such rights, upon request, to any undertaking for the provision of networks or services under the general authorisation referred to in Article 3, subject to the provisions of Articles 6, 7 and 11(1)(c) of this Directive and any other rules ensuring the efficient use of those resources in accordance with Directive 2002/21/EC (Framework Directive).

Without prejudice to specific criteria and procedures adopted by Member States to grant rights of use of radio frequencies to providers of radio or television broadcast content services with a view to pursuing general interest objectives in conformity with Community law, the rights of use for radio frequencies and numbers shall be granted through open, objective, transparent, non-discriminatory and proportionate procedures, and, in the case of radio frequencies, in accordance with the provisions of Article 9 of Directive 2002/21/EC (Framework Directive). An exception to the requirement of open procedures may apply in cases where the granting of individual rights of use of radio frequencies to the providers of radio or television broadcast content services is necessary to achieve a general interest objective as defined by Member States in conformity with Community law.

When granting rights of use, Member States shall specify whether those rights can be transferred by the holder of the rights, and under which conditions. In the case of radio frequencies, such provision shall be in accordance with Articles 9 and 9b of Directive 2002/21/EC (Framework Directive).

Where Member States grant rights of use for a limited period of time, the duration shall be appropriate for the service concerned in view of the objective pursued taking due account of the need to allow for an appropriate period for investment amortisation.

Where individual rights to use radio frequencies are granted for 10 years or more and such rights may not be transferred or leased between undertakings pursuant to Article 9b of Directive 2002/21/EC (Framework Directive) the competent national authority shall ensure that the criteria to grant individual rights of use apply and are complied with for the duration of the licence, in particular upon a justified request of the holder of the right. If those criteria are no longer applicable, the individual right of use shall be changed into a general authorisation for the use of radio frequencies, subject to prior notice and after a reasonable period, or shall be made transferable or leaseable between undertakings in accordance with Article 9b of Directive 2002/21/EC (Framework Directive).

3. Decisions on the granting of rights of use shall be taken, communicated and made public as soon as possible after receipt of the complete application by the national regulatory authority, within three weeks in the case of numbers that have been allocated for specific purposes within the national numbering plan and within six weeks in the case of radio frequencies that have been allocated to be used by electronic communications services within the national frequency plan. The latter time limit shall be without prejudice to any applicable international

⁽⁸⁾ See page 51 of this Official Journal. [L 108, 24.4.2002]

agreements relating to the use of radio frequencies or of orbital positions.

4. Where it has been decided, after consultation with interested parties in accordance with Article 6 of Directive 2002/21/EC (Framework Directive), that rights for use of numbers of exceptional economic value are to be granted through competitive or comparative selection procedures, Member States may extend the maximum period of three weeks by up to a further three weeks.

With regard to competitive or comparative selection procedures for radio frequencies, Article 7 shall apply.

5. Member States shall not limit the number of rights of use to be granted except where this is necessary to ensure the efficient use of radio frequencies in accordance with Article 7.

6. Competent national authorities shall ensure that radio frequencies are efficiently and effectively used in accordance with Articles 8(2) and 9(2) of Directive 2002/21/EC (Framework Directive). They shall ensure competition is not distorted by any transfer or accumulation of rights of use of radio frequencies. For such purposes, Member States may take appropriate measures such as mandating the sale or the lease of rights to use radio frequencies.

Article 6

Conditions attached to the general authorisation and to the rights of use for radio frequencies and for numbers, and specific obligations

1. The general authorisation for the provision of electronic communications networks or services and the rights of use for radio frequencies and rights of use for numbers may be subject only to the conditions listed in the Annex. Such conditions shall be non-discriminatory, proportionate and transparent and, in the case of rights of use for radio frequencies, shall be in accordance with Article 9 of Directive 2002/21/EC (Framework Directive).

2. Specific obligations which may be imposed on providers of electronic communications networks and services under Articles 5(1), 5(2), 6 and 8 of Directive 2002/19/EC (Access Directive) and Article 17 of Directive 2002/22/EC (Universal Service Directive) or on those designated to provide universal service under the said Directive shall be legally separate from the rights and obligations under the general authorisation. In order to achieve transparency for undertakings, the criteria and procedures for imposing such specific obligations on individual undertakings shall be referred to in the general authorisation.

3. The general authorisation shall only contain conditions which are specific for that sector and are set out in Part A of the Annex and shall not duplicate conditions which are applicable to undertakings by virtue of other national legislation.

4. Member States shall not duplicate the conditions of the general authorisation where they grant the right of use for radio frequencies or numbers.

Article 7

Procedure for limiting the number of rights of use to be granted for radio frequencies

1. Where a Member State is considering whether to limit the number of rights of use to be granted for radio frequencies or whether to extend the duration of existing rights other than in accordance with the terms specified in such rights, it shall *inter alia*:

- (a) give due weight to the need to maximise benefits for users and to facilitate the development of competition;
- (b) give all interested parties, including users and consumers, the opportunity to express their views on any limitation in accordance with Article 6 of Directive 2002/21/EC (Framework Directive);
- (c) publish any decision to limit the granting of rights of use or the renewal of rights of use, stating the reasons therefor;
- (d) after having determined the procedure, invite applications for rights of use; and
- (e) review the limitation at reasonable intervals or at the reasonable request of affected undertakings.

2. Where a Member State concludes that further rights of use for radio frequencies can be granted, it shall publish that conclusion and invite applications for such rights.

3. Where the granting of rights of use for radio frequencies needs to be limited, Member States shall grant such rights on the basis of selection criteria which must be objective, transparent, non-discriminatory and proportionate. Any such selection criteria must give due weight to the achievement of the objectives of Article 8 of Directive 2002/21/EC (Framework Directive) and of the requirements of Article 9 of that Directive.

4. Where competitive or comparative selection procedures are to be used, Member States may extend the maximum period of six weeks referred to in Article 5(3) for as long as necessary to ensure that such procedures are fair, reasonable, open and transparent to all interested parties, but by no longer than eight months.

These time limits shall be without prejudice to any applicable international agreements relating to the use of radio frequencies and satellite coordination.

5. This Article is without prejudice to the transfer of rights of use for radio frequencies in accordance with Article 9b of Directive 2002/21/EC (Framework Directive).

Article 8

Harmonised assignment of radio frequencies

Where the usage of radio frequencies has been harmonised, access conditions and procedures have been agreed, and undertakings to which the radio frequencies shall be assigned have been selected in accordance with international agreements and Community rules, Member States shall grant the right of use for such radio frequencies in accordance therewith. Provided that all national conditions attached to the right to use the radio frequencies concerned have been satisfied in the case of a common selection procedure, Member States shall not

impose any further conditions, additional criteria or procedures which would restrict, alter or delay the correct implementation of the common assignment of such radio frequencies.

Article 9

Declarations to facilitate the exercise of rights to install facilities and rights of interconnection

At the request of an undertaking, national regulatory authorities shall, within one week, issue standardised declarations, confirming, where applicable, that the undertaking has submitted a notification under Article 3(2) and detailing under what circumstances any undertaking providing electronic communications networks or services under the general authorisation has the right to apply for rights to install facilities, negotiate interconnection, and/or obtain access or interconnection in order to facilitate the exercise of those rights for instance at other levels of government or in relation to other undertakings. Where appropriate such declarations may also be issued as an automatic reply following the notification referred to in Article 3(2).

Article 10

Compliance with the conditions of the general authorisation or of rights of use and with specific obligations

1. National regulatory authorities shall monitor and supervise compliance with the conditions of the general authorisation or of rights of use and with the specific obligations referred to in Article 6(2), in accordance with Article 11.

National regulatory authorities shall have the power to require undertakings providing electronic communications networks or services covered by the general authorisation or enjoying rights of use for radio frequencies or numbers to provide all information necessary to verify compliance with the conditions of the general authorisation or of rights of use or with the specific obligations referred to in Article 6(2), in accordance with Article 11.

2. Where a national regulatory authority finds that an undertaking does not comply with one or more of the conditions of the general authorisation or of rights of use, or with the specific obligations referred to in Article 6(2), it shall notify the undertaking of those findings and give the undertaking the opportunity to state its views, within a reasonable time limit.

3. The relevant authority shall have the power to require the cessation of the breach referred to in paragraph 2 either immediately or within a reasonable time limit and shall take appropriate and proportionate measures aimed at ensuring compliance.

In this regard, Member States shall empower the relevant authorities to impose:

- (a) dissuasive financial penalties where appropriate, which may include periodic penalties having retroactive effect; and
- (b) orders to cease or delay provision of a service or bundle of services which, if continued, would result in significant harm to competition, pending

compliance with access obligations imposed following a market analysis carried out in accordance with Article 16 of Directive 2002/21/EC (Framework Directive).

The measures and the reasons on which they are based shall be communicated to the undertaking concerned without delay and shall stipulate a reasonable period for the undertaking to comply with the measure.

4. Notwithstanding the provisions of paragraphs 2 and 3, Member States shall empower the relevant authority to impose financial penalties where appropriate on undertakings for failure to provide information in accordance with the obligations imposed under Article 11(1)(a) or (b) of this Directive and Article 9 of Directive 2002/19/EC (Access Directive) within a reasonable period stipulated by the national regulatory authority.

5. In cases of serious or repeated breaches of the conditions of the general authorisation or of the rights of use, or specific obligations referred to in Article 6(2), where measures aimed at ensuring compliance as referred to in paragraph 3 of this Article have failed, national regulatory authorities may prevent an undertaking from continuing to provide electronic communications networks or services or suspend or withdraw rights of use. Sanctions and penalties which are effective, proportionate and dissuasive may be applied to cover the period of any breach, even if the breach has subsequently been rectified.

6. Irrespective of the provisions of paragraphs 2, 3 and 5, where the relevant authority has evidence of a breach of the conditions of the general authorisation rights of use or of the specific obligations referred to in Article 6(2) that represents an immediate and serious threat to public safety, public security or public health or will create serious economic or operational problems for other providers or users of electronic communications networks or services or other users of the radio spectrum, it may take urgent interim measures to remedy the situation in advance of reaching a final decision. The undertaking concerned shall thereafter be given a reasonable opportunity to state its views and propose any remedies. Where appropriate, the relevant authority may confirm the interim measures, which shall be valid for a maximum of 3 months, but which may, in circumstances where enforcement procedures have not been completed, be extended for a further period of up to three months.

7. Undertakings shall have the right to appeal against measures taken under this Article in accordance with the procedure referred to in Article 4 of Directive 2002/21/EC (Framework Directive).

Article 11

Information required under the general authorisation, for rights of use and for the specific obligations

1. Without prejudice to information and reporting obligations under national legislation other than the general authorisation, national regulatory authorities may only require undertakings to provide information under the general authorisation, for rights of use or the specific obligations referred to in Article 6(2) that is proportionate and objectively justified for:

- (a) systematic or case-by-case verification of compliance with conditions 1 and 2 of Part A, conditions 2 and 6 of Part B and conditions 2 and 7 of Part C of the Annex and of compliance with obligations as referred to in Article 6(2);
- (b) case-by-case verification of compliance with conditions as set out in the Annex where a complaint has been received or where the national regulatory authority has other reasons to believe that a condition is not complied with or in case of an investigation by the national regulatory authority on its own initiative;
- (c) procedures for and assessment of requests for granting rights of use;
- (d) publication of comparative overviews of quality and price of services for the benefit of consumers;
- (e) clearly defined statistical purposes;
- (f) market analysis for the purposes of Directive 2002/19/EC (Access Directive) or Directive 2002/22/EC (Universal Service Directive).
- (g) safeguarding the efficient use and ensuring the effective management of radio frequencies;
- (h) evaluating future network or service developments that could have an impact on wholesale services made available to competitors.

The information referred to in points (a), (b), (d), (e), (f), (g) and (h) of the first subparagraph may not be required prior to, or as a condition for, market access.

2. Where national regulatory authorities require undertakings to provide information as referred to in paragraph 1, they shall inform them of the specific purpose for which this information is to be used.

Article 12

Administrative charges

1. Any administrative charges imposed on undertakings providing a service or a network under the general authorisation or to whom a right of use has been granted shall:

- (a) in total, cover only the administrative costs which will be incurred in the management, control and enforcement of the general authorisation scheme and of rights of use and of specific obligations as referred to in Article 6(2), which may include costs for international cooperation, harmonisation and standardisation, market analysis, monitoring compliance and other market control, as well as regulatory work involving preparation and enforcement of secondary legislation and administrative decisions, such as decisions on access and interconnection; and
- (b) be imposed upon the individual undertakings in an objective, transparent and proportionate manner which minimises additional administrative costs and attendant charges.

2. Where national regulatory authorities impose administrative charges, they shall publish a yearly

overview of their administrative costs and of the total sum of the charges collected. In the light of the difference between the total sum of the charges and the administrative costs, appropriate adjustments shall be made.

Article 13

Fees for rights of use and rights to install facilities

Member States may allow the relevant authority to impose fees for the rights of use for radio frequencies or numbers or rights to install facilities on, over or under public or private property which reflect the need to ensure the optimal use of these resources. Member States shall ensure that such fees shall be objectively justified, transparent, non-discriminatory and proportionate in relation to their intended purpose and shall take into account the objectives in Article 8 of Directive 2002/21/EC (Framework Directive).

Article 14

Amendment of rights and obligations

1. Member States shall ensure that the rights, conditions and procedures concerning general authorisations and rights of use or rights to install facilities may only be amended in objectively justified cases and in a proportionate manner, taking into consideration, where appropriate, the specific conditions applicable to transferable rights of use for radio frequencies. Except where proposed amendments are minor and have been agreed with the holder of the rights or general authorisation, notice shall be given in an appropriate manner of the intention to make such amendments and interested parties, including users and consumers, shall be allowed a sufficient period of time to express their views on the proposed amendments, which shall be no less than four weeks except in exceptional circumstances.

2. Member States shall not restrict or withdraw rights to install facilities or rights of use for radio frequencies before expiry of the period for which they were granted except where justified and where applicable in conformity with the Annex and relevant national provisions regarding compensation for withdrawal of rights.

Article 15

Publication of information

1. Member States shall ensure that all relevant information on rights, conditions, procedures, charges, fees and decisions concerning general authorisations, rights of use and rights to install facilities is published and kept up to date in an appropriate manner so as to provide easy access to that information for all interested parties.

2. Where information as referred to in paragraph 1 is held at different levels of government, in particular information regarding procedures and conditions on rights to install facilities, the national regulatory authority shall make all reasonable efforts, bearing in mind the costs involved, to create a user-friendly overview of all such information, including information on the relevant levels of government and the responsible authorities, in order to facilitate applications for rights to install facilities.

Article 16

Review procedures

The Commission shall periodically review the functioning of the national authorisation systems and the development of cross-border service provision within the Community and report to the European Parliament and to the Council on the first occasion not later than three years after the date of application of this Directive referred to in Article 18(1), second subparagraph. For this purpose, the Commission may request from the Member States information, which shall be supplied without undue delay.

Article 17

Existing authorisations

1. Without prejudice to Article 9a of Directive 2002/21/EC (Framework Directive), Member States shall bring general authorisations and individual rights of use already in existence on 31 December 2009 into conformity with Articles 5, 6, 7, and the Annex of this Directive 19 December 2011 at the latest.

2. Where application of paragraph 1 results in a reduction of the rights or an extension of the general authorisations and individual rights of use already in existence, Member States may extend the validity of those authorisations and rights until 30 September 2012 at the latest, provided that the rights of other undertakings under Community law are not affected thereby. Member States shall notify such extensions to the Commission and state the reasons therefor.

3. Where the Member State concerned can prove that the abolition of an authorisation condition regarding access to electronic communications networks, which was in force before the date of entry into force of this Directive, creates excessive difficulties for undertakings that have benefited from mandated access to another network, and where it is not possible for these undertakings to negotiate new agreements on reasonable commercial terms before the date of application referred to in Article 18(1), second subparagraph, Member States may request a temporary prolongation of the relevant condition(s). Such requests shall be submitted by the date of application referred to in Article 18(1), second subparagraph, at the latest, and shall specify the condition(s) and period for which the temporary prolongation is requested.

The Member State shall inform the Commission of the reasons for requesting a prolongation. The Commission shall consider such a request, taking into account the particular situation in that Member State and of the undertaking(s) concerned, and the need to ensure a coherent regulatory environment at a Community level. It shall take a decision on whether to grant or reject the request, and where it decides to grant the request, on the scope and duration of the prolongation to be granted. The Commission shall communicate its decision to the Member State concerned within six months after receipt of the application for a prolongation. Such decisions shall be published in *the Official Journal of the European Communities*.

Article 18

Transposition

1. Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive by 24 July 2003 at the latest. They shall forthwith inform the Commission thereof.

They shall apply those measures from 25 July 2003.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field governed by this Directive and of any subsequent amendments to those provisions.

Article 19

Entry into force

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Article 20

Addressees

This Directive is addressed to the Member States.

Done at Brussels, 7 March 2002.

For the European Parliament

The President

P. Cox

For the Council

The President

J. C. Aparicio

ANNEX

The conditions listed in this Annex provide the maximum list of conditions which may be attached to general authorisations (Part A), rights to use radio frequencies (Part B) and rights to use numbers (Part C) as referred to in Article 6(1) and Article 11(1)(a), within the limits allowed under Articles 5, 6, 7, 8 and 9 of Directive 2002/21/EC (the Framework Directive).

A. Conditions which may be attached to a general authorisation

1. Financial contributions to the funding of universal service in conformity with Directive 2002/22/EC (Universal Service Directive).
2. Administrative charges in accordance with Article 12 of this Directive.
3. Interoperability of services and interconnection of networks in conformity with Directive 2002/19/EC (Access Directive).
4. Accessibility by end users of numbers from the national numbering plan, numbers from the European Telephone Numbering Space, the Universal International Freephone Numbers, and, where technically and economically feasible, from numbering plans of other Member States, and conditions in conformity with Directive 2002/22/EC (Universal Service Directive).
5. Environmental and town and country planning requirements, as well as requirements and conditions linked to the granting of access to or use of public or private land and conditions linked to co-location and facility sharing in conformity with Directive 2002/22/EC (Framework Directive) and including, where applicable, any financial or technical guarantees necessary to ensure the proper execution of infrastructure works.
6. 'Must carry' obligations in conformity with Directive 2002/22/EC (Universal Service Directive).
7. Personal data and privacy protection specific to the electronic communications sector in conformity with Directive 2002/58/EC of the European Parliament and of the Council (Directive on privacy and electronic communications) (*)
8. Consumer protection rules specific to the electronic communications sector, including conditions in conformity with Directive 2002/22/EC (Universal Service Directive), and conditions on accessibility for users with disabilities in accordance with Article 7 of that Directive.
9. Restrictions in relation to the transmission of illegal content, in accordance with Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ⁽⁹⁾ and restrictions in relation to the transmission of harmful content in accordance with Article 2a(2) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities ⁽¹⁰⁾.
10. Information to be provided under a notification procedure in accordance with Article 3(3) of this Directive and for other purposes as included in Article 11 of this Directive.
11. Enabling of legal interception by competent national authorities in conformity with Directive 2002/58/EC and Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ⁽¹¹⁾.
- 11a. Terms of use for communications from public authorities to the general public for warning the public of imminent threats and for mitigating the consequences of major catastrophes.
12. Terms of use during major disasters or national emergencies to ensure communications between emergency services and authorities.
13. Measures regarding the limitation of exposure of the general public to electromagnetic fields caused by electronic communications networks in accordance with Community law.
14. Access obligations other than those provided for in Article 6(2) of this Directive applying to undertakings providing electronic communications networks or services, in conformity with Directive 2002/19/EC (Access Directive).
15. Maintenance of the integrity of public communications networks in accordance with Directive 2002/19/EC (Access Directive) and Directive 2002/22/EC (Universal Service Directive) including by conditions to prevent electromagnetic interference between electronic communications networks and/or services in accordance with Council Directive

(*) OJ L 201, 31.7.2002, p. 37.

⁽⁹⁾ OJ L 178, 17.7.2000, p. 1.

⁽¹⁰⁾ OJ L 298, 17.10.1989, p. 23. Directive as amended by Directive 97/36/EC of the European Parliament and of the Council (OJ L 202, 30.7.1997, p. 60).

⁽¹¹⁾ OJ L 281, 23.11.1995, p. 31.

89/336/EEC of 3 May 1989 on the approximation of the laws of the Member States relating to electromagnetic compatibility ⁽¹²⁾.

16. Security of public networks against unauthorised access according to Directive 2002/58/EC (Directive on Privacy and electronic communications).
17. Conditions for the use of radio frequencies, in conformity with Article 7(2) of Directive 1999/5/EC, where such use is not made subject to the granting of individual rights of use in accordance with Article 5(1) of this Directive.
18. Measures designed to ensure compliance with the standards and/or specifications referred to in Article 17 of Directive 2002/21/EC (Framework Directive).
19. Transparency obligations on public communications network providers providing electronic communications services available to the public to ensure end-to-end connectivity, in conformity with the objectives and principles set out in Article 8 of Directive 2002/21/EC (Framework Directive), disclosure regarding any conditions limiting access to and/or use of services and applications where such conditions are allowed by Member States in conformity with Community law, and, where necessary and proportionate, access by national regulatory authorities to such information needed to verify the accuracy of such disclosure.

B. Conditions which may be attached to rights of use for radio frequencies

1. Obligation to provide a service or to use a type of technology for which the rights of use for the frequency has been granted, including, where appropriate, coverage and quality requirements.
2. Effective and efficient use of frequencies in conformity with Directive 2002/21/EC (Framework Directive).
3. Technical and operational conditions necessary for the avoidance of harmful interference and for the limitation of exposure of the general public to electromagnetic fields, where such conditions are different from those included in the general authorisation.
4. Maximum duration in conformity with Article 5 of this Directive, subject to any changes in the national frequency plan.
5. Transfer of rights at the initiative of the right holder and conditions for such transfer in conformity with Directive 2002/21/EC (Framework Directive).
6. Usage fees in accordance with Article 13 of this Directive.
7. Any commitments which the undertaking obtaining the usage right has made in the course of a competitive or comparative selection procedure.
8. Obligations under relevant international agreements relating to the use of frequencies.
9. Obligations specific to an experimental use of radio frequencies.

C. Conditions which may be attached to rights of use for numbers

1. Designation of service for which the number shall be used, including any requirements linked to the provision of that service and, for the avoidance of doubt, tariff principles and maximum prices that can apply in the specific number range for the purposes of ensuring consumer protection in accordance with Article 8(4)(b) of Directive 2002/21/EC (Framework Directive).
2. Effective and efficient use of numbers in conformity with Directive 2002/21/EC (Framework Directive).
3. Number portability requirements in conformity with Directive 2002/22/EC (Universal Service Directive).
4. Obligation to provide public directory subscriber information for the purposes of Articles 5 and 25 of Directive 2002/22/EC (Universal Service Directive).
5. Maximum duration in conformity with Article 5 of this Directive, subject to any changes in the national numbering plan.
6. Transfer of rights at the initiative of the right holder and conditions for such transfer in conformity with Directive 2002/21/EC (Framework Directive).
7. Usage fees in accordance with Article 13 of this Directive.
8. Any commitments which the undertaking obtaining the usage right has made in the course of a competitive or comparative selection procedure.
9. Obligations under relevant international agreements relating to the use of numbers.

⁽¹²⁾ OJ L 139, 23.5.1989, p. 19. Directive as last amended by Directive 93/68/EEC (OJ L 220, 30.8.1993, p. 1).

DIRECTIVE 2002/19/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 7 March 2002

**on access to, and interconnection of, electronic communications networks and associated facilities
(Access Directive) (*)**

as amended by Directive 2009/140/EC ()**
(unofficially consolidated version)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the Economic and Social Committee ⁽²⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽³⁾,

Whereas:

- (1) Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) ⁽⁴⁾ lays down the objectives of a regulatory framework to cover electronic communications networks and services in the Community, including fixed and mobile telecommunications networks, cable television networks, networks used for terrestrial broadcasting, satellite networks and Internet networks, whether used for voice, fax, data or images. Such networks may have been authorised by Member States under Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) ⁽⁵⁾ or have been authorised under previous regulatory measures. The provisions of this Directive apply to those networks that are used for the provision of publicly available electronic communications services. This Directive covers access and interconnection arrangements between service suppliers. Non-public networks do not have obligations under this Directive except where, in benefiting from access to public networks, they may be subject to conditions laid down by Member States.
- (2) Services providing content such as the offer for sale of a package of sound or television

broadcasting content are not covered by the common regulatory framework for electronic communications networks and services.

- (3) The term 'access' has a wide range of meanings, and it is therefore necessary to define precisely how that term is used in this Directive, without prejudice to how it may be used in other Community measures. An operator may own the underlying network or facilities or may rent some or all of them.
- (4) Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals ⁽⁶⁾ did not mandate any specific digital television transmission system or service requirement, and this opened up an opportunity for the market actors to take the initiative and develop suitable systems. Through the Digital Video Broadcasting Group, European market actors have developed a family of television transmission systems that have been adopted by broadcasters throughout the world. These transmissions systems have been standardised by the European Telecommunications Standards Institute (ETSI) and have become International Telecommunication Union recommendations. In relation to wide-screen digital television, the 16:9 aspect ratio is the reference format for wide-format television services and programmes, and is now established in Member States' markets as a result of Council Decision 93/424/EEC of 22 July 1993 on an action plan for the introduction of advanced television services in Europe ⁽⁷⁾.
- (5) In an open and competitive market, there should be no restrictions that prevent undertakings from negotiating access and interconnection arrangements between themselves, in particular on cross-border agreements, subject to the competition rules of the Treaty. In the context of achieving a more efficient, truly pan-European market, with effective competition, more choice and competitive services to consumers, undertakings which receive requests for access or interconnection should in principle conclude such agreements on a commercial basis, and negotiate in good faith.
- (6) In markets where there continue to be large differences in negotiating power between undertakings, and where some undertakings rely on infrastructure provided by others for delivery of their services, it is appropriate to establish a framework to ensure that the market functions effectively. National regulatory authorities should have the power to secure, where commercial

(*) OJ L 108, 24.04.2002, p. 7.

(**) OJ L 337, 18.12.2009, p. 37.

⁽¹⁾ OJ C 365 E, 19.12.2000, p. 215 and OJ C 270 E, 25.9.2001, p. 161.

⁽²⁾ OJ C 123, 25.4.2001, p. 50.

⁽³⁾ Opinion of the European Parliament of 1 March 2001 (OJ C 277, 1.10.2001, p. 72), Council Common Position of 17 September 2001 (OJ C 337, 30.11.2001, p. 1) and Decision of the European Parliament of 12 December 2001 (not yet published in the Official Journal). Council Decision of 14 February 2002.

⁽⁴⁾ See page 33 of this Official Journal. [L 108, 24.4.2002]

⁽⁵⁾ See page 21 of this Official Journal. [L 108, 24.4.2002]

⁽⁶⁾ OJ L 281, 23.11.1995, p. 51.

⁽⁷⁾ OJ L 196, 5.8.1993, p. 48.

- negotiation fails, adequate access and interconnection and interoperability of services in the interest of end-users. In particular, they may ensure end-to-end connectivity by imposing proportionate obligations on undertakings that control access to end-users. Control of means of access may entail ownership or control of the physical link to the end-user (either fixed or mobile), and/or the ability to change or withdraw the national number or numbers needed to access an end-user's network termination point. This would be the case for example if network operators were to restrict unreasonably end-user choice for access to Internet portals and services.
- (7) National legal or administrative measures that link the terms and conditions for access or interconnection to the activities of the party seeking interconnection, and specifically to the degree of its investment in network infrastructure, and not to the interconnection or access services provided, may cause market distortion and may therefore not be compatible with competition rules.
- (8) Network operators who control access to their own customers do so on the basis of unique numbers or addresses from a published numbering or addressing range. Other network operators need to be able to deliver traffic to those customers, and so need to be able to interconnect directly or indirectly to each other. The existing rights and obligations to negotiate interconnection should therefore be maintained. It is also appropriate to maintain the obligations formerly laid down in Directive 95/47/EC requiring fully digital electronic communications networks used for the distribution of television services and open to the public to be capable of distributing wide-screen television services and programmes, so that users are able to receive such programmes in the format in which they were transmitted.
- (9) Interoperability is of benefit to end-users and is an important aim of this regulatory framework. Encouraging interoperability is one of the objectives for national regulatory authorities as set out in this framework, which also provides for the Commission to publish a list of standards and/or specifications covering the provision of services, technical interfaces and/or network functions, as the basis for encouraging harmonisation in electronic communications. Member States should encourage the use of published standards and/or specifications to the extent strictly necessary to ensure interoperability of services and to improve freedom of choice for users.
- (10) Competition rules alone may not be sufficient to ensure cultural diversity and media pluralism in the area of digital television. Directive 95/47/EC provided an initial regulatory framework for the nascent digital television industry which should be maintained, including in particular the obligation to provide conditional access on fair, reasonable and non-discriminatory terms, in order to make sure that a wide variety of programming and services is available. Technological and market developments make it necessary to review these obligations on a regular basis, either by a Member State for its national market or the Commission for the Community, in particular to determine whether there is justification for extending obligations to new gateways, such as electronic programme guides (EPGs) and application program interfaces (APIs), to the extent that is necessary to ensure accessibility for end-users to specified digital broadcasting services. Member States may specify the digital broadcasting services to which access by end-users must be ensured by any legislative, regulatory or administrative means that they deem necessary.
- (11) Member States may also permit their national regulatory authority to review obligations in relation to conditional access to digital broadcasting services in order to assess through a market analysis whether to withdraw or amend conditions for operators that do not have significant market power on the relevant market. Such withdrawal or amendment should not adversely affect access for end-users to such services or the prospects for effective competition.
- (12) In order to ensure continuity of existing agreements and to avoid a legal vacuum, it is necessary to ensure that obligations for access and interconnection imposed under Articles 4, 6, 7, 8, 11, 12, and 14 of Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of open network provision (ONP)⁽⁸⁾, obligations on special access imposed under Article 16 of Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment⁽⁹⁾, and obligations concerning the provision of leased line transmission capacity under Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines⁽¹⁰⁾, are initially carried over into the new regulatory framework, but are subject to immediate review in the light of prevailing market conditions. Such a review should also extend to those organisations covered by Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop⁽¹¹⁾.
- (13) The review should be carried out using an economic market analysis based on competition law methodology. The aim is to reduce ex ante sector specific rules progressively as competition in the market develops. However the procedure also takes account of transitional problems in the market such as those related to international roaming and of the possibility of new bottlenecks arising as a result of technological development, which may require ex ante regulation, for example in the area of broadband access networks. It may well be the case that competition develops at different speeds in different market segments and

⁽⁸⁾ OJ L 199, 26.7.1997, p. 32. Directive as last amended by Directive 98/61/EC (OJ L 268, 3.10.1998, p. 37).

⁽⁹⁾ OJ L 101, 1.4.1998, p. 24.

⁽¹⁰⁾ OJ L 165, 19.6.1992, p. 27. Directive as last amended by Commission Decision No 98/80/EC (OJ L 14, 20.1.1998, p. 27).

⁽¹¹⁾ OJ L 366, 30.12.2000, p. 4.

in different Member States, and national regulatory authorities should be able to relax regulatory obligations in those markets where competition is delivering the desired results. In order to ensure that market players in similar circumstances are treated in similar ways in different Member States, the Commission should be able to ensure harmonised application of the provisions of this Directive. National regulatory authorities and national authorities entrusted with the implementation of competition law should, where appropriate, coordinate their actions to ensure that the most appropriate remedy is applied. The Community and its Member States have entered into commitments on interconnection of telecommunications networks in the context of the World Trade Organisation agreement on basic telecommunications and these commitments need to be respected.

- (14) Directive 97/33/EC laid down a range of obligations to be imposed on undertakings with significant market power, namely transparency, non-discrimination, accounting separation, access, and price control including cost orientation. This range of possible obligations should be maintained but, in addition, they should be established as a set of maximum obligations that can be applied to undertakings, in order to avoid over-regulation. Exceptionally, in order to comply with international commitments or Community law, it may be appropriate to impose obligations for access or interconnection on all market players, as is currently the case for conditional access systems for digital television services.
- (15) The imposition of a specific obligation on an undertaking with significant market power does not require an additional market analysis but a justification that the obligation in question is appropriate and proportionate in relation to the nature of the problem identified.
- (16) Transparency of terms and conditions for access and interconnection, including prices, serve to speed-up negotiation, avoid disputes and give confidence to market players that a service is not being provided on discriminatory terms. Openness and transparency of technical interfaces can be particularly important in ensuring interoperability. Where a national regulatory authority imposes obligations to make information public, it may also specify the manner in which the information is to be made available, covering for example the type of publication (paper and/or electronic) and whether or not it is free of charge, taking into account the nature and purpose of the information concerned.
- (17) The principle of non-discrimination ensures that undertakings with market power do not distort competition, in particular where they are vertically integrated undertakings that supply services to undertakings with whom they compete on downstream markets.
- (18) Accounting separation allows internal price transfers to be rendered visible, and allows national regulatory authorities to check compliance with obligations for non-discrimination where applicable. In this regard the Commission published Recommendation 98/322/EC of 8 April

1998 on interconnection in a liberalised telecommunications market (Part 2 - accounting separation and cost accounting)⁽¹²⁾.

- (19) Mandating access to network infrastructure can be justified as a means of increasing competition, but national regulatory authorities need to balance the rights of an infrastructure owner to exploit its infrastructure for its own benefit, and the rights of other service providers to access facilities that are essential for the provision of competing services. Where obligations are imposed on operators that require them to meet reasonable requests for access to and use of networks elements and associated facilities, such requests should only be refused on the basis of objective criteria such as technical feasibility or the need to maintain network integrity. Where access is refused, the aggrieved party may submit the case to the dispute resolutions procedure referred to in Articles 20 and 21 of Directive 2002/21/EC (Framework Directive). An operator with mandated access obligations cannot be required to provide types of access which are not within its powers to provide. 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. The Commission has published a Notice on the application of the competition rules to access agreements in the telecommunications sector⁽¹³⁾ which addresses these issues. National regulatory authorities may impose technical and operational conditions on the provider and/or beneficiaries of mandated access in accordance with Community law. In particular the imposition of technical standards should comply with Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules of Information Society Services⁽¹⁴⁾.
- (20) Price control may be necessary when market analysis in a particular market reveals inefficient competition. The regulatory intervention may be relatively light, such as an obligation that prices for carrier selection are reasonable as laid down in Directive 97/33/EC, or much heavier such as an obligation that prices are cost oriented to provide full justification for those prices where competition is not sufficiently strong to prevent excessive pricing. In particular, operators with significant market power should avoid a price squeeze whereby the difference between their retail prices and the interconnection prices charged to competitors who provide similar retail services is not adequate to ensure sustainable competition. When a national regulatory authority calculates costs incurred in establishing a service mandated under this Directive, it is appropriate to allow a reasonable return on the capital employed including appropriate labour and building costs, with the value of capital adjusted where necessary to reflect the current valuation of assets and efficiency of operations. The method of cost

⁽¹²⁾ OJ L 141, 13.5.1998, p. 6.

⁽¹³⁾ OJ C 265, 22.8.1998, p. 2.

⁽¹⁴⁾ OJ L 204, 21.7.1998, p. 37. Directive as amended by Directive 98/48/EC (OJ L 217, 5.8.1998, p. 18).

recovery should be appropriate to the circumstances taking account of the need to promote efficiency and sustainable competition and maximise consumer benefits.

- (21) Where a national regulatory authority imposes obligations to implement a cost accounting system in order to support price controls, it may itself undertake an annual audit to ensure compliance with that cost accounting system, provided that it has the necessary qualified staff, or it may require the audit to be carried out by another qualified body, independent of the operator concerned.
- (22) Publication of information by Member States will ensure that market players and potential market entrants understand their rights and obligations, and know where to find the relevant detailed information. Publication in the national gazette helps interested parties in other Member States to find the relevant information.
- (23) In order to ensure that the pan-European electronic communications market is effective and efficient, the Commission should monitor and publish information on charges which contribute to determining prices to end-users.
- (24) The development of the electronic communications market, with its associated infrastructure, could have adverse effects on the environment and the landscape. Member States should therefore monitor this process and, if necessary, take action to minimise any such effects by means of appropriate agreements and other arrangements with the relevant authorities.
- (25) In order to determine the correct application of Community law, the Commission needs to know which undertakings have been designated as having significant market power and what obligations have been placed upon market players by national regulatory authorities. In addition to national publication of this information, it is therefore necessary for Member States to send this information to the Commission. Where Member States are required to send information to the Commission, this may be in electronic form, subject to appropriate authentication procedures being agreed.
- (26) Given the pace of technological and market developments, the implementation of this Directive should be reviewed within three years of its date of application to determine if it is meeting its objectives.
- (27) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission ⁽¹⁵⁾.
- (28) Since the objectives of the proposed action, namely establishing a harmonised framework for the regulation of access to and interconnection of electronic communications networks and associated facilities, cannot be sufficiently achieved by the Member States and can therefore,

by reason of the scale and effects of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

SCOPE, AIM AND DEFINITIONS

Article 1

Scope and aim

1. Within the framework set out in Directive 2002/21/EC (Framework Directive), this Directive harmonises the way in which Member States regulate access to, and interconnection of, electronic communications networks and associated facilities. The aim is to establish a regulatory framework, in accordance with internal market principles, for the relationships between suppliers of networks and services that will result in sustainable competition, interoperability of electronic communications services and consumer benefits.

2. This Directive establishes rights and obligations for operators and for undertakings seeking interconnection and/or access to their networks or associated facilities. It sets out objectives for national regulatory authorities with regard to access and interconnection, and lays down procedures to ensure that obligations imposed by national regulatory authorities are reviewed and, where appropriate, withdrawn once the desired objectives have been achieved. Access in this Directive does not refer to access by end-users.

Article 2

Definitions

For the purposes of this Directive the definitions set out in Article 2 of Directive 2002/21/EC (Framework Directive) shall apply.

The following definitions shall also apply:

- (a) 'access' means the making available of facilities and/or services to another undertaking, under defined conditions, on either an exclusive or non-exclusive basis, for the purpose of providing electronic communications services, including when they are used for the delivery of information society services or broadcast content services. It covers inter alia: access to network elements and associated facilities, which may involve the connection of equipment, by fixed or non-fixed means (in particular this includes access to the local loop and to facilities and services necessary to provide services over the local loop); access to physical infrastructure including buildings, ducts and masts; access to relevant software systems including operational support systems; access to information systems or databases for pre-ordering, provisioning, ordering, maintaining and repair

⁽¹⁵⁾ OJ L 184, 17.7.1999, p. 23.

requests, and billing; access to number translation or systems offering equivalent functionality; access to fixed and mobile networks, in particular for roaming; access to conditional access systems for digital television services and access to virtual network services.

- (b) 'interconnection' means the physical and logical linking of public communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking, or to access services provided by another undertaking. Services may be provided by the parties involved or other parties who have access to the network. Interconnection is a specific type of access implemented between public network operators;
- (c) 'operator' means an undertaking providing or authorised to provide a public communications network or an associated facility;
- (d) 'wide-screen television service' means a television service that consists wholly or partially of programmes produced and edited to be displayed in a full height wide-screen format. The 16:9 format is the reference format for wide-screen television services;
- (e) 'local loop' means the physical circuit connecting the network termination point to a distribution frame or equivalent facility in the fixed public electronic communications network.

CHAPTER II

GENERAL PROVISIONS

Article 3

General framework for access and interconnection

1. Member States shall ensure that there are no restrictions which prevent undertakings in the same Member State or in different Member States from negotiating between themselves agreements on technical and commercial arrangements for access and/or interconnection, in accordance with Community law. The undertaking requesting access or interconnection does not need to be authorised to operate in the Member State where access or interconnection is requested, if it is not providing services and does not operate a network in that Member State.

2. Without prejudice to Article 31 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) ⁽¹⁶⁾, Member States shall not maintain legal or administrative measures which oblige operators, when granting access or interconnection, to offer different terms and conditions to different undertakings for equivalent services and/or imposing obligations that are not related to the actual access and interconnection services provided without prejudice to the conditions fixed in the Annex of Directive 2002/20/EC (Authorisation Directive).

⁽¹⁶⁾ See page 51 of this Official Journal. [L 108, 24.4.2002]

Article 4

Rights and obligations for undertakings

1. Operators of public communications networks shall have a right and, when requested by other undertakings so authorised in accordance with Article 4 of Directive 2002/20/EC (Authorisation Directive), an obligation to negotiate interconnection with each other for the purpose of providing publicly available electronic communications services, in order to ensure provision and interoperability of services throughout the Community. Operators shall offer access and interconnection to other undertakings on terms and conditions consistent with obligations imposed by the national regulatory authority pursuant to Articles 5 to 8.

2. Public electronic communications networks established for the distribution of digital television services shall be capable of distributing wide-screen television services and programmes. Network operators that receive and redistribute wide-screen television services or programmes shall maintain that wide-screen format.

3. Without prejudice to Article 11 of Directive 2002/20/EC (Authorisation Directive), Member States shall require that undertakings which acquire information from another undertaking before, during or after the process of negotiating access or interconnection arrangements use that information solely for the purpose for which it was supplied and respect at all times the confidentiality of information transmitted or stored. The received information shall not be passed on to any other party, in particular other departments, subsidiaries or partners, for whom such information could provide a competitive advantage.

Article 5

Powers and responsibilities of the national regulatory authorities with regard to access and interconnection

1. National regulatory authorities shall, acting in pursuit of the objectives set out in Article 8 of Directive 2002/21/EC (Framework Directive), encourage and where appropriate ensure, in accordance with the provisions of this Directive, adequate access and interconnection, and the interoperability of services, exercising their responsibility in a way that promotes efficiency, sustainable competition, efficient investment and innovation, and gives the maximum benefit to end-users.

In particular, without prejudice to measures that may be taken regarding undertakings with significant market power in accordance with Article 8, national regulatory authorities shall be able to impose:

- (a) to the extent that is necessary to ensure end-to-end connectivity, obligations on undertakings that control access to end-users, including in justified cases the obligation to interconnect their networks where this is not already the case;
- (ab) in justified cases and to the extent that is necessary, obligations on undertakings that control access to end users to make their services interoperable.
- (b) to the extent that is necessary to ensure accessibility for end-users to digital radio and

television broadcasting services specified by the Member State, obligations on operators to provide access to the other facilities referred to in Annex I, Part II on fair, reasonable and non-discriminatory terms.

2. Obligations and conditions imposed in accordance with paragraph 1 shall be objective, transparent, proportionate and non-discriminatory, and shall be implemented in accordance with the procedures referred to in Articles 6, 7 and 7a of Directive 2002/21/EC (Framework Directive).

3. *[deleted by Directive 2009/140/EC]*

3¹⁷. With regard to access and interconnection referred to in paragraph 1, Member States shall ensure that the national regulatory authority is empowered to intervene at its own initiative where justified in order to secure the policy objectives of Article 8 of Directive 2002/21/EC (Framework Directive), in accordance with the provisions of this Directive and the procedures referred to in Articles 6 and 7, 20 and 21 of Directive 2002/21/EC (Framework Directive).

CHAPTER III

OBLIGATIONS ON OPERATORS AND MARKET REVIEW PROCEDURES

Article 6

Conditional access systems and other facilities

1. Member States shall ensure that, in relation to conditional access to digital television and radio services broadcast to viewers and listeners in the Community, irrespective of the means of transmission, the conditions laid down in Annex I, Part I apply.

2. In the light of market and technological developments, the Commission may adopt implementing measures to amend Annex I. The measures, designed to amend non-essential elements of this Directive, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 14(3).

3. Notwithstanding the provisions of paragraph 1, Member States may permit their national regulatory authority, as soon as possible after the entry into force of this Directive and periodically thereafter, to review the conditions applied in accordance with this Article, by undertaking a market analysis in accordance with the first paragraph of Article 16 of Directive 2002/21/EC (Framework Directive) to determine whether to maintain, amend or withdraw the conditions applied.

Where, as a result of this market analysis, a national regulatory authority finds that one or more operators do not have significant market power on the relevant market, it may amend or withdraw the conditions with respect to those operators, in accordance with the procedures referred to in Articles 6 and 7 of Directive 2002/21/EC (Framework Directive), only to the extent that:

- (a) accessibility for end-users to radio and television broadcasts and broadcasting channels and services specified in accordance with Article 31 of Directive

2002/22/EC (Universal Service Directive) would not be adversely affected by such amendment or withdrawal, and

- (b) the prospects for effective competition in the markets for:

- (i) retail digital television and radio broadcasting services, and

- (ii) conditional access systems and other associated facilities,

would not be adversely affected by such amendment or withdrawal.

An appropriate period of notice shall be given to parties affected by such amendment or withdrawal of conditions.

4. Conditions applied in accordance with this Article are without prejudice to the ability of Member States to impose obligations in relation to the presentational aspect of electronic programme guides and similar listing and navigation facilities.

Article 7

[deleted by Directive 2009/140/EC]

Article 8

Imposition, amendment or withdrawal of obligations

1. Member States shall ensure that national regulatory authorities are empowered to impose the obligations identified in Articles 9 to 13a.

2. Where an operator is designated as having significant market power on a specific market as a result of a market analysis carried out in accordance with Article 16 of Directive 2002/21/EC (Framework Directive), national regulatory authorities shall impose the obligations set out in Articles 9 to 13 of this Directive as appropriate.

3. Without prejudice to:

- the provisions of Articles 5(1) and 6,
- the provisions of Articles 12 and 13 of Directive 2002/21/EC (Framework Directive), Condition 7 in Part B of the Annex to Directive 2002/20/EC (Authorisation Directive) as applied by virtue of Article 6(1) of that Directive, Articles 27, 28 and 30 of Directive 2002/22/EC (Universal Service Directive) and the relevant provisions of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (*) containing obligations on undertakings other than those designated as having significant market power, or
- the need to comply with international commitments,

¹⁷ The initial paragraph 4 was replaced by this paragraph, including its renumbering to 3.

(*) OJ L 201, 31.7.2002, p. 37.

national regulatory authorities shall not impose the obligations set out in Articles 9 to 13 on operators that have not been designated in accordance with paragraph 2.

In exceptional circumstances, when a national regulatory authority intends to impose on operators with significant market power obligations for access or interconnection other than those set out in Articles 9 to 13 in this Directive, it shall submit this request to the Commission. The Commission shall take utmost account of the opinion of the Body of European Regulators for Electronic Communications (BEREC) (*). The Commission, acting in accordance with Article 14(2), shall take a decision authorising or preventing the national regulatory authority from taking such measures.

4. Obligations imposed in accordance with this Article shall be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of Directive 2002/21/EC (Framework Directive). Such obligations shall only be imposed following consultation in accordance with Articles 6 and 7 of that Directive.

5. In relation to the third indent of the first subparagraph of paragraph 3, national regulatory authorities shall notify decisions to impose, amend or withdraw obligations on market players to the Commission, in accordance with the procedure referred to in Article 7 of Directive 2002/21/EC (Framework Directive).

Article 9

Obligation of transparency

1. National regulatory authorities may, in accordance with the provisions of Article 8, impose obligations for transparency in relation to interconnection and/or access, requiring operators to make public specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, including any conditions limiting access to and/or use of services and applications where such conditions are allowed by Member States in conformity with Community law, and prices.

2. In particular where an operator has obligations of non-discrimination, national regulatory authorities may require that operator to publish a reference offer, which shall be sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested, giving a description of the relevant offerings broken down into components according to market needs, and the associated terms and conditions including prices. The national regulatory authority shall, inter alia, be able to impose changes to reference offers to give effect to obligations imposed under this Directive.

3. National regulatory authorities may specify the precise information to be made available, the level of detail required and the manner of publication.

4. Notwithstanding paragraph 3, where an operator has obligations under Article 12 concerning wholesale network infrastructure access, national regulatory authorities shall

ensure the publication of a reference offer containing at least the elements set out in Annex II.

5. The Commission may adopt the necessary amendments to Annex II in order to adapt it to technological and market developments. The measures, designed to amend non-essential elements of this Directive, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 14(3). In implementing the provisions of this paragraph, the Commission may be assisted by BEREC.

Article 10

Obligation of non-discrimination

1. A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations of non-discrimination, in relation to interconnection and/or access.

2. 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 its subsidiaries or partners.

Article 11

Obligation of accounting separation

1. A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations for accounting separation in relation to specified activities related to interconnection and/or access.

In particular, a national regulatory authority may require a vertically integrated company to make transparent its wholesale prices and its internal transfer prices inter alia to ensure compliance where there is a requirement for non-discrimination under Article 10 or, where necessary, to prevent unfair cross-subsidy. National regulatory authorities may specify the format and accounting methodology to be used.

2. Without prejudice to Article 5 of Directive 2002/21/EC (Framework Directive), to facilitate the verification of compliance with obligations of transparency and non-discrimination, national regulatory authorities shall have the power to require that accounting records, including data on revenues received from third parties, are provided on request. National regulatory authorities may publish such information as would contribute to an open and competitive market, while respecting national and Community rules on commercial confidentiality.

Article 12

Obligations of access to, and use of, specific network facilities

1. A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations on operators to meet reasonable requests for access to, and use of, specific network elements and associated facilities, inter alia in situations where the national regulatory authority

(*) Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office.

considers that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest.

Operators may be required inter alia:

- (a) to give third parties access to specified network elements and/or facilities, including access to network elements which are not active and/or unbundled access to the local loop, to inter alia allow carrier selection and/or pre-selection and/or subscriber line resale offers;
- (b) to negotiate in good faith with undertakings requesting access;
- (c) not to withdraw access to facilities already granted;
- (d) to provide specified services on a wholesale basis for resale by third parties;
- (e) to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services;
- (f) to provide co-location or other forms of associated facilities sharing;
- (g) to provide specified services needed to ensure interoperability of end-to-end services to users, including facilities for intelligent network services or roaming on mobile networks;
- (h) to provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services;
- (i) to interconnect networks or network facilities.
- (j) to provide access to associated services such as identity, location and presence service.

National regulatory authorities may attach to those obligations conditions covering fairness, reasonableness and timeliness.

2. When national regulatory authorities are considering the obligations referred in paragraph 1, and in particular when assessing how such obligations would be imposed proportionate to the objectives set out in Article 8 of Directive 2002/21/EC (Framework Directive), they shall take account in particular of the following factors:

- (a) the technical and economic viability of using or installing competing facilities, in the light of the rate of market development, taking into account the nature and type of interconnection and/or access involved, including the viability of other upstream access products such as access to ducts;
- (b) the feasibility of providing the access proposed, in relation to the capacity available;
- (c) the initial investment by the facility owner, taking account of any public investment made and the risks involved in making the investment;

- (d) the need to safeguard competition in the long term, with particular attention to economically efficient infrastructure based competition;
- (e) where appropriate, any relevant intellectual property rights;
- (f) the provision of pan-European services.

3. When imposing obligations on an operator to provide access in accordance with the provisions of this Article, national regulatory authorities may lay down technical or operational conditions to be met by the provider and/or beneficiaries of such access where necessary to ensure normal operation of the network. Obligations to follow specific technical standards or specifications shall be in compliance with the standards and specifications laid down in accordance with Article 17 of Directive 2002/21/EC (Framework Directive).

Article 13

Price control and cost accounting obligations

1. A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of interconnection and/or access, in situations where a market analysis indicates that a lack of effective competition means that the operator concerned may sustain prices at an excessively high level, or may apply a price squeeze, to the detriment of end-users. To encourage investments by the operator, including in next generation networks, national regulatory authorities shall take into account the investment made by the operator, and allow him a reasonable rate of return on adequate capital employed, taking into account any risks specific to a particular new investment network project.

2. National regulatory authorities shall ensure that any cost recovery mechanism or pricing methodology that is mandated serves to promote efficiency and sustainable competition and maximise consumer benefits. In this regard national regulatory authorities may also take account of prices available in comparable competitive markets.

3. Where an operator has an obligation regarding the cost orientation of its prices, the burden of proof that charges are derived from costs including a reasonable rate of return on investment shall lie with the operator concerned. For the purpose of calculating the cost of efficient provision of services, national regulatory authorities may use cost accounting methods independent of those used by the undertaking. National regulatory authorities may require an operator to provide full justification for its prices, and may, where appropriate, require prices to be adjusted.

4. National regulatory authorities shall ensure that, where implementation of a cost accounting system is mandated in order to support price controls, a description of the cost accounting system is made publicly available, showing at least the main categories under which costs are grouped and the rules used for the allocation of costs. Compliance with the cost accounting system shall be verified by a qualified independent body. A statement concerning compliance shall be published annually.

Functional separation

1. Where the national regulatory authority concludes that the appropriate obligations imposed under Articles 9 to 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, it may, as an exceptional measure, in accordance with the provisions of the second subparagraph of Article 8(3), impose an obligation on vertically integrated undertakings to place activities related to the wholesale provision of relevant access products in an independently operating business entity.

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 for functional separation, it shall submit a proposal 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 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 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 in a sector as a whole, particularly 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 consequential effects on consumers;
- (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/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.

4. Following the Commission's decision on the draft measure taken in accordance with Article 8(3), 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 16 of Directive 2002/21/EC (Framework Directive). On the basis of its assessment, the national regulatory authority shall impose, maintain, amend or withdraw obligations, in accordance with Articles 6 and 7 of Directive 2002/21/EC (Framework Directive).

5. An undertaking on which functional separation has been imposed may be subject to any of the obligations identified in Articles 9 to 13 in any specific market where it has been designated as having significant market power in accordance with Article 16 of Directive 2002/21/EC (Framework Directive), or any other obligations authorised by the Commission pursuant to Article 8(3).

Article 13b

Voluntary separation by a vertically integrated undertaking

1. 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.

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.

2. The national regulatory authority shall assess the effect of the intended transaction on existing regulatory obligations under Directive 2002/21/EC (Framework Directive).

For that purpose, 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 16 of Directive 2002/21/EC (Framework Directive).

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

3. The legally and/or operationally separate business entity may be subject to any of the obligations identified in Articles 9 to 13 in any specific market where it has been designated as having significant market power in accordance with Article 16 of Directive 2002/21/EC (Framework Directive), or any other obligations authorised by the Commission pursuant to Article 8(3).

PROCEDURAL PROVISIONS**Review procedures***Article 14***Committee**

1. The Commission shall be assisted by the Communications Committee set up by Article 22 of Directive 2002/21/EC (Framework Directive).

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

3. Where reference is made to this paragraph, Article 5a(1) to (4) and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

4. *[deleted by Directive 2009/140/EC]*

*Article 18***Transposition**

1. Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive by not later than 24 July 2003. They shall forthwith inform the Commission thereof.

They shall apply those measures from 25 July 2003.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field governed by this Directive and of any subsequent amendments to those provisions.

*Article 15***Publication of, and access to, information**

1. Member States shall ensure that the specific obligations imposed on undertakings under this Directive are published and that the specific product/service and geographical markets are identified. They shall ensure that up-to-date information, provided that the information is not confidential and, in particular, does not comprise business secrets, is made publicly available in a manner that guarantees all interested parties easy access to that information.

2. Member States shall send to the Commission a copy of all such information published. The Commission shall make this information available in a readily accessible form, and shall distribute the information to the Communications Committee as appropriate.

*Article 19***Entry into force**

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

*Article 16***Notification**

1. Member States shall notify to the Commission by at the latest the date of application referred to in Article 18(1) second subparagraph the national regulatory authorities responsible for the tasks set out in this Directive.

2. National regulatory authorities shall notify to the Commission the names of operators deemed to have significant market power for the purposes of this Directive, and the obligations imposed upon them under this Directive. Any changes affecting the obligations imposed upon undertakings or of the undertakings affected under the provisions of this Directive shall be notified to the Commission without delay.

*Article 20***Addressees**

This Directive is addressed to the Member States.

Done at Brussels, 7 March 2002.

For the European Parliament

For the Council

The President

The President

P. Cox

J. C. Aparicio

ANNEX I

CONDITIONS FOR ACCESS TO DIGITAL TELEVISION AND RADIO SERVICES BROADCAST TO VIEWERS AND LISTENERS IN THE COMMUNITY

Part I: Conditions for conditional access systems to be applied in accordance with Article 6(1)

In relation to conditional access to digital television and radio services broadcast to viewers and listeners in the Community, irrespective of the means of transmission, Member States must ensure in accordance with Article 6 that the following conditions apply:

- (a) conditional access systems operated on the market in the Community are to have the necessary technical capability for cost-effective transcontrol allowing the possibility for full control by network operators at local or regional level of the services using such conditional access systems;
- (b) all operators of conditional access services, irrespective of the means of transmission, who provide access services to digital television and radio services and whose access services broadcasters depend on to reach any group of potential viewers or listeners are to:
 - offer to all broadcasters, on a fair, reasonable and non-discriminatory basis compatible with Community competition law, technical services enabling the broadcasters' digitally-transmitted services to be received by viewers or listeners authorised by means of decoders administered by the service operators, and comply with Community competition law,
 - keep separate financial accounts regarding their activity as conditional access providers.
- (c) when granting licences to manufacturers of consumer equipment, holders of industrial property rights to conditional access products and systems are to ensure that this is done on fair, reasonable and non-discriminatory terms. Taking into account technical and commercial factors, holders of rights are not to subject the granting of licences to conditions prohibiting, deterring or discouraging the inclusion in the same product of:
 - a common interface allowing connection with several other access systems, or
 - means specific to another access system, provided that the licensee complies with the relevant and reasonable conditions ensuring, as far as he is concerned, the security of transactions of conditional access system operators.

Part II: Other facilities to which conditions may be applied under Article 5(1)(b)

- (a) Access to application program interfaces (APIs);
- (b) Access to electronic programme guides (EPGs).

MINIMUM LIST OF ITEMS TO BE INCLUDED IN A REFERENCE OFFER FOR WHOLESALE NETWORK INFRASTRUCTURE ACCESS, INCLUDING SHARED OR FULLY UNBUNDLED ACCESS TO THE LOCAL LOOP AT A FIXED LOCATION TO BE PUBLISHED BY NOTIFIED OPERATORS WITH SIGNIFICANT MARKET POWER (SMP);

For the purposes of this Annex the following definitions apply:

- (a) 'local sub-loop' means a partial local loop connecting the network termination point to a concentration point or a specified intermediate access point in the fixed public electronic communications network;
- (b) 'unbundled access to the local loop' means full unbundled access to the local loop and shared access to the local loop; it does not entail a change in ownership of the local loop;
- (c) 'full unbundled access to the local loop' means the provision to a beneficiary of access to the local loop or local sub-loop of the SMP operator allowing the use of the full capacity of the network infrastructure;
- (d) 'shared access to the local loop' means the provision to a beneficiary of access to the local loop or local sub-loop of the SMP operator, allowing the use of a specified part of the capacity of the network infrastructure such as a part of the frequency or an equivalent;

A. Conditions for unbundled access to the local loop

- 1. Network elements to which access is offered covering in particular the following elements together with appropriate associated facilities:
 - (a) unbundled access to local loops (full and shared);
 - (b) unbundled access to local sub-loops (full and shared), including, when relevant, access to network elements which are not active for the purpose of roll-out of backhaul networks;
 - (c) where relevant, duct access enabling the roll out of access networks.
- 2. Information concerning the locations of physical access sites including cabinets and distribution frames, availability of local loops, sub-loops and backhaul in specific parts of the access network and when relevant, information concerning the locations of ducts and the availability within ducts;
- 3. Technical conditions related to access and use of local loops and sub-loops, including the technical characteristics of the twisted pair and/or optical fibre and/or equivalent, cable distributors, and associated facilities and, when relevant, technical conditions related to access to ducts;
- 4. Ordering and provisioning procedures, usage restrictions.

B. Co-location services

- 1. Information on the SMP operator's existing relevant sites or equipment locations and planned update thereof (*).
- 2. Co-location options at the sites indicated under point 1 (including physical co-location and, as appropriate, distant co-location and virtual co-location).
- 3. Equipment characteristics: restrictions, if any, on equipment that can be co-located.
- 4. Security issues: measures put in place by notified operators to ensure the security of their locations.
- 5. Access conditions for staff of competitive operators.
- 6. Safety standards.
- 7. Rules for the allocation of space where co-location space is limited.
- 8. Conditions for beneficiaries to inspect the locations at which physical co-location is available, or sites where co-location has been refused on grounds of lack of capacity.

C. Information systems

Conditions for access to notified operator's operational support systems, information systems or databases for pre-ordering, provisioning, ordering, maintenance and repair requests and billing.

* Availability of this information may be restricted to interested parties only, in order to avoid public security concerns.

D. Supply conditions

1. Lead time for responding to requests for supply of services and facilities; service level agreements, fault resolution, procedures to return to a normal level of service and quality of service parameters.
2. Standard contract terms, including, where appropriate, compensation provided for failure to meet lead times.
3. Prices or pricing formulae for each feature, function and facility listed above.

DIRECTIVE 2002/22/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 7 March 2002

**on universal service and users' rights relating to electronic communications networks and services
(Universal Service Directive) (*)**

as amended by Directive 2009/136/EC ()
(unofficially consolidated version)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the Economic and Social Committee ⁽²⁾,

Having regard to the opinion of the Committee of the Regions ⁽³⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽⁴⁾,

Whereas:

- (1) The liberalisation of the telecommunications sector and increasing competition and choice for communications services go hand in hand with parallel action to create a harmonised regulatory framework which secures the delivery of universal service. The concept of universal service should evolve to reflect advances in technology, market developments and changes in user demand. The regulatory framework established for the full liberalisation of the telecommunications market in 1998 in the Community defined the minimum scope of universal service obligations and established rules for its costing and financing.
- (2) Under Article 153 of the Treaty, the Community is to contribute to the protection of consumers.
- (3) The Community and its Member States have undertaken commitments on the regulatory framework of telecommunications networks and services in the context of the World Trade Organisation (WTO) agreement on basic telecommunications. Any member of the WTO has the right to define the kind of universal service obligation it wishes to maintain. Such obligations will not be regarded as anti-competitive per se, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than

necessary for the kind of universal service defined by the member.

- (4) Ensuring universal service (that is to say, the provision of a defined minimum set of services to all end-users at an affordable price) may involve the provision of some services to some end-users at prices that depart from those resulting from normal market conditions. However, compensating undertakings designated to provide such services in such circumstances need not result in any distortion of competition, provided that designated undertakings are compensated for the specific net cost involved and provided that the net cost burden is recovered in a competitively neutral way.
- (5) In a competitive market, certain obligations should apply to all undertakings providing publicly available telephone services at fixed locations and others should apply only to undertakings enjoying significant market power or which have been designated as a universal service operator.
- (6) The network termination point represents a boundary for regulatory purposes between the regulatory framework for electronic communication networks and services and the regulation of telecommunication terminal equipment. Defining the location of the network termination point is the responsibility of the national regulatory authority, where necessary on the basis of a proposal by the relevant undertakings.
- (7) Member States should continue to ensure that the services set out in Chapter II are made available with the quality specified to all end-users in their territory, irrespective of their geographical location, and, in the light of specific national conditions, at an affordable price. Member States may, in the context of universal service obligations and in the light of national conditions, take specific measures for consumers in rural or geographically isolated areas to ensure their access to the services set out in the Chapter II and the affordability of those services, as well as ensure under the same conditions this access, in particular for the elderly, the disabled and for people with special social needs. Such measures may also include measures directly targeted at consumers with special social needs providing support to identified consumers, for example by means of specific measures, taken after the examination of individual requests, such as the paying off of debts.
- (8) A fundamental requirement of universal service is to provide users on request with a connection to the public telephone network at a fixed location, at an affordable price. The requirement is limited to a single narrowband network connection, the

(*) OJ L 108, 24.04.2002, p. 51.

(**) OJ L 337, 18.12.2009, p. 11.

⁽¹⁾ OJ C 365 E, 19.12.2000, p. 238 and OJ C 332 E, 27.11.2001, p. 292.

⁽²⁾ OJ C139, 11.5.2001, p. 15.

⁽³⁾ OJ C 144, 16.5.2001, p. 60.

⁽⁴⁾ Opinion of the European Parliament of 13 June 2001 (not yet published in the Official Journal), Council Common Position of 17 September 2001 (OJ C 337, 30.11.2001, p. 55) and Decision of the European Parliament of 12 December 2001 (not yet published in the Official Journal). Council Decision of 14 February 2002.

provision of which may be restricted by Member States to the end-user's primary location/residence, and does not extend to the Integrated Services Digital Network (ISDN) which provides two or more connections capable of being used simultaneously. There should be no constraints on the technical means by which the connection is provided, allowing for wired or wireless technologies, nor any constraints on which operators provide part or all of universal service obligations. Connections to the public telephone network at a fixed location should be capable of supporting speech and data communications at rates sufficient for access to online services such as those provided via the public Internet. The speed of Internet access experienced by a given user may depend on a number of factors including the provider(s) of Internet connectivity as well as the given application for which a connection is being used. The data rate that can be supported by a single narrowband connection to the public telephone network depends on the capabilities of the subscriber's terminal equipment as well as the connection. For this reason it is not appropriate to mandate a specific data or bit rate at Community level. Currently available voice band modems typically offer a data rate of 56 kbit/s and employ automatic data rate adaptation to cater for variable line quality, with the result that the achieved data rate may be lower than 56 kbit/s. Flexibility is required on the one hand to allow Member States to take measures where necessary to ensure that connections are capable of supporting such a data rate, and on the other hand to allow Member States where relevant to permit data rates below this upper limit of 56 kbit/s in order, for example, to exploit the capabilities of wireless technologies (including cellular wireless networks) to deliver universal service to a higher proportion of the population. This may be of particular importance in some accession countries where household penetration of traditional telephone connections remains relatively low. In specific cases where the connection to the public telephony network at a fixed location is clearly insufficient to support satisfactory Internet access, Member States should be able to require the connection to be brought up to the level enjoyed by the majority of subscribers so that it supports data rates sufficient for access to the Internet. Where such specific measures produce a net cost burden for those consumers concerned, the net effect may be included in any net cost calculation of universal service obligations.

- (9) The provisions of this Directive do not preclude Member States from designating different undertakings to provide the network and service elements of universal service. Designated undertakings providing network elements may be required to ensure such construction and maintenance as are necessary and proportionate to meet all reasonable requests for connection at a fixed location to the public telephone network and for access to publicly available telephone services at a fixed location.
- (10) Affordable price means a price defined by Member States at national level in the light of specific national conditions, and may involve setting

common tariffs irrespective of location or special tariff options to deal with the needs of low-income users. Affordability for individual consumers is related to their ability to monitor and control their expenditure.

- (11) Directory information and a directory enquiry service constitute an essential access tool for publicly available telephone services and form part of the universal service obligation. Users and consumers desire comprehensive directories and a directory enquiry service covering all listed telephone subscribers and their numbers (including fixed and mobile numbers) and want this information to be presented in a non-preferential fashion. Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector ⁽⁵⁾ ensures the subscribers' right to privacy with regard to the inclusion of their personal information in a public directory.
- (12) For the citizen, it is important for there to be adequate provision of public pay telephones, and for users to be able to call emergency telephone numbers and, in particular, the single European emergency call number (112) free of charge from any telephone, including public pay telephones, without the use of any means of payment. Insufficient information about the existence of "112" deprives citizens of the additional safety ensured by the existence of this number at European level especially during their travel in other Member States.
- (13) Member States should take suitable measures in order to guarantee access to and affordability of all publicly available telephone services at a fixed location for disabled users and users with special social needs. Specific measures for disabled users could include, as appropriate, making available accessible public telephones, public text telephones or equivalent measures for deaf or speech-impaired people, providing services such as directory enquiry services or equivalent measures free of charge for blind or partially sighted people, and providing itemised bills in alternative format on request for blind or partially sighted people. Specific measures may also need to be taken to enable disabled users and users with special social needs to access emergency services "112" and to give them a similar possibility to choose between different operators or service providers as other consumers. Quality of service standards have been developed for a range of parameters to assess the quality of services received by subscribers and how well undertakings designated with universal service obligations perform in achieving these standards. Quality of service standards do not yet exist in respect of disabled users. Performance standards and relevant parameters should be developed for disabled users and are provided for in Article 11 of this Directive. Moreover, national regulatory authorities should be enabled to require publication of quality of service performance data if and when such standards and parameters are developed. The provider of universal service

⁽⁵⁾ OJ L 24, 30.1.1998, p. 1

should not take measures to prevent users from benefiting fully from services offered by different operators or service providers, in combination with its own services offered as part of universal service.

- (14) The importance of access to and use of the public telephone network at a fixed location is such that it should be available to anyone reasonably requesting it. In accordance with the principle of subsidiarity, it is for Member States to decide on the basis of objective criteria which undertakings have universal service obligations for the purposes of this Directive, where appropriate taking into account the ability and the willingness of undertakings to accept all or part of the universal service obligations. It is important that universal service obligations are fulfilled in the most efficient fashion so that users generally pay prices that correspond to efficient cost provision. It is likewise important that universal service operators maintain the integrity of the network as well as service continuity and quality. The development of greater competition and choice provide more possibilities for all or part of the universal service obligations to be provided by undertakings other than those with significant market power. Therefore, universal service obligations could in some cases be allocated to operators demonstrating the most cost-effective means of delivering access and services, including by competitive or comparative selection procedures. Corresponding obligations could be included as conditions in authorisations to provide publicly available services.
- (15) Member States should monitor the situation of consumers with respect to their use of publicly available telephone services and in particular with respect to affordability. The affordability of telephone service is related to the information which users receive regarding telephone usage expenses as well as the relative cost of telephone usage compared to other services, and is also related to their ability to control expenditure. Affordability therefore means giving power to consumers through obligations imposed on undertakings designated as having universal service obligations. These obligations include a specified level of itemised billing, the possibility for consumers selectively to block certain calls (such as high-priced calls to premium services), the possibility for consumers to control expenditure via pre-payment means and the possibility for consumers to offset up-front connection fees. Such measures may need to be reviewed and changed in the light of market developments. Current conditions do not warrant a requirement for operators with universal service obligations to alert subscribers where a predetermined limit of expenditure is exceeded or an abnormal calling pattern occurs. Review of the relevant legislative provisions in future should consider whether there is a possible need to alert subscribers for these reasons.
- (16) Except in cases of persistent late payment or non-payment of bills, consumers should be protected from immediate disconnection from the network on the grounds of an unpaid bill and, particularly in the case of disputes over high bills for premium rate services, should continue to have access to essential telephone services pending resolution of

the dispute. Member States may decide that such access may continue to be provided only if the subscriber continues to pay line rental charges.

- (17) Quality and price are key factors in a competitive market and national regulatory authorities should be able to monitor achieved quality of service for undertakings which have been designated as having universal service obligations. In relation to the quality of service attained by such undertakings, national regulatory authorities should be able to take appropriate measures where they deem it necessary. National regulatory authorities should also be able to monitor the achieved quality of services of other undertakings providing public telephone networks and/or publicly available telephone services to users at fixed locations.
- (18) Member States should, where necessary, establish mechanisms for financing the net cost of universal service obligations in cases where it is demonstrated that the obligations can only be provided at a loss or at a net cost which falls outside normal commercial standards. It is important to ensure that the net cost of universal service obligations is properly calculated and that any financing is undertaken with minimum distortion to the market and to undertakings, and is compatible with the provisions of Articles 87 and 88 of the Treaty.
- (19) Any calculation of the net cost of universal service should take due account of costs and revenues, as well as the intangible benefits resulting from providing universal service, but should not hinder the general aim of ensuring that pricing structures reflect costs. Any net costs of universal service obligations should be calculated on the basis of transparent procedures.
- (20) Taking into account intangible benefits means that an estimate in monetary terms, of the indirect benefits that an undertaking derives by virtue of its position as provider of universal service, should be deducted from the direct net cost of universal service obligations in order to determine the overall cost burden.
- (21) When a universal service obligation represents an unfair burden on an undertaking, it is appropriate to allow Member States to establish mechanisms for efficiently recovering net costs. Recovery via public funds constitutes one method of recovering the net costs of universal service obligations. It is also reasonable for established net costs to be recovered from all users in a transparent fashion by means of levies on undertakings. Member States should be able to finance the net costs of different elements of universal service through different mechanisms, and/or to finance the net costs of some or all elements from either of the mechanisms or a combination of both. In the case of cost recovery by means of levies on undertakings, Member States should ensure that the method of allocation amongst them is based on objective and non-discriminatory criteria and is in accordance with the principle of proportionality. This principle does not prevent Member States from exempting new entrants which have not yet achieved any significant market presence. Any funding mechanism should

- ensure that market participants only contribute to the financing of universal service obligations and not to other activities which are not directly linked to the provision of the universal service obligations. Recovery mechanisms should in all cases respect the principles of Community law, and in particular in the case of sharing mechanisms those of non-discrimination and proportionality. Any funding mechanism should ensure that users in one Member State do not contribute to universal service costs in another Member State, for example when making calls from one Member State to another.
- (22) Where Member States decide to finance the net cost of universal service obligations from public funds, this should be understood to comprise funding from general government budgets including other public financing sources such as state lotteries.
- (23) The net cost of universal service obligations may be shared between all or certain specified classes of undertaking. Member States should ensure that the sharing mechanism respects the principles of transparency, least market distortion, non-discrimination and proportionality. Least market distortion means that contributions should be recovered in a way that as far as possible minimises the impact of the financial burden falling on end-users, for example by spreading contributions as widely as possible.
- (24) National regulatory authorities should satisfy themselves that those undertakings benefiting from universal service funding provide a sufficient level of detail of the specific elements requiring such funding in order to justify their request. Member States' schemes for the costing and financing of universal service obligations should be communicated to the Commission for verification of compatibility with the Treaty. There are incentives for designated operators to raise the assessed net cost of universal service obligations. Therefore Member States should ensure effective transparency and control of amounts charged to finance universal service obligations.
- (25) Communications markets continue to evolve in terms of the services used and the technical means used to deliver them to users. The universal service obligations, which are defined at a Community level, should be periodically reviewed with a view to proposing that the scope be changed or redefined. Such a review should take account of evolving social, commercial and technological conditions and the fact that any change of scope should be subject to the twin test of services that become available to a substantial majority of the population, with a consequent risk of social exclusion for those who can not afford them. Care should be taken in any change of the scope of universal service obligations to ensure that certain technological choices are not artificially promoted above others, that a disproportionate financial burden is not imposed on sector undertakings (thereby endangering market developments and innovation) and that any financing burden does not fall unfairly on consumers with lower incomes. Any change of scope automatically means that any net cost can be financed via the methods permitted in this Directive. Member States are not permitted to impose on market players financial contributions which relate to measures which are not part of universal service obligations. Individual Member States remain free to impose special measures (outside the scope of universal service obligations) and finance them in conformity with Community law but not by means of contributions from market players.
- (26) More effective competition across all access and service markets will give greater choice for users. The extent of effective competition and choice varies across the Community and varies within Member States between geographical areas and between access and service markets. Some users may be entirely dependent on the provision of access and services by an undertaking with significant market power. In general, for reasons of efficiency and to encourage effective competition, it is important that the services provided by an undertaking with significant market power reflect costs. For reasons of efficiency and social reasons, end-user tariffs should reflect demand conditions as well as cost conditions, provided that this does not result in distortions of competition. There is a risk that an undertaking with significant market power may act in various ways to inhibit entry or distort competition, for example by charging excessive prices, setting predatory prices, compulsory bundling of retail services or showing undue preference to certain customers. Therefore, national regulatory authorities should have powers to impose, as a last resort and after due consideration, retail regulation on an undertaking with significant market power. Price cap regulation, geographical averaging or similar instruments, as well as non-regulatory measures such as publicly available comparisons of retail tariffs, may be used to achieve the twin objectives of promoting effective competition whilst pursuing public interest needs, such as maintaining the affordability of publicly available telephone services for some consumers. Access to appropriate cost accounting information is necessary, in order for national regulatory authorities to fulfil their regulatory duties in this area, including the imposition of any tariff controls. However, regulatory controls on retail services should only be imposed where national regulatory authorities consider that relevant wholesale measures or measures regarding carrier selection or pre-selection would fail to achieve the objective of ensuring effective competition and public interest.
- (27) Where a national regulatory authority imposes obligations to implement a cost accounting system in order to support price controls, it may itself undertake an annual audit to ensure compliance with that cost accounting system, provided that it has the necessary qualified staff, or it may require the audit to be carried out by another qualified body, independent of the operator concerned.
- (28) It is considered necessary to ensure the continued application of the existing provisions relating to the minimum set of leased line services in Community telecommunications legislation, in particular in Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision

to leased lines ⁽⁶⁾, until such time as national regulatory authorities determine, in accordance with the market analysis procedures laid down in Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) ⁽⁷⁾, that such provisions are no longer needed because a sufficiently competitive market has developed in their territory. The degree of competition is likely to vary between different markets of leased lines in the minimum set, and in different parts of the territory. In undertaking the market analysis, national regulatory authorities should make separate assessments for each market of leased lines in the minimum set, taking into account their geographic dimension. Leased lines services constitute mandatory services to be provided without recourse to any compensation mechanisms. The provision of leased lines outside of the minimum set of leased lines should be covered by general retail regulatory provisions rather than specific requirements covering the supply of the minimum set.

- (29) National regulatory authorities may also, in the light of an analysis of the relevant market, require mobile operators with significant market power to enable their subscribers to access the services of any interconnected provider of publicly available telephone services on a call-by-call basis or by means of pre-selection.
- (30) Contracts are an important tool for users and consumers to ensure a minimum level of transparency of information and legal security. Most service providers in a competitive environment will conclude contracts with their customers for reasons of commercial desirability. In addition to the provisions of this Directive, the requirements of existing Community consumer protection legislation relating to contracts, in particular Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts ⁽⁸⁾ and Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts ⁽⁹⁾, apply to consumer transactions relating to electronic networks and services. Specifically, consumers should enjoy a minimum level of legal certainty in respect of their contractual relations with their direct telephone service provider, such that the contractual terms, conditions, quality of service, condition for termination of the contract and the service, compensation measures and dispute resolution are specified in their contracts. Where service providers other than direct telephone service providers conclude contracts with consumers, the same information should be included in those contracts as well. The measures to ensure transparency on prices, tariffs, terms and conditions will increase the ability of consumers to optimise their choices and thus to benefit fully

from competition.

- (31) End-users should have access to publicly available information on communications services. Member States should be able to monitor the quality of services which are offered in their territories. National regulatory authorities should be able systematically to collect information on the quality of services offered in their territories on the basis of criteria which allow comparability between service providers and between Member States. Undertakings providing communications services, operating in a competitive environment, are likely to make adequate and up-to-date information on their services publicly available for reasons of commercial advantage. National regulatory authorities should nonetheless be able to require publication of such information where it is demonstrated that such information is not effectively available to the public.
- (32) End-users should be able to enjoy a guarantee of interoperability in respect of all equipment sold in the Community for the reception of digital television. Member States should be able to require minimum harmonised standards in respect of such equipment. Such standards could be adapted from time to time in the light of technological and market developments.
- (33) It is desirable to enable consumers to achieve the fullest connectivity possible to digital television sets. Interoperability is an evolving concept in dynamic markets. Standards bodies should do their utmost to ensure that appropriate standards evolve along with the technologies concerned. It is likewise important to ensure that connectors are available on television sets that are capable of passing all the necessary elements of a digital signal, including the audio and video streams, conditional access information, service information, application program interface (API) information and copy protection information. This Directive therefore ensures that the functionality of the open interface for digital television sets is not limited by network operators, service providers or equipment manufacturers and continues to evolve in line with technological developments. For display and presentation of digital interactive television services, the realisation of a common standard through a market-driven mechanism is recognised as a consumer benefit. Member States and the Commission may take policy initiatives, consistent with the Treaty, to encourage this development.
- (34) All end-users should continue to enjoy access to operator assistance services whatever organisation provides access to the public telephone network.
- (35) The provision of directory enquiry services and directories is already open to competition. The provisions of this Directive complement the provisions of Directive 97/66/EC by giving subscribers a right to have their personal data included in a printed or electronic directory. All service providers which assign telephone numbers to their subscribers are obliged to make relevant information available in a fair, cost-oriented and non-discriminatory manner.
- (36) It is important that users should be able to call the

⁽⁶⁾ OJ L 165, 19.6.1992, p. 27. Directive as last amended by Commission Decision No 98/80/EC (OJ L 14, 20.1.1998, p. 27).

⁽⁷⁾ See page 33 of this Official Journal. [L 108, 24.4.2002]

⁽⁸⁾ OJ L 95, 21.4.1993, p. 29.

⁽⁹⁾ OJ L 144, 4.6.1997, p. 19.

single European emergency number "112", and any other national emergency telephone numbers, free of charge, from any telephone, including public pay telephones, without the use of any means of payment. Member States should have already made the necessary organisational arrangements best suited to the national organisation of the emergency systems, in order to ensure that calls to this number are adequately answered and handled. Caller location information, to be made available to the emergency services, will improve the level of protection and the security of users of "112" services and assist the emergency services, to the extent technically feasible, in the discharge of their duties, provided that the transfer of calls and associated data to the emergency services concerned is guaranteed. The reception and use of such information should comply with relevant Community law on the processing of personal data. Steady information technology improvements will progressively support the simultaneous handling of several languages over the networks at a reasonable cost. This in turn will ensure additional safety for European citizens using the "112" emergency call number.

- (37) Easy access to international telephone services is vital for European citizens and European businesses. "00" has already been established as the standard international telephone access code for the Community. Special arrangements for making calls between adjacent locations across borders between Member States may be established or continued. The ITU has assigned, in accordance with ITU Recommendation E.164, code "3883" to the European Telephony Numbering Space (ETNS). In order to ensure connection of calls to the ETNS, undertakings operating public telephone networks should ensure that calls using "3883" are directly or indirectly interconnected to ETNS serving networks specified in the relevant European Telecommunications Standards Institute (ETSI) standards. Such interconnection arrangements should be governed by the provisions of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) ⁽¹⁰⁾.
- (38) Access by end-users to all numbering resources in the Community is a vital pre-condition for a single market. It should include freephone, premium rate, and other non-geographic numbers, except where the called subscriber has chosen, for commercial reasons, to limit access from certain geographical areas. Tariffs charged to parties calling from outside the Member State concerned need not be the same as for those parties calling from inside that Member State.
- (39) Tone dialling and calling line identification facilities are normally available on modern telephone exchanges and can therefore increasingly be provided at little or no expense. Tone dialling is increasingly being used for user interaction with special services and facilities, including value added services, and the absence of this facility can prevent the user from making use of these

services. Member States are not required to impose obligations to provide these facilities when they are already available. Directive 97/66/EC safeguards the privacy of users with regard to itemised billing, by giving them the means to protect their right to privacy when calling line identification is implemented. The development of these services on a pan-European basis would benefit consumers and is encouraged by this Directive.

- (40) Number portability is a key facilitator of consumer choice and effective competition in a competitive telecommunications environment such that end-users who so request should be able to retain their number(s) on the public telephone network independently of the organisation providing service. The provision of this facility between connections to the public telephone network at fixed and non-fixed locations is not covered by this Directive. However, Member States may apply provisions for porting numbers between networks providing services at a fixed location and mobile networks.
- (41) The impact of number portability is considerably strengthened when there is transparent tariff information, both for end-users who port their numbers and also for end-users who call those who have ported their numbers. National regulatory authorities should, where feasible, facilitate appropriate tariff transparency as part of the implementation of number portability.
- (42) When ensuring that pricing for interconnection related to the provision of number portability is cost-oriented, national regulatory authorities may also take account of prices available in comparable markets.
- (43) Currently, Member States impose certain 'must carry' obligations on networks for the distribution of radio or television broadcasts to the public. Member States should be able to lay down proportionate obligations on undertakings under their jurisdiction, in the interest of legitimate public policy considerations, but such obligations should only be imposed where they are necessary to meet general interest objectives clearly defined by Member States in conformity with Community law and should be proportionate, transparent and subject to periodical review. 'Must carry' obligations imposed by Member States should be reasonable, that is they should be proportionate and transparent in the light of clearly defined general interest objectives, and could, where appropriate, entail a provision for proportionate remuneration. Such 'must carry' obligations may include the transmission of services specifically designed to enable appropriate access by disabled users.
- (44) Networks used for the distribution of radio or television broadcasts to the public include cable, satellite and terrestrial broadcasting networks. They might also include other networks to the extent that a significant number of end-users use such networks as their principal means to receive radio and television broadcasts.
- (45) Services providing content such as the offer for sale of a package of sound or television broadcasting content are not covered by the

⁽¹⁰⁾ See page 7 of this Official Journal. [L 108, 24.4.2002]

common regulatory framework for electronic communications networks and services. Providers of such services should not be subject to universal service obligations in respect of these activities. This Directive is without prejudice to measures taken at national level, in compliance with Community law, in respect of such services.

- (46) Where a Member State seeks to ensure the provision of other specific services throughout its national territory, such obligations should be implemented on a cost efficient basis and outside the scope of universal service obligations. Accordingly, Member States may undertake additional measures (such as facilitating the development of infrastructure or services in circumstances where the market does not satisfactorily address the requirements of end-users or consumers), in conformity with Community law. As a reaction to the Commission's e-Europe initiative, the Lisbon European Council of 23 and 24 March 2000 called on Member States to ensure that all schools have access to the Internet and to multimedia resources.
- (47) In the context of a competitive environment, the views of interested parties, including users and consumers, should be taken into account by national regulatory authorities when dealing with issues related to end-users' rights. Effective procedures should be available to deal with disputes between consumers, on the one hand, and undertakings providing publicly available communications services, on the other. Member States should take full account of Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes⁽¹¹⁾.
- (48) Co-regulation could be an appropriate way of stimulating enhanced quality standards and improved service performance. Co-regulation should be guided by the same principles as formal regulation, i.e. it should be objective, justified, proportional, non-discriminatory and transparent.
- (49) This Directive should provide for elements of consumer protection, including clear contract terms and dispute resolution, and tariff transparency for consumers. It should also encourage the extension of such benefits to other categories of end-users, in particular small and medium-sized enterprises.
- (50) The provisions of this Directive do not prevent a Member State from taking measures justified on grounds set out in Articles 30 and 46 of the Treaty, and in particular on grounds of public security, public policy and public morality.
- (51) Since the objectives of the proposed action, namely setting a common level of universal service for telecommunications for all European users and of harmonising conditions for access to and use of public telephone networks at a fixed location and related publicly available telephone services and also achieving a harmonised framework for the regulation of electronic communications services, electronic communications networks and

associated facilities, cannot be sufficiently achieved by the Member States and can therefore by reason of the scale or effects of the action be better achieved at Community level, the Community may adopt measures in accordance with the principles of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

- (52) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission⁽¹²⁾,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

SCOPE, AIMS AND DEFINITIONS

Article 1

Subject-matter and scope

1. Within the framework of Directive 2002/21/EC (Framework Directive), this Directive concerns the provision of electronic communications networks and services to end-users. The aim is to ensure the availability throughout the Community of good-quality publicly available services through effective competition and choice and to deal with circumstances in which the needs of end-users are not satisfactorily met by the market. The Directive also includes provisions concerning certain aspects of terminal equipment, including provisions intended to facilitate access for disabled end-users.
2. This Directive establishes the rights of end-users and the corresponding obligations of undertakings providing publicly available electronic communications networks and services. With regard to ensuring provision of universal service within an environment of open and competitive markets, this Directive defines the minimum set of services of specified quality to which all end-users have access, at an affordable price in the light of specific national conditions, without distorting competition. This Directive also sets out obligations with regard to the provision of certain mandatory services.
3. This Directive neither mandates nor prohibits conditions, imposed by providers of publicly available electronic communications and services, limiting end-users' access to, and/or use of, services and applications, where allowed under national law and in conformity with Community law, but lays down an obligation to provide information regarding such conditions. National measures regarding end-users' access to, or use of, services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, including in relation to privacy and due process, as defined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.
4. The provisions of this Directive concerning end users' rights shall apply without prejudice to Community rules on

⁽¹¹⁾ OJ L 115, 17.4.1998, p. 31.

⁽¹²⁾ OJ L 184, 17.7.1999, p. 23.

consumer protection, in particular Directives 93/13/EEC and 97/7/EC, and national rules in conformity with Community law.

Article 2

Definitions

For the purposes of this Directive, the definitions set out in Article 2 of Directive 2002/21/EC (Framework Directive) shall apply.

The following definitions shall also apply:

- (a) 'public pay telephone' means a telephone available to the general public, for the use of which the means of payment may include coins and/or credit/debit cards and/or pre-payment cards, including cards for use with dialling codes;
- (b) *[deleted by Directive 2009/136/EC]*
- (c) 'publicly available telephone service' means a service made available to the public for originating and receiving, directly or indirectly, national or national and international calls through a number or numbers in a national or international telephone numbering plan;
- (d) 'geographic number' means a number from the national telephone numbering plan where part of its digit structure contains geographic significance used for routing calls to the physical location of the network termination point (NTP);
- (e) *[deleted by Directive 2009/136/EC]*
- (f) 'non-geographic number' means a number from the national telephone numbering plan that is not a geographic number. It includes, inter alia, mobile, freephone and premium rate numbers.

CHAPTER II

UNIVERSAL SERVICE OBLIGATIONS INCLUDING SOCIAL OBLIGATIONS

Article 3

Availability of universal service

1. Member States shall ensure that the services set out in this Chapter are made available at the quality specified to all end-users in their territory, independently of geographical location, and, in the light of specific national conditions, at an affordable price.
2. Member States shall determine the most efficient and appropriate approach for ensuring the implementation of universal service, whilst respecting the principles of objectivity, transparency, non-discrimination and proportionality. They shall seek to minimise market distortions, in particular the provision of services at prices or subject to other terms and conditions which depart from normal commercial conditions, whilst safeguarding the public interest.

Article 4

Provision of access at a fixed location and provision of telephone services

1. Member States shall ensure that all reasonable requests for connection at a fixed location to a public communications network are met by at least one undertaking.
2. The connection provided shall be capable of supporting voice, facsimile and data communications at data rates that are sufficient to permit functional Internet access, taking into account prevailing technologies used by the majority of subscribers and technological feasibility.
3. Member States shall ensure that all reasonable requests for the provision of a publicly available telephone service over the network connection referred to in paragraph 1 that allows for originating and receiving national and international calls are met by at least one undertaking.

Article 5

Directory enquiry services and directories

1. Member States shall ensure that:
 - (a) at least one comprehensive directory is available to end-users in a form approved by the relevant authority, whether printed or electronic, or both, and is updated on a regular basis, and at least once a year;
 - (b) at least one comprehensive telephone directory enquiry service is available to all end-users, including users of public pay telephones.
2. The directories referred to in paragraph 1 shall comprise, subject to the provisions of Article 12 of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (*), all subscribers of publicly available telephone services.
3. Member States shall ensure that the undertaking(s) providing the services referred to in paragraph 1 apply the principle of non-discrimination to the treatment of information that has been provided to them by other undertakings.

Article 6

Public pay telephones and other public voice telephony access points

1. Member States shall ensure that national regulatory authorities may impose obligations on undertakings in order to ensure that public pay telephones or other public voice telephony access points are provided to meet the reasonable needs of end-users in terms of the geographical coverage, the number of telephones or other access points, accessibility to disabled end-users and the quality of services.

(*) OJ L 201, 31.7.2002, p. 37.

2. A Member State shall ensure that its national regulatory authority can decide not to impose obligations under paragraph 1 in all or part of its territory, if it is satisfied that these facilities or comparable services are widely available, on the basis of a consultation of interested parties as referred to in Article 33.

3. Member States shall ensure that it is possible to make emergency calls from public pay telephones using the single European emergency call number "112" and other national emergency numbers, all free of charge and without having to use any means of payment.

Article 7

Measures for disabled end-users

1. Unless requirements have been specified under Chapter IV which achieve the equivalent effect, Member States shall take specific measures to ensure that access to, and affordability of, the services identified in Article 4(3) and Article 5 for disabled end-users is equivalent to the level enjoyed by other end-users. Member States may oblige national regulatory authorities to assess the general need and the specific requirements, including the extent and concrete form of such specific measures for disabled end-users.

2. Member States may take specific measures, in the light of national conditions, to ensure that disabled end-users can also take advantage of the choice of undertakings and service providers available to the majority of end-users.

3. In taking the measures referred to in paragraphs 1 and 2, Member States shall encourage compliance with the relevant standards or specifications published in accordance with Articles 17 and 18 of Directive 2002/21/EC (Framework Directive).

Article 8

Designation of undertakings

1. Member States may designate one or more undertakings to guarantee the provision of universal service as identified in Articles 4, 5, 6 and 7 and, where applicable, Article 9(2) so that the whole of the national territory can be covered. Member States may designate different undertakings or sets of undertakings to provide different elements of universal service and/or to cover different parts of the national territory.

2. When Member States designate undertakings in part or all of the national territory as having universal service obligations, they shall do so using an efficient, objective, transparent and non-discriminatory designation mechanism, whereby no undertaking is a priori excluded from being designated. Such designation methods shall ensure that universal service is provided in a cost-effective manner and may be used as a means of determining the net cost of the universal service obligation in accordance with Article 12.

3. When an undertaking designated in accordance with paragraph 1 intends to dispose of a substantial part or all of its local access network assets to a separate legal entity under different ownership, it shall inform in advance the national regulatory authority in a timely manner, in order to allow that authority to assess the effect of the intended transaction on the provision of access at a fixed location

and of telephone services pursuant to Article 4. The national regulatory authority may impose, amend or withdraw specific obligations in accordance with Article 6(2) of Directive 2002/20/EC (Authorisation Directive).

Article 9

Affordability of tariffs

1. National regulatory authorities shall monitor the evolution and level of retail tariffs of the services identified in Articles 4 to 7 as falling under the universal service obligations and either provided by designated undertakings or available on the market, if no undertakings are designated in relation to those services, in particular in relation to national consumer prices and income.

2. Member States may, in the light of national conditions, require that designated undertakings provide to consumers tariff options or packages which depart from those provided under normal commercial conditions, in particular to ensure that those on low incomes or with special social needs are not prevented from accessing the network referred to in Article 4(1) or from using the services identified in Article 4(3) and Articles 5, 6 and 7 as falling under the universal service obligations and provided by designated undertakings.

3. Member States may, besides any provision for designated undertakings to provide special tariff options or to comply with price caps or geographical averaging or other similar schemes, ensure that support is provided to consumers identified as having low incomes or special social needs.

4. Member States may require undertakings with obligations under Articles 4, 5, 6 and 7 to apply common tariffs, including geographical averaging, throughout the territory, in the light of national conditions or to comply with price caps.

5. National regulatory authorities shall ensure that, where a designated undertaking has an obligation to provide special tariff options, common tariffs, including geographical averaging, or to comply with price caps, the conditions are fully transparent and are published and applied in accordance with the principle of non-discrimination. National regulatory authorities may require that specific schemes be modified or withdrawn.

Article 10

Control of expenditure

1. Member States shall ensure that designated undertakings, in providing facilities and services additional to those referred to in Articles 4, 5, 6, 7 and 9(2), establish terms and conditions in such a way that the subscriber is not obliged to pay for facilities or services which are not necessary or not required for the service requested.

2. Member States shall ensure that designated undertakings with obligations under Articles 4, 5, 6, 7 and 9(2) provide the specific facilities and services set out in Annex I, Part A, in order that subscribers can monitor and control expenditure and avoid unwarranted disconnection of service.

3. Member States shall ensure that the relevant authority is able to waive the requirements of paragraph 2 in all or part of its national territory if it is satisfied that the facility is widely available.

Article 11

Quality of service of designated undertakings

1. National regulatory authorities shall ensure that all designated undertakings with obligations under Articles 4, 5, 6, 7 and 9(2) publish adequate and up-to-date information concerning their performance in the provision of universal service, based on the quality of service parameters, definitions and measurement methods set out in Annex III. The published information shall also be supplied to the national regulatory authority.

2. National regulatory authorities may specify, *inter alia*, additional quality of service standards, where relevant parameters have been developed, to assess the performance of undertakings in the provision of services to disabled end-users and disabled consumers. National regulatory authorities shall ensure that information concerning the performance of undertakings in relation to these parameters is also published and made available to the national regulatory authority.

3. National regulatory authorities may, in addition, specify the content, form and manner of information to be published, in order to ensure that end-users and consumers have access to comprehensive, comparable and user-friendly information.

4. National regulatory authorities shall be able to set performance targets for undertakings with universal service obligations. In so doing, national regulatory authorities shall take account of views of interested parties, in particular as referred to in Article 33.

5. Member States shall ensure that national regulatory authorities are able to monitor compliance with these performance targets by designated undertakings.

6. Persistent failure by an undertaking to meet performance targets may result in specific measures being taken in accordance with Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) ⁽¹³⁾. National regulatory authorities shall be able to order independent audits or similar reviews of the performance data, paid for by the undertaking concerned, in order to ensure the accuracy and comparability of the data made available by undertakings with universal service obligations.

Article 12

Costing of universal service obligations

1. Where national regulatory authorities consider that the provision of universal service as set out in Articles 3 to 10 may represent an unfair burden on undertakings designated to provide universal service, they shall calculate the net costs of its provision.

For that purpose, national regulatory authorities shall:

- (a) calculate the net cost of the universal service obligation, taking into account any market benefit which accrues to an undertaking designated to provide universal service, in accordance with Annex IV, Part A; or
- (b) make use of the net costs of providing universal service identified by a designation mechanism in accordance with Article 8(2).

2. The accounts and/or other information serving as the basis for the calculation of the net cost of universal service obligations under paragraph 1(a) shall be audited or verified by the national regulatory authority or a body independent of the relevant parties and approved by the national regulatory authority. The results of the cost calculation and the conclusions of the audit shall be publicly available.

Article 13

Financing of universal service obligations

1. Where, on the basis of the net cost calculation referred to in Article 12, national regulatory authorities find that an undertaking is subject to an unfair burden, Member States shall, upon request from a designated undertaking, decide:

- (a) to introduce a mechanism to compensate that undertaking for the determined net costs under transparent conditions from public funds; and/or
- (b) to share the net cost of universal service obligations between providers of electronic communications networks and services.

2. Where the net cost is shared under paragraph 1(b), Member States shall establish a sharing mechanism administered by the national regulatory authority or a body independent from the beneficiaries under the supervision of the national regulatory authority. Only the net cost, as determined in accordance with Article 12, of the obligations laid down in Articles 3 to 10 may be financed.

3. A sharing mechanism shall respect the principles of transparency, least market distortion, non-discrimination and proportionality, in accordance with the principles of Annex IV, Part B. Member States may choose not to require contributions from undertakings whose national turnover is less than a set limit.

4. Any charges related to the sharing of the cost of universal service obligations shall be unbundled and identified separately for each undertaking. Such charges shall not be imposed or collected from undertakings that are not providing services in the territory of the Member State that has established the sharing mechanism.

Article 14

Transparency

1. Where a mechanism for sharing the net cost of universal service obligations as referred to in Article 13 is established, national regulatory authorities shall ensure that the principles for cost sharing, and details of the mechanism used, are publicly available.

⁽¹³⁾ See page 21 of this Official Journal. [L 108, 24.4.2002]

2. Subject to Community and national rules on business confidentiality, national regulatory authorities shall ensure that an annual report is published giving the calculated cost of universal service obligations, identifying the contributions made by all the undertakings involved, and identifying any market benefits, that may have accrued to the undertaking(s) designated to provide universal service, where a fund is actually in place and working.

Article 15

Review of the scope of universal service

1. The Commission shall periodically review the scope of universal service, in particular with a view to proposing to the European Parliament and the Council that the scope be changed or redefined. A review shall be carried out, on the first occasion within two years after the date of application referred to in Article 38(1), second subparagraph, and subsequently every three years.

2. This review shall be undertaken in the light of social, economic and technological developments, taking into account, inter alia, mobility and data rates in the light of the prevailing technologies used by the majority of subscribers. The review process shall be undertaken in accordance with Annex V. The Commission shall submit a report to the European Parliament and the Council regarding the outcome of the review.

CHAPTER III

REGULATORY CONTROLS ON UNDERTAKINGS WITH SIGNIFICANT MARKET POWER IN SPECIFIC RETAIL MARKETS

Article 16

[deleted by Directive 2009/136/EC]

Article 17

Regulatory controls on retail services

1. Member States shall ensure that national regulatory authorities impose appropriate regulatory obligations on undertakings identified as having significant market power on a given retail market in accordance with Article 14 of Directive 2002/21/EC (Framework Directive) where:

- (a) as a result of a market analysis carried out in accordance with Article 16 of Directive 2002/21/EC (Framework Directive), a national regulatory authority determines that a given retail market identified in accordance with Article 15 of that Directive is not effectively competitive; and
- (b) the national regulatory authority concludes that obligations imposed under Articles 9 to 13 of Directive 2002/19/EC (Access Directive) would not result in the achievement of the objectives set out in Article 8 of Directive 2002/21/EC (Framework Directive).

2. Obligations imposed under paragraph 1 shall be based on the nature of the problem identified and be proportionate and justified in the light of the objectives

laid down in Article 8 of Directive 2002/21/EC (Framework Directive). The obligations imposed may include requirements that the identified undertakings do not charge excessive prices, inhibit market entry or restrict competition by setting predatory prices, show undue preference to specific end-users or unreasonably bundle services. National regulatory authorities may apply to such undertakings appropriate retail price cap measures, measures to control individual tariffs, or measures to orient tariffs towards costs or prices on comparable markets, in order to protect end-user interests whilst promoting effective competition.

3. *[deleted by Directive 2009/136/EC]*

4. National regulatory authorities shall ensure that, where an undertaking is subject to retail tariff regulation or other relevant retail controls, the necessary and appropriate cost accounting systems are implemented. National regulatory authorities may specify the format and accounting methodology to be used. Compliance with the cost accounting system shall be verified by a qualified independent body. National regulatory authorities shall ensure that a statement concerning compliance is published annually.

5. Without prejudice to Article 9(2) and Article 10, national regulatory authorities shall not apply retail control mechanisms under paragraph 1 of this Article to geographical or user markets where they are satisfied that there is effective competition.

Article 18

[deleted by Directive 2009/136/EC]

Article 19

[deleted by Directive 2009/136/EC]

CHAPTER IV

END-USER INTERESTS AND RIGHTS

Article 20

Contracts

1. Member States shall ensure that, when subscribing to services providing connection to a public communications network and/or publicly available electronic communications services, consumers, and other end-users so requesting, have a right to a contract with an undertaking or undertakings providing such connection and/or services. The contract shall specify in a clear, comprehensive and easily accessible form at least:

- (a) the identity and address of the undertaking;
- (b) the services provided, including in particular,
 - whether or not access to emergency services and caller location information is being provided, and any limitations on the provision of emergency services under Article 26,
 - information on any other conditions limiting

access to and/or use of services and applications, where such conditions are permitted under national law in accordance with Community law,

- the minimum service quality levels offered, namely the time for the initial connection and, where appropriate, other quality of service parameters, as defined by the national regulatory authorities,
 - information on any procedures put in place by the undertaking to measure and shape traffic so as to avoid filling or overfilling a network link, and information on how those procedures could impact on service quality,
 - the types of maintenance service offered and customer support services provided, as well as the means of contacting these services,
 - any restrictions imposed by the provider on the use of terminal equipment supplied;
- (c) where an obligation exists under Article 25, the subscriber's options as to whether or not to include his or her personal data in a directory, and the data concerned;
- (d) details of prices and tariffs, the means by which up-to-date information on all applicable tariffs and maintenance charges may be obtained, payment methods offered and any differences in costs due to payment method;
- (e) the duration of the contract and the conditions for renewal and termination of services and of the contract, including:
- any minimum usage or duration required to benefit from promotional terms,
 - any charges related to portability of numbers and other identifiers,
 - any charges due on termination of the contract, including any cost recovery with respect to terminal equipment;
- (f) any compensation and the refund arrangements which apply if contracted service quality levels are not met;
- (g) the means of initiating procedures for the settlement of disputes in accordance with Article 34;
- (h) the type of action that might be taken by the undertaking in reaction to security or integrity incidents or threats and vulnerabilities.

Member States may also require that the contract include any information which may be provided by the relevant public authorities for this purpose on the use of electronic communications networks and services to engage in unlawful activities or to disseminate harmful content, and on the means of protection against risks to personal security, privacy and personal data, referred to in Article 21(4) and relevant to the service provided.

2. Member States shall ensure that subscribers have a right to withdraw from their contract without penalty upon notice of modification to the contractual conditions

proposed by the undertakings providing electronic communications networks and/or services. Subscribers shall be given adequate notice, not shorter than one month, of any such modification, and shall be informed at the same time of their right to withdraw, without penalty, from their contract if they do not accept the new conditions. Member States shall ensure that national regulatory authorities are able to specify the format of such notifications.

Article 21

Transparency and publication of information

1. Member States shall ensure that national regulatory authorities are able to oblige undertakings providing public electronic communications networks and/or publicly available electronic communications services to publish transparent, comparable, adequate and up-to-date information on applicable prices and tariffs, on any charges due on termination of a contract and on standard terms and conditions in respect of access to, and use of services provided by them to end-users and consumers in accordance with Annex II. Such information shall be published in a clear, comprehensive and easily accessible form. National regulatory authorities may specify additional requirements regarding the form in which such information is to be published .

2. National regulatory authorities shall encourage the provision of comparable information to enable end-users and consumers to make an independent evaluation of the cost of alternative usage patterns, for instance by means of interactive guides or similar techniques. Where such facilities are not available on the market free of charge or at a reasonable price, Member States shall ensure that national regulatory authorities are able to make such guides or techniques available themselves or through third party procurement. Third parties shall have a right to use, free of charge, the information published by undertakings providing electronic communications networks and/or publicly available electronic communications services for the purposes of selling or making available such interactive guides or similar techniques.

3. Member States shall ensure that national regulatory authorities are able to oblige undertakings providing public electronic communications networks and/or publicly available electronic communications services to inter alia:

- (a) provide applicable tariff information to subscribers regarding any number or service subject to particular pricing conditions; with respect to individual categories of services, national regulatory authorities may require such information to be provided immediately prior to connecting the call;
- (b) inform subscribers of any change to access to emergency services or caller location information in the service to which they have subscribed;
- (c) inform subscribers of any change to conditions limiting access to and/or use of services and applications, where such conditions are permitted under national law in accordance with Community law;
- (d) provide information on any procedures put in place by the provider to measure and shape traffic so as to avoid filling or overfilling a network link, and on

how those procedures could impact on service quality;

- (e) inform subscribers of their right to determine whether or not to include their personal data in a directory, and of the types of data concerned, in accordance with Article 12 of Directive 2002/58/EC (Directive on privacy and electronic communications); and
- (f) regularly inform disabled subscribers of details of products and services designed for them.

If deemed appropriate, national regulatory authorities may promote self- or co-regulatory measures prior to imposing any obligation.

4. Member States may require that the undertakings referred to in paragraph 3 distribute public interest information free of charge to existing and new subscribers, where appropriate, by the same means as those ordinarily used by them in their communications with subscribers. In such a case, that information shall be provided by the relevant public authorities in a standardised format and shall, *inter alia*, cover the following topics:

- (a) the most common uses of electronic communications services to engage in unlawful activities or to disseminate harmful content, particularly where it may prejudice respect for the rights and freedoms of others, including infringements of copyright and related rights, and their legal consequences; and
- (b) the means of protection against risks to personal security, privacy and personal data when using electronic communications services.

Article 22

Quality of service

1. Member States shall ensure that national regulatory authorities are, after taking account of the views of interested parties, able to require undertakings that provide publicly available electronic communications networks and/or services to publish comparable, adequate and up-to-date information for end-users on the quality of their services and on measures taken to ensure equivalence in access for disabled end-users. That information shall, on request, be supplied to the national regulatory authority in advance of its publication.

2. National regulatory authorities may specify, *inter alia*, the quality of service parameters to be measured and the content, form and manner of the information to be published, including possible quality certification mechanisms, in order to ensure that end-users, including disabled end-users, have access to comprehensive, comparable, reliable and user-friendly information. Where appropriate, the parameters, definitions and measurement methods set out in Annex III may be used.

3. In order to prevent the degradation of service and the hindering or slowing down of traffic over networks, Member States shall ensure that national regulatory authorities are able to set minimum quality of service requirements on an undertaking or undertakings providing public communications networks.

National regulatory authorities shall provide the Commission, in good time before setting any such requirements, with a summary of the grounds for action, the envisaged requirements and the proposed course of action. This information shall also be made available to the Body of European Regulators for Electronic Communications (BEREC). The Commission may, having examined such information, make comments or recommendations thereupon, in particular to ensure that the envisaged requirements do not adversely affect the functioning of the internal market. National regulatory authorities shall take the utmost account of the Commission's comments or recommendations when deciding on the requirements.

Article 23

Availability of services

Member States shall take all necessary measures to ensure the fullest possible availability of publicly available telephone services provided over public communications networks in the event of catastrophic network breakdown or in cases of force majeure. Member States shall ensure that undertakings providing publicly available telephone services take all necessary measures to ensure uninterrupted access to emergency services.

Article 23a

Ensuring equivalence in access and choice for disabled end-users

1. Member States shall enable relevant national authorities to specify, where appropriate, requirements to be met by undertakings providing publicly available electronic communication services to ensure that disabled end-users:

- (a) have access to electronic communications services equivalent to that enjoyed by the majority of end-users; and
- (b) benefit from the choice of undertakings and services available to the majority of end-users.

2. In order to be able to adopt and implement specific arrangements for disabled end-users, Member States shall encourage the availability of terminal equipment offering the necessary services and functions.

Article 24

Interoperability of consumer digital television equipment

In accordance with the provisions of Annex VI, Member States shall ensure the interoperability of the consumer digital television equipment referred to therein.

Article 25

Telephone directory enquiry services

1. Member States shall ensure that subscribers to publicly available telephone services have the right to have an entry in the publicly available directory referred to in Article 5(1)(a) and to have their information made

available to providers of directory enquiry services and/or directories in accordance with paragraph 2.

2. Member States shall ensure that all undertakings which assign telephone numbers to subscribers meet all reasonable requests to make available, for the purposes of the provision of publicly available directory enquiry services and directories, the relevant information in an agreed format on terms which are fair, objective, cost oriented and non-discriminatory.

3. Member States shall ensure that all end-users provided with a publicly available telephone service can access directory enquiry services. National regulatory authorities shall be able to impose obligations and conditions on undertakings that control access of end-users for the provision of directory enquiry services in accordance with the provisions of Article 5 of Directive 2002/19/EC (Access Directive). Such obligations and conditions shall be objective, equitable, non-discriminatory and transparent.

4. Member States shall not maintain any regulatory restrictions which prevent end-users in one Member State from accessing directly the directory enquiry service in another Member State by voice call or SMS, and shall take measures to ensure such access in accordance with Article 28.

5. Paragraphs 1 to 4 shall apply subject to the requirements of Community legislation on the protection of personal data and privacy and, in particular, Article 12 of Directive 2002/58/EC (Directive on privacy and electronic communications).

Article 26

Emergency services and the single European emergency call number

1. Member States shall ensure that all end-users of the service referred to in paragraph 2, including users of public pay telephones, are able to call the emergency services free of charge and without having to use any means of payment, by using the single European emergency call number "112" and any national emergency call number specified by Member States.

2. Member States, in consultation with national regulatory authorities, emergency services and providers, shall ensure that undertakings providing end-users with an electronic communications service for originating national calls to a number or numbers in a national telephone numbering plan provide access to emergency services.

3. Member States shall ensure that calls to the single European emergency call number "112" are appropriately answered and handled in the manner best suited to the national organisation of emergency systems. Such calls shall be answered and handled at least as expeditiously and effectively as calls to the national emergency number or numbers, where these continue to be in use.

4. Member States shall ensure that access for disabled end-users to emergency services is equivalent to that enjoyed by other end-users. Measures taken to ensure that disabled end-users are able to access emergency services whilst travelling in other Member States shall be based to the greatest extent possible on European standards or specifications published in accordance with the provisions of Article 17 of Directive 2002/21/EC (Framework Directive), and they shall not prevent Member

States from adopting additional requirements in order to pursue the objectives set out in this Article.

5. Member States shall ensure that undertakings concerned make caller location information available free of charge to the authority handling emergency calls as soon as the call reaches that authority. This shall apply to all calls to the single European emergency call number "112". Member States may extend this obligation to cover calls to national emergency numbers. Competent regulatory authorities shall lay down criteria for the accuracy and reliability of the caller location information provided.

6. Member States shall ensure that citizens are adequately informed about the existence and use of the single European emergency call number "112", in particular through initiatives specifically targeting persons travelling between Member States.

7. In order to ensure effective access to "112" services in the Member States, the Commission, having consulted BEREC, may adopt technical implementing measures. However, these technical implementing measures shall be adopted without prejudice to, and shall have no impact on, the organisation of emergency services, which remains of the exclusive competence of Member States.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 37(2).

Article 27

European telephone access codes

1. Member States shall ensure that the "00" code is the standard international access code. Special arrangements for making calls between locations adjacent to one another across borders between Member States may be established or continued. End-users in the locations concerned shall be fully informed of such arrangements.

2. A legal entity, established within the Community and designated by the Commission, shall have sole responsibility for the management, including number assignment, and promotion of the European Telephony Numbering Space (ETNS). The Commission shall adopt the necessary implementing rules.

3. Member States shall ensure that all undertakings that provide publicly available telephone services allowing international calls handle all calls to and from the ETNS at rates similar to those applied for calls to and from other Member States.

Article 27a

Harmonised numbers for harmonised services of social value, including the missing children hotline number

1. Member States shall promote the specific numbers in the numbering range beginning with "116" identified by Commission Decision 2007/116/EC of 15 February 2007 on reserving the national numbering range beginning with "116" for harmonised numbers for harmonised services of

social value (*). They shall encourage the provision within their territory of the services for which such numbers are reserved.

2. Member States shall ensure that disabled end users are able to access services provided under the "116" numbering range to the greatest extent possible. Measures taken to facilitate disabled end-users' access to such services whilst travelling in other Member States shall be based on compliance with relevant standards or specifications published in accordance with Article 17 of Directive 2002/21/EC (Framework Directive).

3. Member States shall ensure that citizens are adequately informed of the existence and use of services provided under the "116" numbering range, in particular through initiatives specifically targeting persons travelling between Member States.

4. Member States shall, in addition to measures of general applicability to all numbers in the "116" numbering range taken pursuant to paragraphs 1, 2, and 3, make every effort to ensure that citizens have access to a service operating a hotline to report cases of missing children. The hotline shall be available on the number "116000".

5. In order to ensure the effective implementation of the "116" numbering range, in particular the missing children hotline number "116000", in the Member States, including access for disabled end-users when travelling in other Member States, the Commission, having consulted BERE, may adopt technical implementing measures. However, these technical implementing measures shall be adopted without prejudice to, and shall have no impact on, the organisation of these services, which remains of the exclusive competence of Member States.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 37(2).

Article 28

Access to numbers and services

1. Member States shall ensure that, where technically and economically feasible, and except where a called subscriber has chosen for commercial reasons to limit access by calling parties located in specific geographical areas, relevant national authorities take all necessary steps to ensure that end users are able to:

- (a) access and use services using non-geographic numbers within the Community; and
- (b) access all numbers provided in the Community, regardless of the technology and devices used by the operator, including those in the national numbering plans of Member States, those from the ETNS and Universal International Freephone Numbers (UIFN).

2. Member States shall ensure that the relevant authorities are able to require undertakings providing public communications networks and/or publicly available electronic communications services to block, on a case-by-case basis, access to numbers or services where this is justified by reasons of fraud or misuse and to require that

in such cases providers of electronic communications services withhold relevant interconnection or other service revenues.

Article 29

Provision of additional facilities

1. Without prejudice to Article 10(2), Member States shall ensure that national regulatory authorities are able to require all undertakings that provide publicly available telephone services and/or access to public communications networks to make available all or part of the additional facilities listed in Part B of Annex I, subject to technical feasibility and economic viability, as well as all or part of the additional facilities listed in Part A of Annex I.

2. A Member State may decide to waive paragraph 1 in all or part of its territory if it considers, after taking into account the views of interested parties, that there is sufficient access to these facilities.

3. *[deleted by Directive 2009/136/EC]*

Article 30

Facilitating change of provider

1. Member States shall ensure that all subscribers with numbers from the national telephone numbering plan who so request can retain their number(s) independently of the undertaking providing the service in accordance with the provisions of Part C of Annex I.

2. National regulatory authorities shall ensure that pricing between operators and/or service providers related to the provision of number portability is cost-oriented, and that direct charges to subscribers, if any, do not act as a disincentive for subscribers against changing service provider.

3. National regulatory authorities shall not impose retail tariffs for the porting of numbers in a manner that would distort competition, such as by setting specific or common retail tariffs.

4. Porting of numbers and their subsequent activation shall be carried out within the shortest possible time. In any case, subscribers who have concluded an agreement to port a number to a new undertaking shall have that number activated within one working day.

Without prejudice to the first subparagraph, competent national authorities may establish the global process of porting of numbers, taking into account national provisions on contracts, technical feasibility and the need to maintain continuity of service to the subscriber. In any event, loss of service during the process of porting shall not exceed one working day. Competent national authorities shall also take into account, where necessary, measures ensuring that subscribers are protected throughout the switching process and are not switched to another provider against their will.

Member States shall ensure that appropriate sanctions on undertakings are provided for, including an obligation to compensate subscribers in case of delay in porting or abuse of porting by them or on their behalf.

(*) OJ L 49, 17.2.007, p. 30.

5. Member States shall ensure that contracts concluded between consumers and undertakings providing electronic communications services do not mandate an initial commitment period that exceeds 24 months. Member States shall also ensure that undertakings offer users the possibility to subscribe to a contract with a maximum duration of 12 months.

6. Without prejudice to any minimum contractual period, Member States shall ensure that conditions and procedures for contract termination do not act as a disincentive against changing service provider.

Article 31

"Must carry" obligations

1. Member States may impose reasonable "must carry" obligations, for the transmission of specified radio and television broadcast channels and complementary services, particularly accessibility services to enable appropriate access for disabled end-users, on undertakings under their jurisdiction providing electronic communications networks used for the distribution of radio or television broadcast channels to the public where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcast channels. Such obligations shall only be imposed where they are necessary to meet general interest objectives as clearly defined by each Member State and shall be proportionate and transparent.

The obligations referred to in the first subparagraph shall be reviewed by the Member States at the latest within one year of 25 May 2011 except where Member States have carried out such a review within the previous two years.

Member States shall review "must carry" obligations on a regular basis.

2. Neither paragraph 1 of this Article nor Article 3(2) of Directive 2002/19/EC (Access Directive) shall prejudice the ability of Member States to determine appropriate remuneration, if any, in respect of measures taken in accordance with this Article while ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks. Where remuneration is provided for, Member States shall ensure that it is applied in a proportionate and transparent manner.

CHAPTER V

GENERAL AND FINAL PROVISIONS

Article 32

Additional mandatory services

Member States may decide to make additional services, apart from services within the universal service obligations as defined in Chapter II, publicly available in its own territory but, in such circumstances, no compensation mechanism involving specific undertakings may be imposed.

Article 33

Consultation with interested parties

1. Member States shall ensure as far as appropriate that national regulatory authorities take account of the views of end-users, consumers (including, in particular, disabled consumers), manufacturers and undertakings that provide electronic communications networks and/or services on issues related to all end-user and consumer rights concerning publicly available electronic communications services, in particular where they have a significant impact on the market.

In particular, Member States shall ensure that national regulatory authorities establish a consultation mechanism ensuring that in their decisions on issues related to end-user and consumer rights concerning publicly available electronic communications services, due consideration is given to consumer interests in electronic communications.

2. Where appropriate, interested parties may develop, with the guidance of national regulatory authorities, mechanisms, involving consumers, user groups and service providers, to improve the general quality of service provision by, inter alia, developing and monitoring codes of conduct and operating standards.

3. Without prejudice to national rules in conformity with Community law promoting cultural and media policy objectives, such as cultural and linguistic diversity and media pluralism, national regulatory authorities and other relevant authorities may promote cooperation between undertakings providing electronic communications networks and/or services and sectors interested in the promotion of lawful content in electronic communication networks and services. That cooperation may also include coordination of the public interest information to be provided pursuant to Article 21(4) and the second subparagraph of Article 20(1).

Article 34

Out-of-court dispute resolution

1. Member States shall ensure that transparent, non-discriminatory, simple and inexpensive out-of-court procedures are available for dealing with unresolved disputes between consumers and undertakings providing electronic communications networks and/or services arising under this Directive and relating to the contractual conditions and/or performance of contracts concerning the supply of those networks and/or services. Member States shall adopt measures to ensure that such procedures enable disputes to be settled fairly and promptly and may, where warranted, adopt a system of reimbursement and/or compensation. Such procedures shall enable disputes to be settled impartially and shall not deprive the consumer of the legal protection afforded by national law. Member States may extend these obligations to cover disputes involving other end-users.

2. Member States shall ensure that their legislation does not hamper the establishment of complaints offices and the provision of on-line services at the appropriate territorial level to facilitate access to dispute resolution by consumers and end-users.

3. Where such disputes involve parties in different Member States, Member States shall coordinate their efforts with a view to bringing about a resolution of the dispute.

4. This Article is without prejudice to national court procedures.

Article 35

Adaptation of annexes

Measures designed to amend non-essential elements of this Directive and necessary to adapt Annexes I, II, III, and VI to technological developments or changes in market demand shall be adopted by the Commission in accordance with the regulatory procedure with scrutiny referred to in Article 37(2).

Article 36

Notification, monitoring and review procedures

1. National regulatory authorities shall notify to the Commission by at the latest the date of application referred to in Article 38(1), second subparagraph, and immediately in the event of any change thereafter in the names of undertakings designated as having universal service obligations under Article 8(1).

The Commission shall make the information available in a readily accessible form, and shall distribute it to the Communications Committee referred to in Article 37.

2. National regulatory authorities shall notify to the Commission the universal service obligations imposed upon undertakings designated as having universal service obligations. Any changes affecting these obligations or of the undertakings affected under the provisions of this Directive shall be notified to the Commission without delay.

3. The Commission shall periodically review the functioning of this Directive and report to the European Parliament and to the Council, on the first occasion not later than three years after the date of application referred to in Article 38(1), second subparagraph. The Member States and national regulatory authorities shall supply the necessary information to the Commission for this purpose.

Article 37

Committee procedure

1. The Commission shall be assisted by the Communications Committee set up under Article 22 of Directive 2002/21/EC (Framework Directive).

2. Where reference is made to this paragraph, Article 5a(1) to (4) and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

Article 38

Transposition

1. Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive by 24 July 2003 at the latest. They shall forthwith inform the Commission thereof.

They shall apply those measures from 25 July 2003.

2. When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

3. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field governed by this Directive and of any subsequent modifications to those provisions.

Article 39

Entry into force

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Article 40

Addressees

This Directive is addressed to the Member States.

Done at Brussels, 7 March 2002.

For the European Parliament

The President

P. Cox

For the Council

The President

J. C. Aparicio

**DESCRIPTION OF FACILITIES AND SERVICES REFERRED TO IN ARTICLE 10 (CONTROL OF EXPENDITURE),
ARTICLE 29 (ADDITIONAL FACILITIES) AND ARTICLE 30 (FACILITATING CHANGE OF PROVIDER)**

Part A: Facilities and services referred to in Article 10

(a) Itemised billing

Member States are to ensure that national regulatory authorities, subject to the requirements of relevant legislation on the protection of personal data and privacy, may lay down the basic level of itemised bills which are to be provided by undertakings to subscribers free of charge in order that they can:

- (i) allow verification and control of the charges incurred in using the public communications network at a fixed location and/or related publicly available telephone services; and
- (ii) adequately monitor their usage and expenditure and thereby exercise a reasonable degree of control over their bills.

Where appropriate, additional levels of detail may be offered to subscribers at reasonable tariffs or at no charge.

Calls which are free of charge to the calling subscriber, including calls to helplines, are not to be identified in the calling subscriber's itemised bill.

(b) Selective barring for outgoing calls or premium SMS or MMS, or, where technically feasible, other kinds of similar applications, free of charge

i.e. the facility whereby the subscriber can, on request to the designated undertaking that provides telephone services, bar outgoing calls or premium SMS or MMS or other kinds of similar applications of defined types or to defined types of numbers free of charge.

(c) Pre-payment systems

Member States are to ensure that national regulatory authorities may require designated undertakings to provide means for consumers to pay for access to the public communications network and use of publicly available telephone services on pre-paid terms.

(d) Phased payment of connection fees

Member States are to ensure that national regulatory authorities may require designated undertakings to allow consumers to pay for connection to the public communications network on the basis of payments phased over time.

(e) Non-payment of bills

Member States are to authorise specified measures, which are to be proportionate, non discriminatory and published, to cover non payment of telephone bills issued by undertakings. These measures are to ensure that due warning of any consequent service interruption or disconnection is given to the subscriber beforehand. Except in cases of fraud, persistent late payment or non payment, these measures are to ensure, as far as is technically feasible that any service interruption is confined to the service concerned. Disconnection for non payment of bills should take place only after due warning is given to the subscriber. Member States may allow a period of limited service prior to complete disconnection, during which only calls that do not incur a charge to the subscriber (e.g. "112" calls) are permitted.

(f) Tariff advice

i.e. the facility whereby subscribers may request the undertaking to provide information regarding alternative lower-cost tariffs, if available.

(g) Cost control

i.e. the facility whereby undertakings offer other means, if determined to be appropriate by national regulatory authorities, to control the costs of publicly available telephone services, including free-of-charge alerts to consumers in case of abnormal or excessive consumption patterns.

Part B: Facilities referred to in Article 29

(a) Tone dialling or DTMF (dual-tone multi-frequency operation)

i.e. the public communications network and/or publicly available telephone services supports the use of DTMF tones as defined in ETSI ETR 207 for end-to-end signalling throughout the network both within a Member State and between Member States.

(b) Calling-line identification

i.e. the calling party's number is presented to the called party prior to the call being established.

This facility should be provided in accordance with relevant legislation on protection of personal data and privacy, in particular Directive 2002/58/EC (Directive on privacy and electronic communications).

To the extent technically feasible, operators should provide data and signals to facilitate the offering of calling-line identity and tone dialling across Member State boundaries.

Part C: Implementation of the number portability provisions referred to in Article 30

The requirement that all subscribers with numbers from the national numbering plan, who so request can retain their number(s) independently of the undertaking providing the service shall apply:

- (a) in the case of geographic numbers, at a specific location; and
- (b) in the case of non-geographic numbers, at any location.

This Part does not apply to the porting of numbers between networks providing services at a fixed location and mobile networks.

ANNEX II

**INFORMATION TO BE PUBLISHED IN ACCORDANCE WITH ARTICLE 21
(TRANSPARENCY AND PUBLICATION OF INFORMATION)**

The national regulatory authority has a responsibility to ensure that the information in this Annex is published, in accordance with Article 21. It is for the national regulatory authority to decide which information is to be published by the undertakings providing public communications networks and/or publicly available telephone services and which information is to be published by the national regulatory authority itself, so as to ensure that consumers are able to make informed choices.

1. Name(s) and address(es) of undertaking(s)
i.e. names and head office addresses of undertakings providing public communications networks and/or publicly available telephone services.
2. Description of services offered
 - 2.1. Scope of services offered
 - 2.2. Standard tariffs indicating the services provided and the content of each tariff element (e.g. charges for access, all types of usage charges, maintenance charges), and including details of standard discounts applied and special and targeted tariff schemes and any additional charges, as well as costs with respect to terminal equipment.
 - 2.3. Compensation/refund policy, including specific details of any compensation/refund schemes offered.
 - 2.4. Types of maintenance service offered.
 - 2.5. Standard contract conditions, including any minimum contractual period, termination of the contract and procedures and direct charges related to the portability of numbers and other identifiers, if relevant.
3. Dispute settlement mechanisms, including those developed by the undertaking.
4. Information about rights as regards universal service, including, where appropriate, the facilities and services mentioned in Annex I.

ANNEX III

QUALITY OF SERVICE PARAMETERS

Quality-of-Service Parameters, Definitions and Measurement Methods referred to in Articles 11 and 22

For undertakings providing access to a public communications network

PARAMETER (Note 1)	DEFINITION	MEASUREMENT METHOD
Supply time for initial connection	ETSI EG 202 057	ETSI EG 202 057
Fault rate per access line	ETSI EG 202 057	ETSI EG 202 057
Fault repair time	ETSI EG 202 057	ETSI EG 202 057

For undertakings providing a publicly available telephone service

Call set up time (Note 2)	ETSI EG 202 057	ETSI EG 202 057
Response times for directory enquiry services	ETSI EG 202 057	ETSI EG 202 057
Proportion of coin and card operated public pay-telephones in working order	ETSI EG 202 057	ETSI EG 202 057
Bill correctness complaints	ETSI EG 202 057	ETSI EG 202 057
Unsuccessful call ratio (Note 2)	ETSI EG 202 057	ETSI EG 202 057

Version number of ETSI EG 202 057-1 is 1.3.1 (July 2008)

Note 1

Parameters should allow for performance to be analysed at a regional level (i.e. no less than level 2 in the Nomenclature of Territorial Units for Statistics (NUTS) established by Eurostat).

Note 2

Member States may decide not to require up-to-date information concerning the performance for these two parameters to be kept if evidence is available to show that performance in these two areas is satisfactory.

CALCULATING THE NET COST, IF ANY, OF UNIVERSAL SERVICE OBLIGATIONS AND ESTABLISHING ANY RECOVERY OR SHARING MECHANISM IN ACCORDANCE WITH ARTICLES 12 AND 13

Part A: Calculation of net cost

Universal service obligations refer to those obligations placed upon an undertaking by a Member State which concern the provision of a network and service throughout a specified geographical area, including, where required, averaged prices in that geographical area for the provision of that service or provision of specific tariff options for consumers with low incomes or with special social needs.

National regulatory authorities are to consider all means to ensure appropriate incentives for undertakings (designated or not) to provide universal service obligations cost efficiently. In undertaking a calculation exercise, the net cost of universal service obligations is to be calculated as the difference between the net cost for a designated undertaking of operating with the universal service obligations and operating without the universal service obligations. This applies whether the network in a particular Member State is fully developed or is still undergoing development and expansion. Due attention is to be given to correctly assessing the costs that any designated undertaking would have chosen to avoid had there been no universal service obligation. The net cost calculation should assess the benefits, including intangible benefits, to the universal service operator.

The calculation is to be based upon the costs attributable to:

- (i) elements of the identified services which can only be provided at a loss or provided under cost conditions falling outside normal commercial standards.
This category may include service elements such as access to emergency telephone services, provision of certain public pay telephones, provision of certain services or equipment for disabled people, etc;
- (ii) specific end-users or groups of end-users who, taking into account the cost of providing the specified network and service, the revenue generated and any geographical averaging of prices imposed by the Member State, can only be served at a loss or under cost conditions falling outside normal commercial standards.

This category includes those end-users or groups of end-users which would not be served by a commercial operator which did not have an obligation to provide universal service.

The calculation of the net cost of specific aspects of universal service obligations is to be made separately and so as to avoid the double counting of any direct or indirect benefits and costs. The overall net cost of universal service obligations to any undertaking is to be calculated as the sum of the net costs arising from the specific components of universal service obligations, taking account of any intangible benefits. The responsibility for verifying the net cost lies with the national regulatory authority.

Part B: Recovery of any net costs of universal service obligations

The recovery or financing of any net costs of universal service obligations requires designated undertakings with universal service obligations to be compensated for the services they provide under non-commercial conditions. Because such a compensation involves financial transfers, Member States are to ensure that these are undertaken in an objective, transparent, non-discriminatory and proportionate manner. This means that the transfers result in the least distortion to competition and to user demand.

In accordance with Article 13(3), a sharing mechanism based on a fund should use a transparent and neutral means for collecting contributions that avoids the danger of a double imposition of contributions falling on both outputs and inputs of undertakings.

The independent body administering the fund is to be responsible for collecting contributions from undertakings which are assessed as liable to contribute to the net cost of universal service obligations in the Member State and is to oversee the transfer of sums due and/or administrative payments to the undertakings entitled to receive payments from the fund.

PROCESS FOR REVIEWING THE SCOPE OF UNIVERSAL SERVICE IN ACCORDANCE WITH ARTICLE 15

In considering whether a review of the scope of universal service obligations should be undertaken, the Commission is to take into consideration the following elements:

- social and market developments in terms of the services used by consumers,
- social and market developments in terms of the availability and choice of services to consumers,
- technological developments in terms of the way services are provided to consumers.

In considering whether the scope of universal service obligations be changed or redefined, the Commission is to take into consideration the following elements:

- are specific services available to and used by a majority of consumers and does the lack of availability or non-use by a minority of consumers result in social exclusion, and
- does the availability and use of specific services convey a general net benefit to all consumers such that public intervention is warranted in circumstances where the specific services are not provided to the public under normal commercial circumstances?

INTEROPERABILITY OF DIGITAL CONSUMER EQUIPMENT REFERRED TO IN ARTICLE 24

1. *Common scrambling algorithm and free-to-air reception*

All consumer equipment intended for the reception of conventional digital television signals (i.e. broadcasting via terrestrial, cable or satellite transmission which is primarily intended for fixed reception, such as DVB-T, DVB-C or DVB-S), for sale or rent or otherwise made available in the Community, capable of descrambling digital television signals, is to possess the capability to:

- allow the descrambling of such signals according to a common European scrambling algorithm as administered by a recognised European standards organisation, currently ETSI;
- display signals that have been transmitted in the clear provided that, in the event that such equipment is rented, the renter is in compliance with the relevant rental agreement.

2. *Interoperability for analogue and digital television sets*

Any analogue television set with an integral screen of visible diagonal greater than 42 cm which is put on the market for sale or rent in the Community is to be fitted with at least one open interface socket, as standardised by a recognised European standards organisation, e.g. as given in the Cenelec EN 50 049-1:1997 standard, permitting simple connection of peripherals, especially additional decoders and digital receivers.

Any digital television set with an integral screen of visible diagonal greater than 30 cm which is put on the market for sale or rent in the Community is to be fitted with at least one open interface socket (either standardised by, or conforming to a standard adopted by, a recognised European standards organisation, or conforming to an industry-wide specification) e.g. the DVB common interface connector, permitting simple connection of peripherals, and able to pass all the elements of a digital television signal, including information relating to interactive and conditionally accessed services.

ANNEX VII

[deleted by Directive 2009/136/EC]

DIRECTIVE 2002/58/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 12 July 2002

concerning the processing of personal data and the protection of privacy in the electronic communications sector

(Directive on privacy and electronic communications) (*)

as amended by Directive 2006/24/EC () and Directive 2009/136/EC (***)
(unofficially consolidated version)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the Economic and Social Committee ⁽²⁾,

Having consulted the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽³⁾,

Whereas:

- (1) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ⁽⁴⁾ requires Member States to ensure the rights and freedoms of natural persons with regard to the processing of personal data, and in particular their right to privacy, in order to ensure the free flow of personal data in the Community.
- (2) This Directive seeks to respect the fundamental rights and observes the principles recognised in particular by the Charter of fundamental rights of the European Union. In particular, this Directive seeks to ensure full respect for the rights set out in Articles 7 and 8 of that Charter.
- (3) Confidentiality of communications is guaranteed in accordance with the international instruments relating to human rights, in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the constitutions of the Member States.
- (4) Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the

telecommunications sector ⁽⁵⁾ translated the principles set out in Directive 95/46/EC into specific rules for the telecommunications sector. Directive 97/66/EC has to be adapted to developments in the markets and technologies for electronic communications services in order to provide an equal level of protection of personal data and privacy for users of publicly available electronic communications services, regardless of the technologies used. That Directive should therefore be repealed and replaced by this Directive.

- (5) New advanced digital technologies are currently being introduced in public communications networks in the Community, which give rise to specific requirements concerning the protection of personal data and privacy of the user. The development of the information society is characterised by the introduction of new electronic communications services. Access to digital mobile networks has become available and affordable for a large public. These digital networks have large capacities and possibilities for processing personal data. The successful cross-border development of these services is partly dependent on the confidence of users that their privacy will not be at risk.
- (6) The Internet is overturning traditional market structures by providing a common, global infrastructure for the delivery of a wide range of electronic communications services. Publicly available electronic communications services over the Internet open new possibilities for users but also new risks for their personal data and privacy.
- (7) In the case of public communications networks, specific legal, regulatory and technical provisions should be made in order to protect fundamental rights and freedoms of natural persons and legitimate interests of legal persons, in particular with regard to the increasing capacity for automated storage and processing of data relating to subscribers and users.
- (8) Legal, regulatory and technical provisions adopted by the Member States concerning the protection of personal data, privacy and the legitimate interest of legal persons, in the electronic communication sector, should be harmonised in order to avoid obstacles to the internal market for electronic communication in accordance with Article 14 of the Treaty. Harmonisation should be limited to requirements necessary to guarantee that the promotion and development of new electronic communications services and networks between Member States are not hindered.

(*) OJ L 201, 31.07.2002, p. 37.

(**) OJ L 105, 13.4.2006, p. 54.

(***) OJ L 337, 18.12.2009, p. 11.

⁽¹⁾ OJ C 365 E, 19.12.2000, p. 223.

⁽²⁾ OJ C 123, 25.4.2001, p. 53.

⁽³⁾ Opinion of the European Parliament of 13 November 2001 (not yet published in the Official Journal), Council Common Position of 28 January 2002 (OJ C 113 E, 14.5.2002, p. 39) and Decision of the European Parliament of 30 May 2002 (not yet published in the Official Journal). Council Decision of 25 June 2002.

⁽⁴⁾ OJ L 281, 23.11.1995, p. 31.

⁽⁵⁾ OJ L 24, 30.1.1998, p. 1.

- (9) The Member States, providers and users concerned, together with the competent Community bodies, should cooperate in introducing and developing the relevant technologies where this is necessary to apply the guarantees provided for by this Directive and taking particular account of the objectives of minimising the processing of personal data and of using anonymous or pseudonymous data where possible.
- (10) In the electronic communications sector, Directive 95/46/EC applies in particular to all matters concerning protection of fundamental rights and freedoms, which are not specifically covered by the provisions of this Directive, including the obligations on the controller and the rights of individuals. Directive 95/46/EC applies to non-public communications services.
- (11) Like Directive 95/46/EC, this Directive does not address issues of protection of fundamental rights and freedoms related to activities which are not governed by Community law. Therefore it does not alter the existing balance between the individual's right to privacy and the possibility for Member States to take the measures referred to in Article 15(1) of this Directive, necessary for the protection of public security, defence, State security (including the economic well-being of the State when the activities relate to State security matters) and the enforcement of criminal law. Consequently, this Directive does not affect the ability of Member States to carry out lawful interception of electronic communications, or take other measures, if necessary for any of these purposes and in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the rulings of the European Court of Human Rights. Such measures must be appropriate, strictly proportionate to the intended purpose and necessary within a democratic society and should be subject to adequate safeguards in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms.
- (12) Subscribers to a publicly available electronic communications service may be natural or legal persons. By supplementing Directive 95/46/EC, this Directive is aimed at protecting the fundamental rights of natural persons and particularly their right to privacy, as well as the legitimate interests of legal persons. This Directive does not entail an obligation for Member States to extend the application of Directive 95/46/EC to the protection of the legitimate interests of legal persons, which is ensured within the framework of the applicable Community and national legislation.
- (13) The contractual relation between a subscriber and a service provider may entail a periodic or a one-off payment for the service provided or to be provided. Prepaid cards are also considered as a contract.
- (14) Location data may refer to the latitude, longitude and altitude of the user's terminal equipment, to the direction of travel, to the level of accuracy of the location information, to the identification of the network cell in which the terminal equipment is located at a certain point in time and to the time the location information was recorded.
- (15) A communication may include any naming, numbering or addressing information provided by the sender of a communication or the user of a connection to carry out the communication. Traffic data may include any translation of this information by the network over which the communication is transmitted for the purpose of carrying out the transmission. Traffic data may, *inter alia*, consist of data referring to the routing, duration, time or volume of a communication, to the protocol used, to the location of the terminal equipment of the sender or recipient, to the network on which the communication originates or terminates, to the beginning, end or duration of a connection. They may also consist of the format in which the communication is conveyed by the network.
- (16) Information that is part of a broadcasting service provided over a public communications network is intended for a potentially unlimited audience and does not constitute a communication in the sense of this Directive. However, in cases where the individual subscriber or user receiving such information can be identified, for example with video-on-demand services, the information conveyed is covered within the meaning of a communication for the purposes of this Directive.
- (17) For the purposes of this Directive, consent of a user or subscriber, regardless of whether the latter is a natural or a legal person, should have the same meaning as the data subject's consent as defined and further specified in Directive 95/46/EC. Consent may be given by any appropriate method enabling a freely given specific and informed indication of the user's wishes, including by ticking a box when visiting an Internet website.
- (18) Value added services may, for example, consist of advice on least expensive tariff packages, route guidance, traffic information, weather forecasts and tourist information.
- (19) The application of certain requirements relating to presentation and restriction of calling and connected line identification and to automatic call forwarding to subscriber lines connected to analogue exchanges should not be made mandatory in specific cases where such application would prove to be technically impossible or would require a disproportionate economic effort. It is important for interested parties to be informed of such cases and the Member States should therefore notify them to the Commission.
- (20) Service providers should take appropriate measures to safeguard the security of their services, if necessary in conjunction with the provider of the network, and inform subscribers of any special risks of a breach of the security of the network. Such risks may especially occur for electronic communications services over an open network such as the Internet or analogue mobile telephony. It is particularly important for subscribers and users of such services to be fully informed by their service provider of the existing security risks which lie outside the scope of

possible remedies by the service provider. Service providers who offer publicly available electronic communications services over the Internet should inform users and subscribers of measures they can take to protect the security of their communications for instance by using specific types of software or encryption technologies. The requirement to inform subscribers of particular security risks does not discharge a service provider from the obligation to take, at its own costs, appropriate and immediate measures to remedy any new, unforeseen security risks and restore the normal security level of the service. The provision of information about security risks to the subscriber should be free of charge except for any nominal costs which the subscriber may incur while receiving or collecting the information, for instance by downloading an electronic mail message. Security is appraised in the light of Article 17 of Directive 95/46/EC.

- (21) Measures should be taken to prevent unauthorised access to communications in order to protect the confidentiality of communications, including both the contents and any data related to such communications, by means of public communications networks and publicly available electronic communications services. National legislation in some Member States only prohibits intentional unauthorised access to communications.
- (22) The prohibition of storage of communications and the related traffic data by persons other than the users or without their consent is not intended to prohibit any automatic, intermediate and transient storage of this information in so far as this takes place for the sole purpose of carrying out the transmission in the electronic communications network and provided that the information is not stored for any period longer than is necessary for the transmission and for traffic management purposes, and that during the period of storage the confidentiality remains guaranteed. Where this is necessary for making more efficient the onward transmission of any publicly accessible information to other recipients of the service upon their request, this Directive should not prevent such information from being further stored, provided that this information would in any case be accessible to the public without restriction and that any data referring to the individual subscribers or users requesting such information are erased.
- (23) Confidentiality of communications should also be ensured in the course of lawful business practice. Where necessary and legally authorised, communications can be recorded for the purpose of providing evidence of a commercial transaction. Directive 95/46/EC applies to such processing. Parties to the communications should be informed prior to the recording about the recording, its purpose and the duration of its storage. The recorded communication should be erased as soon as possible and in any case at the latest by the end of the period during which the transaction can be lawfully challenged.
- (24) Terminal equipment of users of electronic communications networks and any information stored on such equipment are part of the private sphere of the users requiring protection under the

European Convention for the Protection of Human Rights and Fundamental Freedoms. So-called spyware, web bugs, hidden identifiers and other similar devices can enter the user's terminal without their knowledge in order to gain access to information, to store hidden information or to trace the activities of the user and may seriously intrude upon the privacy of these users. The use of such devices should be allowed only for legitimate purposes, with the knowledge of the users concerned.

- (25) However, such devices, for instance so-called "cookies", can be a legitimate and useful tool, for example, in analysing the effectiveness of website design and advertising, and in verifying the identity of users engaged in on-line transactions. Where such devices, for instance cookies, are intended for a legitimate purpose, such as to facilitate the provision of information society services, their use should be allowed on condition that users are provided with clear and precise information in accordance with Directive 95/46/EC about the purposes of cookies or similar devices so as to ensure that users are made aware of information being placed on the terminal equipment they are using. Users should have the opportunity to refuse to have a cookie or similar device stored on their terminal equipment. This is particularly important where users other than the original user have access to the terminal equipment and thereby to any data containing privacy-sensitive information stored on such equipment. Information and the right to refuse may be offered once for the use of various devices to be installed on the user's terminal equipment during the same connection and also covering any further use that may be made of those devices during subsequent connections. The methods for giving information, offering a right to refuse or requesting consent should be made as user-friendly as possible. Access to specific website content may still be made conditional on the well-informed acceptance of a cookie or similar device, if it is used for a legitimate purpose.
- (26) The data relating to subscribers processed within electronic communications networks to establish connections and to transmit information contain information on the private life of natural persons and concern the right to respect for their correspondence or concern the legitimate interests of legal persons. Such data may only be stored to the extent that is necessary for the provision of the service for the purpose of billing and for interconnection payments, and for a limited time. Any further processing of such data which the provider of the publicly available electronic communications services may want to perform, for the marketing of electronic communications services or for the provision of value added services, may only be allowed if the subscriber has agreed to this on the basis of accurate and full information given by the provider of the publicly available electronic communications services about the types of further processing it intends to perform and about the subscriber's right not to give or to withdraw his/her consent to such processing. Traffic data used for marketing communications services or for the provision of value added services should also be erased or made anonymous after the provision of the

- service. Service providers should always keep subscribers informed of the types of data they are processing and the purposes and duration for which this is done.
- (27) The exact moment of the completion of the transmission of a communication, after which traffic data should be erased except for billing purposes, may depend on the type of electronic communications service that is provided. For instance for a voice telephony call the transmission will be completed as soon as either of the users terminates the connection. For electronic mail the transmission is completed as soon as the addressee collects the message, typically from the server of his service provider.
- (28) The obligation to erase traffic data or to make such data anonymous when it is no longer needed for the purpose of the transmission of a communication does not conflict with such procedures on the Internet as the caching in the domain name system of IP addresses or the caching of IP addresses to physical address bindings or the use of log-in information to control the right of access to networks or services.
- (29) The service provider may process traffic data relating to subscribers and users where necessary in individual cases in order to detect technical failure or errors in the transmission of communications. Traffic data necessary for billing purposes may also be processed by the provider in order to detect and stop fraud consisting of unpaid use of the electronic communications service.
- (30) Systems for the provision of electronic communications networks and services should be designed to limit the amount of personal data necessary to a strict minimum. Any activities related to the provision of the electronic communications service that go beyond the transmission of a communication and the billing thereof should be based on aggregated, traffic data that cannot be related to subscribers or users. Where such activities cannot be based on aggregated data, they should be considered as value added services for which the consent of the subscriber is required.
- (31) Whether the consent to be obtained for the processing of personal data with a view to providing a particular value added service should be that of the user or of the subscriber, will depend on the data to be processed and on the type of service to be provided and on whether it is technically, procedurally and contractually possible to distinguish the individual using an electronic communications service from the legal or natural person having subscribed to it.
- (32) Where the provider of an electronic communications service or of a value added service subcontracts the processing of personal data necessary for the provision of these services to another entity, such subcontracting and subsequent data processing should be in full compliance with the requirements regarding controllers and processors of personal data as set out in Directive 95/46/EC. Where the provision of a value added service requires that traffic or location data are forwarded from an electronic communications service provider to a provider of value added services, the subscribers or users to whom the data are related should also be fully informed of this forwarding before giving their consent for the processing of the data.
- (33) The introduction of itemised bills has improved the possibilities for the subscriber to check the accuracy of the fees charged by the service provider but, at the same time, it may jeopardise the privacy of the users of publicly available electronic communications services. Therefore, in order to preserve the privacy of the user, Member States should encourage the development of electronic communication service options such as alternative payment facilities which allow anonymous or strictly private access to publicly available electronic communications services, for example calling cards and facilities for payment by credit card. To the same end, Member States may ask the operators to offer their subscribers a different type of detailed bill in which a certain number of digits of the called number have been deleted.
- (34) It is necessary, as regards calling line identification, to protect the right of the calling party to withhold the presentation of the identification of the line from which the call is being made and the right of the called party to reject calls from unidentified lines. There is justification for overriding the elimination of calling line identification presentation in specific cases. Certain subscribers, in particular help lines and similar organisations, have an interest in guaranteeing the anonymity of their callers. It is necessary, as regards connected line identification, to protect the right and the legitimate interest of the called party to withhold the presentation of the identification of the line to which the calling party is actually connected, in particular in the case of forwarded calls. The providers of publicly available electronic communications services should inform their subscribers of the existence of calling and connected line identification in the network and of all services which are offered on the basis of calling and connected line identification as well as the privacy options which are available. This will allow the subscribers to make an informed choice about the privacy facilities they may want to use. The privacy options which are offered on a per-line basis do not necessarily have to be available as an automatic network service but may be obtainable through a simple request to the provider of the publicly available electronic communications service.
- (35) In digital mobile networks, location data giving the geographic position of the terminal equipment of the mobile user are processed to enable the transmission of communications. Such data are traffic data covered by Article 6 of this Directive. However, in addition, digital mobile networks may have the capacity to process location data which are more precise than is necessary for the transmission of communications and which are used for the provision of value added services such as services providing individualised traffic information and guidance to drivers. The processing of such data for value added services should only be allowed where subscribers have given their consent. Even in cases where

subscribers have given their consent, they should have a simple means to temporarily deny the processing of location data, free of charge.

- (36) Member States may restrict the users' and subscribers' rights to privacy with regard to calling line identification where this is necessary to trace nuisance calls and with regard to calling line identification and location data where this is necessary to allow emergency services to carry out their tasks as effectively as possible. For these purposes, Member States may adopt specific provisions to entitle providers of electronic communications services to provide access to calling line identification and location data without the prior consent of the users or subscribers concerned.
- (37) Safeguards should be provided for subscribers against the nuisance which may be caused by automatic call forwarding by others. Moreover, in such cases, it must be possible for subscribers to stop the forwarded calls being passed on to their terminals by simple request to the provider of the publicly available electronic communications service.
- (38) Directories of subscribers to electronic communications services are widely distributed and public. The right to privacy of natural persons and the legitimate interest of legal persons require that subscribers are able to determine whether their personal data are published in a directory and if so, which. Providers of public directories should inform the subscribers to be included in such directories of the purposes of the directory and of any particular usage which may be made of electronic versions of public directories especially through search functions embedded in the software, such as reverse search functions enabling users of the directory to discover the name and address of the subscriber on the basis of a telephone number only.
- (39) The obligation to inform subscribers of the purpose(s) of public directories in which their personal data are to be included should be imposed on the party collecting the data for such inclusion. Where the data may be transmitted to one or more third parties, the subscriber should be informed of this possibility and of the recipient or the categories of possible recipients. Any transmission should be subject to the condition that the data may not be used for other purposes than those for which they were collected. If the party collecting the data from the subscriber or any third party to whom the data have been transmitted wishes to use the data for an additional purpose, the renewed consent of the subscriber is to be obtained either by the initial party collecting the data or by the third party to whom the data have been transmitted.
- (40) Safeguards should be provided for subscribers against intrusion of their privacy by unsolicited communications for direct marketing purposes in particular by means of automated calling machines, telefaxes, and e-mails, including SMS messages. These forms of unsolicited commercial communications may on the one hand be relatively easy and cheap to send and on the other may impose a burden and/or cost on the recipient.

Moreover, in some cases their volume may also cause difficulties for electronic communications networks and terminal equipment. For such forms of unsolicited communications for direct marketing, it is justified to require that prior explicit consent of the recipients is obtained before such communications are addressed to them. The single market requires a harmonised approach to ensure simple, Community-wide rules for businesses and users.

- (41) Within the context of an existing customer relationship, it is reasonable to allow the use of electronic contact details for the offering of similar products or services, but only by the same company that has obtained the electronic contact details in accordance with Directive 95/46/EC. When electronic contact details are obtained, the customer should be informed about their further use for direct marketing in a clear and distinct manner, and be given the opportunity to refuse such usage. This opportunity should continue to be offered with each subsequent direct marketing message, free of charge, except for any costs for the transmission of this refusal.
- (42) Other forms of direct marketing that are more costly for the sender and impose no financial costs on subscribers and users, such as person-to-person voice telephony calls, may justify the maintenance of a system giving subscribers or users the possibility to indicate that they do not want to receive such calls. Nevertheless, in order not to decrease existing levels of privacy protection, Member States should be entitled to uphold national systems, only allowing such calls to subscribers and users who have given their prior consent.
- (43) To facilitate effective enforcement of Community rules on unsolicited messages for direct marketing, it is necessary to prohibit the use of false identities or false return addresses or numbers while sending unsolicited messages for direct marketing purposes.
- (44) Certain electronic mail systems allow subscribers to view the sender and subject line of an electronic mail, and also to delete the message, without having to download the rest of the electronic mail's content or any attachments, thereby reducing costs which could arise from downloading unsolicited electronic mails or attachments. These arrangements may continue to be useful in certain cases as an additional tool to the general obligations established in this Directive.
- (45) This Directive is without prejudice to the arrangements which Member States make to protect the legitimate interests of legal persons with regard to unsolicited communications for direct marketing purposes. Where Member States establish an opt-out register for such communications to legal persons, mostly business users, the provisions of Article 7 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic

- commerce, in the internal market (Directive on electronic commerce) ⁽⁶⁾ are fully applicable.
- (46) The functionalities for the provision of electronic communications services may be integrated in the network or in any part of the terminal equipment of the user, including the software. The protection of the personal data and the privacy of the user of publicly available electronic communications services should be independent of the configuration of the various components necessary to provide the service and of the distribution of the necessary functionalities between these components. Directive 95/46/EC covers any form of processing of personal data regardless of the technology used. The existence of specific rules for electronic communications services alongside general rules for other components necessary for the provision of such services may not facilitate the protection of personal data and privacy in a technologically neutral way. It may therefore be necessary to adopt measures requiring manufacturers of certain types of equipment used for electronic communications services to construct their product in such a way as to incorporate safeguards to ensure that the personal data and privacy of the user and subscriber are protected. The adoption of such measures in accordance with Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity ⁽⁷⁾ will ensure that the introduction of technical features of electronic communication equipment including software for data protection purposes is harmonised in order to be compatible with the implementation of the internal market.
- (47) Where the rights of the users and subscribers are not respected, national legislation should provide for judicial remedies. Penalties should be imposed on any person, whether governed by private or public law, who fails to comply with the national measures taken under this Directive.
- (48) It is useful, in the field of application of this Directive, to draw on the experience of the Working Party on the Protection of Individuals with regard to the Processing of Personal Data composed of representatives of the supervisory authorities of the Member States, set up by Article 29 of Directive 95/46/EC.
- (49) To facilitate compliance with the provisions of this Directive, certain specific arrangements are needed for processing of data already under way on the date that national implementing legislation pursuant to this Directive enters into force,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Scope and aim

1. This Directive provides for the harmonisation of the national provisions required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy and confidentiality, with

⁽⁶⁾ OJ L 178, 17.7.2000, p. 1.

⁽⁷⁾ OJ L 91, 7.4.1999, p. 10.

respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and of electronic communication equipment and services in the Community.

2. The provisions of this Directive particularise and complement Directive 95/46/EC for the purposes mentioned in paragraph 1. Moreover, they provide for protection of the legitimate interests of subscribers who are legal persons.

3. This Directive shall not apply to activities which fall outside the scope of the Treaty establishing the European Community, such as those covered by Titles V and VI of the Treaty on European Union, and in any case to activities concerning public security, defence, State security (including the economic well-being of the State when the activities relate to State security matters) and the activities of the State in areas of criminal law.

Article 2

Definitions

Save as otherwise provided, the definitions in Directive 95/46/EC and in Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) ⁽⁸⁾ shall apply.

The following definitions shall also apply:

- (a) 'user' means any natural person using a publicly available electronic communications service, for private or business purposes, without necessarily having subscribed to this service;
- (b) 'traffic data' means any data processed for the purpose of the conveyance of a communication on an electronic communications network or for the billing thereof;
- (c) 'location data' means any data processed in an electronic communications network or by an electronic communications service, indicating the geographic position of the terminal equipment of a user of a publicly available electronic communications service;
- (d) 'communication' means any information exchanged or conveyed between a finite number of parties by means of a publicly available electronic communications service. This does not include any information conveyed as part of a broadcasting service to the public over an electronic communications network except to the extent that the information can be related to the identifiable subscriber or user receiving the information;
- (e) *[deleted by Directive 2009/136/EC]*
- (f) 'consent' by a user or subscriber corresponds to the data subject's consent in Directive 95/46/EC;
- (g) 'value added service' means any service which requires the processing of traffic data or location data other than traffic data beyond what is

⁽⁸⁾ OJ L 108, 24.4.2002, p. 33.

- necessary for the transmission of a communication or the billing thereof;
- (h) 'electronic mail' means any text, voice, sound or image message sent over a public communications network which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient.
- (i) 'personal data breach' means a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed in connection with the provision of a publicly available electronic communications service in the Community.

Article 3

Services concerned

This Directive shall apply to the processing of personal data in connection with the provision of publicly available electronic communications services in public communications networks in the Community, including public communications networks supporting data collection and identification devices.

Article 4

Security of processing

1. The provider of a publicly available electronic communications service must take appropriate technical and organisational measures to safeguard security of its services, if necessary in conjunction with the provider of the public communications network with respect to network security. Having regard to the state of the art and the cost of their implementation, these measures shall ensure a level of security appropriate to the risk presented.

1a. Without prejudice to Directive 95/46/EC, the measures referred to in paragraph 1 shall at least:

- ensure that personal data can be accessed only by authorised personnel for legally authorised purposes,
- protect personal data stored or transmitted against accidental or unlawful destruction, accidental loss or alteration, and unauthorised or unlawful storage, processing, access or disclosure, and
- ensure the implementation of a security policy with respect to the processing of personal data,

Relevant national authorities shall be able to audit the measures taken by providers of publicly available electronic communication services and to issue recommendations about best practices concerning the level of security which those measures should achieve.

2. In case of a particular risk of a breach of the security of the network, the provider of a publicly available electronic communications service must inform the subscribers concerning such risk and, where the risk lies outside the scope of the measures to be taken by the service provider, of any possible remedies, including an indication of the likely costs involved.

3. In the case of a personal data breach, the provider of publicly available electronic communications services shall, without undue delay, notify the personal data breach to the competent national authority.

When the personal data breach is likely to adversely affect the personal data or privacy of a subscriber or individual, the provider shall also notify the subscriber or individual of the breach without undue delay.

Notification of a personal data breach to a subscriber or individual concerned shall not be required if the provider has demonstrated to the satisfaction of the competent authority that it has implemented appropriate technological protection measures, and that those measures were applied to the data concerned by the security breach. Such technological protection measures shall render the data unintelligible to any person who is not authorised to access it.

Without prejudice to the provider's obligation to notify subscribers and individuals concerned, if the provider has not already notified the subscriber or individual of the personal data breach, the competent national authority, having considered the likely adverse effects of the breach, may require it to do so.

The notification to the subscriber or individual shall at least describe the nature of the personal data breach and the contact points where more information can be obtained, and shall recommend measures to mitigate the possible adverse effects of the personal data breach. The notification to the competent national authority shall, in addition, describe the consequences of, and the measures proposed or taken by the provider to address, the personal data breach.

4. Subject to any technical implementing measures adopted under paragraph 5, the competent national authorities may adopt guidelines and, where necessary, issue instructions concerning the circumstances in which providers are required to notify personal data breaches, the format of such notification and the manner in which the notification is to be made. They shall also be able to audit whether providers have complied with their notification obligations under this paragraph, and shall impose appropriate sanctions in the event of a failure to do so.

Providers shall maintain an inventory of personal data breaches comprising the facts surrounding the breach, its effects and the remedial action taken which shall be sufficient to enable the competent national authorities to verify compliance with the provisions of paragraph 3. The inventory shall only include the information necessary for this purpose.

5. In order to ensure consistency in implementation of the measures referred to in paragraphs 2, 3 and 4, the Commission may, following consultation with the European Network and Information Security Agency (ENISA), the Working Party on the Protection of Individuals with regard to the Processing of Personal Data established by Article 29 of Directive 95/46/EC and the European Data Protection Supervisor, adopt technical implementing measures concerning the circumstances, format and procedures applicable to the information and notification requirements referred to in this Article. When adopting such measures, the Commission shall involve all relevant stakeholders particularly in order to be informed of the best available technical and economic means of implementation of this Article.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 14a(2).

Article 5

Confidentiality of the communications

1. Member States shall ensure the confidentiality of communications and the related traffic data by means of a public communications network and publicly available electronic communications services, through national legislation. In particular, they shall prohibit listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users, without the consent of the users concerned, except when legally authorised to do so in accordance with Article 15(1). This paragraph shall not prevent technical storage which is necessary for the conveyance of a communication without prejudice to the principle of confidentiality.

2. Paragraph 1 shall not affect any legally authorised recording of communications and the related traffic data when carried out in the course of lawful business practice for the purpose of providing evidence of a commercial transaction or of any other business communication.

3. Member States shall ensure that the storing of information, or the gaining of access to information already stored, in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned has given his or her consent, having been provided with clear and comprehensive information, in accordance with Directive 95/46/EC, *inter alia* about the purposes of the processing. This shall not prevent any technical storage or access for the sole purpose of carrying out the transmission of a communication over an electronic communications network, or as strictly necessary in order for the provider of an information society service explicitly requested by the subscriber or user to provide the service.

Article 6

Traffic data

1. Traffic data relating to subscribers and users processed and stored by the provider of a public communications network or publicly available electronic communications service must be erased or made anonymous when it is no longer needed for the purpose of the transmission of a communication without prejudice to paragraphs 2, 3 and 5 of this Article and Article 15(1).

2. Traffic data necessary for the purposes of subscriber billing and interconnection payments may be processed. Such processing is permissible only up to the end of the period during which the bill may lawfully be challenged or payment pursued.

3. For the purpose of marketing electronic communications services or for the provision of value added services, the provider of a publicly available electronic communications service may process the data referred to in paragraph 1 to the extent and for the duration necessary for such services or marketing, if the subscriber or user to whom the data relate has given his or her prior consent. Users or

subscribers shall be given the possibility to withdraw their consent for the processing of traffic data at any time.

4. The service provider must inform the subscriber or user of the types of traffic data which are processed and of the duration of such processing for the purposes mentioned in paragraph 2 and, prior to obtaining consent, for the purposes mentioned in paragraph 3.

5. Processing of traffic data, in accordance with paragraphs 1, 2, 3 and 4, must be restricted to persons acting under the authority of providers of the public communications networks and publicly available electronic communications services handling billing or traffic management, customer enquiries, fraud detection, marketing electronic communications services or providing a value added service, and must be restricted to what is necessary for the purposes of such activities.

6. Paragraphs 1, 2, 3 and 5 shall apply without prejudice to the possibility for competent bodies to be informed of traffic data in conformity with applicable legislation with a view to settling disputes, in particular interconnection or billing disputes.

Article 7

Itemised billing

1. Subscribers shall have the right to receive non-itemised bills.

2. Member States shall apply national provisions in order to reconcile the rights of subscribers receiving itemised bills with the right to privacy of calling users and called subscribers, for example by ensuring that sufficient alternative privacy enhancing methods of communications or payments are available to such users and subscribers.

Article 8

Presentation and restriction of calling and connected line identification

1. Where presentation of calling line identification is offered, the service provider must offer the calling user the possibility, using a simple means and free of charge, of preventing the presentation of the calling line identification on a per-call basis. The calling subscriber must have this possibility on a per-line basis.

2. Where presentation of calling line identification is offered, the service provider must offer the called subscriber the possibility, using a simple means and free of charge for reasonable use of this function, of preventing the presentation of the calling line identification of incoming calls.

3. Where presentation of calling line identification is offered and where the calling line identification is presented prior to the call being established, the service provider must offer the called subscriber the possibility, using a simple means, of rejecting incoming calls where the presentation of the calling line identification has been prevented by the calling user or subscriber.

4. Where presentation of connected line identification is offered, the service provider must offer the called subscriber the possibility, using a simple means and free of charge, of preventing the presentation of the connected line identification to the calling user.

5. Paragraph 1 shall also apply with regard to calls to third countries originating in the Community. Paragraphs 2, 3 and 4 shall also apply to incoming calls originating in third countries.

6. Member States shall ensure that where presentation of calling and/or connected line identification is offered, the providers of publicly available electronic communications services inform the public thereof and of the possibilities set out in paragraphs 1, 2, 3 and 4.

Article 9

Location data other than traffic data

1. Where location data other than traffic data, relating to users or subscribers of public communications networks or publicly available electronic communications services, can be processed, such data may only be processed when they are made anonymous, or with the consent of the users or subscribers to the extent and for the duration necessary for the provision of a value added service. The service provider must inform the users or subscribers, prior to obtaining their consent, of the type of location data other than traffic data which will be processed, of the purposes and duration of the processing and whether the data will be transmitted to a third party for the purpose of providing the value added service. Users or subscribers shall be given the possibility to withdraw their consent for the processing of location data other than traffic data at any time.

2. Where consent of the users or subscribers has been obtained for the processing of location data other than traffic data, the user or subscriber must continue to have the possibility, using a simple means and free of charge, of temporarily refusing the processing of such data for each connection to the network or for each transmission of a communication.

3. Processing of location data other than traffic data in accordance with paragraphs 1 and 2 must be restricted to persons acting under the authority of the provider of the public communications network or publicly available communications service or of the third party providing the value added service, and must be restricted to what is necessary for the purposes of providing the value added service.

Article 10

Exceptions

Member States shall ensure that there are transparent procedures governing the way in which a provider of a public communications network and/or a publicly available electronic communications service may override:

- (a) the elimination of the presentation of calling line identification, on a temporary basis, upon application of a subscriber requesting the tracing of malicious or nuisance calls. In this case, in accordance with national law, the data containing the identification of the calling subscriber will be stored and be made available by the provider of a public communications network and/or publicly available electronic communications service;
- (b) the elimination of the presentation of calling line identification and the temporary denial or absence of consent of a subscriber or user for the

processing of location data, on a per-line basis for organisations dealing with emergency calls and recognised as such by a Member State, including law enforcement agencies, ambulance services and fire brigades, for the purpose of responding to such calls.

Article 11

Automatic call forwarding

Member States shall ensure that any subscriber has the possibility, using a simple means and free of charge, of stopping automatic call forwarding by a third party to the subscriber's terminal.

Article 12

Directories of subscribers

1. Member States shall ensure that subscribers are informed, free of charge and before they are included in the directory, about the purpose(s) of a printed or electronic directory of subscribers available to the public or obtainable through directory enquiry services, in which their personal data can be included and of any further usage possibilities based on search functions embedded in electronic versions of the directory.

2. Member States shall ensure that subscribers are given the opportunity to determine whether their personal data are included in a public directory, and if so, which, to the extent that such data are relevant for the purpose of the directory as determined by the provider of the directory, and to verify, correct or withdraw such data. Not being included in a public subscriber directory, verifying, correcting or withdrawing personal data from it shall be free of charge.

3. Member States may require that for any purpose of a public directory other than the search of contact details of persons on the basis of their name and, where necessary, a minimum of other identifiers, additional consent be asked of the subscribers.

4. Paragraphs 1 and 2 shall apply to subscribers who are natural persons. Member States shall also ensure, in the framework of Community law and applicable national legislation, that the legitimate interests of subscribers other than natural persons with regard to their entry in public directories are sufficiently protected.

Article 13

Unsolicited communications

1. The use of automated calling and communication systems without human intervention (automatic calling machines), facsimile machines (fax) or electronic mail for the purposes of direct marketing may be allowed only in respect of subscribers or users who have given their prior consent.

2. Notwithstanding paragraph 1, where a natural or legal person obtains from its customers their electronic contact details for electronic mail, in the context of the sale of a product or a service, in accordance with Directive 95/46/EC, the same natural or legal person may use these electronic contact details for direct marketing of its own

similar products or services provided that customers clearly and distinctly are given the opportunity to object, free of charge and in an easy manner, to such use of electronic contact details at the time of their collection and on the occasion of each message in case the customer has not initially refused such use.

3. Member States shall take appropriate measures to ensure that unsolicited communications for the purposes of direct marketing, in cases other than those referred to in paragraphs 1 and 2, are not allowed either without the consent of the subscribers or users concerned or in respect of subscribers or users who do not wish to receive these communications, the choice between these options to be determined by national legislation, taking into account that both options must be free of charge for the subscriber or user.

4. In any event, the practice of sending electronic mail for the purposes of direct marketing which disguise or conceal the identity of the sender on whose behalf the communication is made, which contravene Article 6 of Directive 2000/31/EC, which do not have a valid address to which the recipient may send a request that such communications cease or which encourage recipients to visit websites that contravene that Article shall be prohibited.

5. Paragraphs 1 and 3 shall apply to subscribers who are natural persons. Member States shall also ensure, in the framework of Community law and applicable national legislation, that the legitimate interests of subscribers other than natural persons with regard to unsolicited communications are sufficiently protected.

6. Without prejudice to any administrative remedy for which provision may be made, inter alia, under Article 15a(2), Member States shall ensure that any natural or legal person adversely affected by infringements of national provisions adopted pursuant to this Article and therefore having a legitimate interest in the cessation or prohibition of such infringements, including an electronic communications service provider protecting its legitimate business interests, may bring legal proceedings in respect of such infringements. Member States may also lay down specific rules on penalties applicable to providers of electronic communications services which by their negligence contribute to infringements of national provisions adopted pursuant to this Article.

Article 14

Technical features and standardisation

1. In implementing the provisions of this Directive, Member States shall ensure, subject to paragraphs 2 and 3, that no mandatory requirements for specific technical features are imposed on terminal or other electronic communication equipment which could impede the placing of equipment on the market and the free circulation of such equipment in and between Member States.

2. Where provisions of this Directive can be implemented only by requiring specific technical features in electronic communications networks, Member States shall inform the Commission in accordance with the procedure provided for by Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical

standards and regulations and of rules on information society services⁽⁹⁾.

3. Where required, measures may be adopted to ensure that terminal equipment is constructed in a way that is compatible with the right of users to protect and control the use of their personal data, in accordance with Directive 1999/5/EC and Council Decision 87/95/EEC of 22 December 1986 on standardisation in the field of information technology and communications⁽¹⁰⁾.

Article 14a

Committee procedure

1. The Commission shall be assisted by the Communications Committee established by Article 22 of Directive 2002/21/EC (Framework Directive).

2. Where reference is made to this paragraph, Article 5a(1) to (4) and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

3. Where reference is made to this paragraph, Article 5a(1), (2), (4) and (6) and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

Article 15

Application of certain provisions of Directive 95/46/EC

1. Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6, Article 8(1), (2), (3) and (4), and Article 9 of this Directive when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article 13(1) of Directive 95/46/EC. To this end, Member States may, inter alia, adopt legislative measures providing for the retention of data for a limited period justified on the grounds laid down in this paragraph. All the measures referred to in this paragraph shall be in accordance with the general principles of Community law, including those referred to in Article 6(1) and (2) of the Treaty on European Union.

1a. Paragraph 1 shall not apply to data specifically required by Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks^(*) to be retained for the purposes referred to in Article 1(1) of that Directive.

1b. Providers shall establish internal procedures for responding to requests for access to users' personal data based on national provisions adopted pursuant to paragraph 1. They shall provide the competent national

⁽⁹⁾ OJ L 204, 21.7.1998, p. 37. Directive as amended by Directive 98/48/EC (OJ L 217, 5.8.1998, p. 18).

⁽¹⁰⁾ OJ L 36, 7.2.1987, p. 31. Decision as last amended by the 1994 Act of Accession.

^(*) OJ L 105, 13.4.2006, p. 54.

authority, on demand, with information about those procedures, the number of requests received, the legal justification invoked and their response.

2. The provisions of Chapter III on judicial remedies, liability and sanctions of Directive 95/46/EC shall apply with regard to national provisions adopted pursuant to this Directive and with regard to the individual rights derived from this Directive.

3. The Working Party on the Protection of Individuals with regard to the Processing of Personal Data instituted by Article 29 of Directive 95/46/EC shall also carry out the tasks laid down in Article 30 of that Directive with regard to matters covered by this Directive, namely the protection of fundamental rights and freedoms and of legitimate interests in the electronic communications sector.

Article 15a

Implementation and enforcement

1. Member States shall lay down the rules on penalties, including criminal sanctions where appropriate, applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive and may be applied to cover the period of any breach, even where the breach has subsequently been rectified. The Member States shall notify those provisions to the Commission by 25 May 2011 and shall notify it without delay of any subsequent amendment affecting them.

2. Without prejudice to any judicial remedy which might be available, Member States shall ensure that the competent national authority and, where relevant, other national bodies have the power to order the cessation of the infringements referred to in paragraph 1.

3. Member States shall ensure that the competent national authority and, where relevant, other national bodies have the necessary investigative powers and resources, including the power to obtain any relevant information they might need to monitor and enforce national provisions adopted pursuant to this Directive.

4. The relevant national regulatory authorities may adopt measures to ensure effective cross-border cooperation in the enforcement of the national laws adopted pursuant to this Directive and to create harmonised conditions for the provision of services involving cross-border data flows . The national regulatory authorities shall provide the Commission, in good time before adopting any such measures, with a summary of the grounds for action, the envisaged measures and the proposed course of action. The Commission may, having examined such information and consulted ENISA and the Working Party on the Protection of Individuals with regard to the Processing of Personal Data established by Article 29 of Directive 95/46/EC, make comments or recommendations thereupon, in particular to ensure that the envisaged measures do not adversely affect the functioning of the internal market. National regulatory authorities shall take the utmost account of the Commission's comments or recommendations when deciding on the measures.

Article 16

Transitional arrangements

1. Article 12 shall not apply to editions of directories already produced or placed on the market in printed or off-line electronic form before the national provisions adopted pursuant to this Directive enter into force.

2. Where the personal data of subscribers to fixed or mobile public voice telephony services have been included in a public subscriber directory in conformity with the provisions of Directive 95/46/EC and of Article 11 of Directive 97/66/EC before the national provisions adopted in pursuance of this Directive enter into force, the personal data of such subscribers may remain included in this public directory in its printed or electronic versions, including versions with reverse search functions, unless subscribers indicate otherwise, after having received complete information about purposes and options in accordance with Article 12 of this Directive.

Article 17

Transposition

1. Before 31 October 2003 Member States shall bring into force the provisions necessary to comply with this Directive. They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field governed by this Directive and of any subsequent amendments to those provisions.

Article 18

Review

The Commission shall submit to the European Parliament and the Council, not later than three years after the date referred to in Article 17(1), a report on the application of this Directive and its impact on economic operators and consumers, in particular as regards the provisions on unsolicited communications, taking into account the international environment. For this purpose, the Commission may request information from the Member States, which shall be supplied without undue delay. Where appropriate, the Commission shall submit proposals to amend this Directive, taking account of the results of that report, any changes in the sector and any other proposal it may deem necessary in order to improve the effectiveness of this Directive.

Article 19

Repeal

Directive 97/66/EC is hereby repealed with effect from the date referred to in Article 17(1).

References made to the repealed Directive shall be construed as being made to this Directive.

Article 20

Entry into force

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Article 21

Addressees

This Directive is addressed to the Member States.

Done at Brussels, 12 July 2002.

For the European Parliament *For the Council*

The President *The President*

P. Cox T. Pedersen

Regulation (EC) No 544/2009 of the European Parliament and of the Council

of 18 June 2009

amending Regulation (EC) No 717/2007 on roaming on public mobile telephone networks within the Community and Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (*)

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission, Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,

Having consulted the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽²⁾,

Whereas:

- (1) Regulation (EC) No 717/2007 ⁽³⁾ imposed, on an exceptional and temporary basis, limits on the charges that may be levied by mobile operators, at wholesale and retail levels, for the provision of international roaming services for voice calls originating and terminating within the Community. That Regulation also laid down rules aimed at increasing price transparency and improving the provision of information on charges to users of Community-wide roaming services.
- (2) The Commission has carried out a review in accordance with Article 11 of Regulation (EC) No 717/2007, where it was required to evaluate whether the objectives of that Regulation had been achieved, to review developments in wholesale and retail charges for the provision to roaming customers of voice and data communications services, including SMS and MMS, and to include, if appropriate, recommendations regarding the need to regulate those services. In its report to the European Parliament and the Council, contained in its Communication of 23 September 2008 on the outcome of the review of the functioning of Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC, the Commission concluded that it was appropriate to extend the validity of Regulation (EC) No 717/2007 beyond 30 June 2010.
- (3) Furthermore, the Commission found that the scope of Regulation (EC) No 717/2007 should be extended to cover the provision within the Community of SMS and data roaming services. The

special characteristics exhibited by the international roaming markets, which justified the adoption of Regulation (EC) No 717/2007 and the imposition of obligations on mobile operators with regard to the provision of Community-wide voice roaming calls, apply equally to the provision of Community-wide SMS and data roaming services. Like voice roaming services, SMS and data roaming services are not purchased independently at national level but constitute only part of a broader retail package purchased by customers from their home provider, thereby limiting the competitive forces at play. Likewise, because of the cross-border nature of the services concerned, national regulatory authorities which are responsible for safeguarding and promoting the interests of mobile customers resident within their territory are not able to control the behaviour of the operators of the visited network, situated in other Member States.

- (4) Structural problems relating to roaming services should be easier to solve in a genuine single market for mobile communication services, which is not fully in place at present, but which should be the ultimate aim of any regulatory framework.
- (5) For this reason the national regulatory authorities, acting within the European Regulators Group for Electronic Communications Networks and Services (ERG), established by Commission Decision 2002/627/EC ⁽⁴⁾, in its response to the public consultation on the review of Regulation (EC) No 717/2007, once again called on the Commission to act at Community level, both as regards the prolongation of the Regulation and with regard to the regulation of SMS roaming and data roaming services.
- (6) Data on the development of prices for Community-wide voice roaming services since the entry into force of Regulation (EC) No 717/2007, including in particular those collected by national regulatory authorities and reported on a quarterly basis through the medium of the ERG, do not provide sufficient evidence to suggest that competition at the retail or wholesale levels is likely to be sustainable from June 2010 onwards in the absence of regulatory measures. Such data indicates that retail and wholesale prices are clustering at or close to the limits set by Regulation (EC) No 717/2007, with only limited competition below those limits.
- (7) The expiry in June 2010 of the regulatory safeguards which apply to intra-Community voice roaming services at wholesale and retail levels by virtue of Regulation (EC) No 717/2007 would therefore give rise to a significant risk that the underlying lack of competitive pressures in the

(*) OJ L 167, 29.6.2009, p. 12.

⁽¹⁾ Opinion of 15 January 2009 (not yet published in the Official Journal).

⁽²⁾ Opinion of the European Parliament of 22 April 2009 (not yet published in the Official Journal) and Council Decision of 8 June 2009.

⁽³⁾ OJ L 171, 29.6.2007, p. 32.

⁽⁴⁾ OJ L 200, 30.7.2002, p. 38.

- voice roaming market and the incentive for mobile operators to maximise their roaming revenues would result in retail and wholesale prices for intra-Community roaming that do not constitute a reasonable reflection of the underlying costs involved in the provision of the service, thereby jeopardising the objectives of Regulation (EC) No 717/2007. Regulation (EC) No 717/2007 should therefore be extended beyond 30 June 2010 for a period of two years in order to ensure the smooth functioning of the internal market by guaranteeing that consumers continue to benefit from the assurance that they will not be charged an excessive price, in comparison with competitive national prices, when making or receiving a regulated roaming call while at the same time leaving sufficient time for competition to develop.
- (8) The obligations laid down in this Regulation should not distort the competitive conditions between mobile operators within the Community and should not introduce any sort of competitive advantage, in particular on the basis of the size, type of roaming traffic or home market of the provider of roaming services.
- (9) The levels of the maximum average wholesale charges for regulated roaming calls set by Regulation (EC) No 717/2007 should continue to decrease over the extended duration of the Regulation to reflect decreasing costs, including reductions in regulated mobile termination rates in the Member States, in order to ensure the smooth functioning of the internal market while at the same time continuing to meet the dual objectives of eliminating excessive prices and allowing operators freedom to compete and innovate.
- (10) In order to stimulate and strengthen sustainable competition in the various roaming services, national regulatory authorities should monitor whether there is discrimination between large and smaller providers, particularly in relation to the calculation of wholesale prices.
- (11) The date in 2009 on which the decrease in the maximum price limits for regulated roaming calls at both wholesale and retail levels takes effect should be brought forward from 30 August to 1 July, in order to ensure consistency with the introduction of the obligations regarding the pricing of regulated SMS messages provided for by this Regulation. In this way, users of both voice and SMS roaming services would be able to benefit from the new tariffs during the period when there is the greatest demand for those services.
- (12) Where charge limits are not denominated in euro, the applicable charge limits for the initial limits and the revised values of those limits should be determined in the relevant currency by applying the reference exchange rates published in the Official Journal of the European Union on the dates specified in this Regulation. Where there is no publication on the date specified, the applicable reference exchange rates should be those published in the first Official Journal of the European Union following that date and containing such reference exchange rates.
- (13) As compliance with the wholesale charge limit established by Regulation (EC) No 717/2007 is measured by reference to the average wholesale price prevailing between any two operators over a 12-month period, it is appropriate to clarify that the period may be shorter, for example where the date of a scheduled decrease in the level of the maximum average wholesale charge occurs before the end of the 12-month period.
- (14) The practice by some mobile network operators of billing for the provision of wholesale roaming calls on the basis of minimum charging periods of up to 60 seconds, as opposed to the per second basis normally applied for other wholesale interconnection charges, creates a distortion of competition between these operators and those applying different billing methods and undermines the consistent application of the wholesale price limits introduced by Regulation (EC) No 717/2007. Moreover it represents an additional charge which, by increasing wholesale costs, has negative consequences for the pricing of voice roaming services at retail level. Mobile operators should therefore be required to bill for the wholesale provision of regulated roaming calls on a per second basis.
- (15) The maximum levels of the Eurotariff, both for calls made and calls received, should continue to decrease annually during the extended period of validity of Regulation (EC) No 717/2007 in a manner consistent with the decreases required during the initial period of application of that Regulation, to reflect the continuing decreases in domestic mobile prices generally and the continuing decreases in the underlying costs of providing regulated roaming calls. In this way, the continuity in the effects of that Regulation is maintained.
- (16) The increased margins between maximum wholesale and retail charges provided for by this Regulation should allow increased scope for operators to compete on price at the retail level, thereby maximising the chances that a properly competitive market will emerge.
- (17) Some operators face higher wholesale costs than others due to geographical or other circumstances, such as difficult topography, regions with low population density and large influxes of tourists within short time periods.
- (18) The ERG has estimated that the practice of mobile operators of using charging intervals of more than one second when billing for roaming services at retail level has added 24 % to a typical Eurotariff bill for calls made and 19 % for calls received. They also stated that these increases represent a form of hidden charge since they are not transparent to most consumers. For this reason, the ERG recommended urgent action to address the different billing practices at retail level applied to the Eurotariff.
- (19) While Regulation (EC) No 717/2007, by introducing a Eurotariff in the Community, established a common approach to ensuring that roaming customers are not charged excessive prices for regulated roaming calls, the different billing unitisation practices employed by mobile operators seriously undermines its consistent application. This also means that, despite the

- Community-wide, cross-border nature of intra-Community roaming services, there are divergent approaches in relation to the billing of regulated roaming calls which distort competitive conditions in the single market.
- (20) A common set of rules regarding unitisation of Eurotariff bills at retail level should therefore be introduced in order to further strengthen the single market and provide throughout the Community a common level of protection to consumers of Community-wide roaming services.
- (21) Providers of regulated roaming calls at the retail level should therefore be required to bill their customers on a per second basis for all calls subject to a Eurotariff, subject only to the possibility to apply a minimum initial charging period of no more than 30 seconds for calls made. This will enable operators to cover any reasonable set-up costs and to provide flexibility to compete by offering shorter minimum charging periods. However, no minimum initial charging period is justified in the case of Eurotariff calls received, as the underlying wholesale cost is charged on a per second basis and any specific set-up costs are already covered by mobile termination rates.
- (22) Customers should not have to pay for receiving voice mail messages in a visited network, as they cannot control the duration of such messages. This should be without prejudice to other applicable voice mail charges, for example charges for listening to such messages.
- (23) As regards SMS roaming services, the market data collected by the ERG and the Commission since the entry into force of Regulation (EC) No 717/2007 have demonstrated that a situation persists across the Community in which wholesale charges for these services have remained broadly stable and have no meaningful relationship with underlying costs. As is the case for voice roaming services, there appear to be insufficient competitive pressures on operators to reduce wholesale prices. Retail prices for SMS roaming services have also, with no clear justification, remained broadly stable, subject to high margins and priced significantly above equivalent domestic SMS services.
- (24) Just as is the case for voice roaming calls, there is a significant risk that imposing wholesale pricing obligations alone would not result automatically in lower rates for retail customers. On the other hand, action to reduce the level of retail prices without addressing the level of the wholesale costs associated with the provision of these services could prejudice the position of some operators, in particular smaller operators, by increasing the risk of price squeeze.
- (25) Furthermore, because of the particular structure of the roaming market and its cross-border nature, the 2002 regulatory framework has not provided national regulatory authorities with suitable tools to address effectively the competitive problems underlying the high level of wholesale and retail prices for regulated roaming SMS services. This fails to ensure the smooth functioning of the internal market and should be corrected.
- (26) The ERG also stated in its response to the Commission's public consultation on the review of the operation of Regulation (EC) No 717/2007 that it considered that regulation of SMS roaming was necessary, at both wholesale and retail levels, in order to bring prices more into line with costs and with domestic prices. It considered that arrangements analogous to those for voice roaming would be suitable. More specifically, the ERG recommended introducing a cap on the average wholesale rate charged by any one operator to any other operator for SMS roaming, and amending the Eurotariff obligation to include an offer of SMS roaming at a rate no greater than a specified maximum cap.
- (27) Regulatory obligations should therefore be imposed with regard to regulated roaming SMS services at wholesale level, in order to establish a more reasonable relationship between wholesale charges and the underlying costs of provision, and at retail level to protect the interests of roaming customers.
- (28) These regulatory obligations should take effect as soon as possible, while allowing the operators concerned a reasonable period to adapt their prices and service offers to ensure compliance.
- (29) The most effective and proportionate approach to regulating the level of prices for regulated roaming SMS messages at wholesale level is the setting at Community level of a maximum average charge per SMS sent from a visited network. The average wholesale charge should apply between any pair of mobile operators within the Community over a specified period.
- (30) The wholesale price limit for regulated roaming SMS should include all costs incurred by the provider of the wholesale service, including, inter alia, origination, transit and the unrecovered cost of termination of roaming SMS messages on the visited network. Wholesale providers of regulated roaming SMS services should therefore be prohibited from introducing a separate charge for the termination of roaming SMS messages on their network, in order to ensure the consistent application of the rules established by this Regulation.
- (31) The most effective and proportionate approach to regulating the level of prices for Community-wide roaming SMS messages at the retail level is the introduction of a requirement for mobile operators to offer their roaming customers a Euro-SMS tariff which does not exceed a specified maximum price limit. The Euro-SMS tariff should be set at a level which guarantees a sufficient margin to operators while also more reasonably reflecting the underlying retail costs.
- (32) This regulatory approach should ensure that retail charges for regulated roaming SMS messages more accurately reflect the underlying costs involved in the provision of the service than has previously been the case. The maximum Euro-SMS tariff that may be offered to roaming customers should therefore reflect a reasonable margin over the costs of providing a regulated roaming SMS service, whilst allowing operators the freedom to compete by differentiating their offerings and

adapting their pricing structures to market conditions and consumer preferences. This regulatory approach should not apply to value-added SMS services.

- (33) Roaming customers should not be required to pay any additional charge for receiving a regulated roaming SMS or voicemail message while roaming on a visited network, since such termination costs are already compensated by the retail charge levied for the sending of a roaming SMS or voicemail message.
- (34) A Euro-SMS tariff should automatically apply to any new or existing roaming customer who has not deliberately chosen or does not deliberately choose a special SMS roaming tariff or a package for roaming services including regulated roaming SMS services.
- (35) In order to ensure end-to-end connectivity and interoperability for roaming customers of regulated roaming SMS services, national regulatory authorities should intervene in a timely manner where a terrestrial mobile network operator established in one Member State complains to its national regulatory authority that its subscribers are unable to send or receive regulated roaming SMS messages to or from subscribers of a terrestrial mobile network located in another Member State as a result of a failure of the two operators concerned to conclude an agreement. Such intervention should be in accordance with the provisions of Article 5 of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) ⁽⁵⁾ and on a coordinated basis, and in accordance with the provisions of Article 8(1) of Regulation (EC) No 717/2007 and Article 21 of Directive 2002/21/EC ⁽⁶⁾.
- (36) An SMS message is a Short Message Service text message and is clearly distinct from other messages such as MMS messages or e-mails. In order to ensure that the Regulation is not deprived of its effectiveness and that its objectives are fully met, any changes to the technical parameters of a roaming SMS message which would differentiate it from a domestic SMS message should be prohibited.
- (37) Data collected by national regulatory authorities indicate that average wholesale charges for data roaming services levied by visited network operators from roaming customers' home providers appear to be on a downward trend, although high prices for wholesale data roaming services persist.
- (38) The high level of retail prices for data roaming services continues to be of concern and indicates that competition in these services is still not sufficient. However, unlike voice and SMS roaming services, competitive constraints exist at retail level, as roaming customers have alternative means of accessing data services when abroad, such as public wireless access to the Internet,

without associated numbering constraints. It would therefore be premature at this stage to regulate prices at the retail level. Furthermore, any roaming network connection should be established with the user's consent. Accordingly, there should be no roaming data downloading, including software updating and e-mail retrieval, without the user's prior consent or request, unless the user has indicated that he does not wish to enjoy such protection.

- (39) Home providers should not charge the roaming customer for any regulated data roaming service, unless and until the roaming customer accepts the provision of the service.
- (40) However, measures should be introduced to improve the transparency of retail prices for data roaming services, in particular to eliminate the problem of "bill shock" which constitutes a barrier to the smooth functioning of the internal market, and to provide roaming customers with the tools they need to monitor and control their expenditure on data roaming services. Equally, there should be no obstacles to the emergence of applications or technologies which can be a substitute for, or alternative to, roaming services, such as WiFi, Voice over Internet Protocol (VoIP) and Instant Messaging services. Consumers should be provided with this information, thereby allowing them to make an informed choice.
- (41) In particular, mobile operators should provide their roaming customers with personalised tariff information on the charges applicable to those customers for data roaming services every time they initiate a data roaming service on entering another Member State. This information should be delivered to their mobile telephone or other mobile device in the manner best suited to its easy receipt and comprehension.
- (42) In order to facilitate customers' understanding of the financial consequences of the use of regulated data roaming services and to permit them to monitor and control their expenditure, the home provider should give examples for data roaming applications, such as e-mail, picture and web-browsing, by indicating their approximate size in terms of data usage.
- (43) In addition, in order to avoid bill shocks, mobile operators should define one or more maximum financial and/or volume limits for their outstanding charges for data roaming services, expressed in the currency in which the roaming customer is billed, and which they should offer to all their roaming customers, free of charge, with an appropriate notification when this limit is being approached. Upon reaching this maximum limit, customers should no longer receive and be charged for those services unless they specifically request continued provision of those services in accordance with the terms and conditions set out in the notification. Roaming customers should be given the opportunity to opt for any of these maximum financial or volume limits within a reasonable period or to choose not to have such a limit. Unless customers state otherwise, they should be put on a default limit system.

⁽⁵⁾ OJ L 108, 24.4.2002, p. 7.

⁽⁶⁾ OJ L 108, 24.4.2002, p. 33.

- (44) These transparency measures should be seen as minimum safeguards for roaming customers, and should not preclude mobile operators from offering their customers a range of other facilities which help them to predict and control their expenditure on data roaming services. For example, many operators are developing new retail flat rate roaming offers which permit data roaming for a specified price over a specified period up to a "fair use" volume limit. Likewise operators are developing systems to enable their roaming customers to be updated on a real-time basis on their accumulated outstanding data roaming charges. To ensure the smooth functioning of the internal market, these developments on the domestic markets should be reflected in the harmonised rules.
- (45) Moreover, the persistence of high wholesale charges for data roaming services is primarily attributable to high wholesale prices charged by operators of non-preferred networks. Such charges are caused by traffic steering limitations which leave operators with no incentive to reduce their standard wholesale prices unilaterally since the traffic will be received irrespective of the price charged. This results in an extreme variation in wholesale costs. In some cases the wholesale data roaming prices applicable to non-preferred networks are 30 times higher than those applied to the preferred network. These excessively high wholesale charges for data roaming services lead to appreciable distortions of competitive conditions between mobile operators within the Community which undermine the smooth functioning of the internal market. They also constrain the ability of home providers to predict their wholesale costs and therefore to provide their customers with transparent and competitive retail pricing packages. In view of the limitations on the ability of national regulatory authorities to deal with these problems effectively at national level, a wholesale price limit on data roaming services should apply. The wholesale price limit should be set at a safeguard level well above the lowest wholesale prices currently available in the market, to enhance competitive conditions and permit the development of a competitive trend in the market, while ensuring the better functioning of the internal market for the benefit of consumers. By eliminating the excessive wholesale data roaming charges that persist in certain cases in the market, this safeguard level should prevent, throughout the period of application of Regulation (EC) No 717/2007, the emergence of distortions or restrictions on competition between mobile operators.
- (46) In order to reflect developments in the market, and the applicable regulatory framework for electronic communications, it is necessary to refer to "public communications networks" instead of "public telephony networks". For the sake of consistency Article 1(5) of Directive 2002/21/EC should be amended accordingly.
- (47) Since the objectives of this Regulation, namely to amend Regulation (EC) No 717/2007 and Directive 2002/21/EC in order to maintain and further develop a common set of rules to ensure that users of public mobile communications networks when travelling within the Community do not pay excessive prices for Community-wide roaming services (be it in respect of voice calls, SMS messages or data transmissions), thereby contributing to the smooth functioning of the internal market, while achieving a high level of consumer protection and safeguarding competition between mobile operators, cannot be sufficiently achieved by the Member States in a secure, harmonised and timely manner and can therefore, by reason of the scale and effects of the proposed action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.
- (48) This common approach should nevertheless be maintained for a limited time period but may, in the light of a review to be carried out by the Commission, be further extended or amended or be replaced by alternative regulatory options, on the basis of appropriate recommendations from the Commission.
- (49) The Commission should review the effectiveness of Regulation (EC) No 717/2007 as amended by this Regulation in light of its objectives and the contribution to the implementation of the regulatory framework and the smooth functioning of the internal market. In this context, the Commission should consider the impact on the competitive position of mobile communications providers of different sizes and from different parts of the Community, the developments, trends and transparency in retail and wholesale charges, their relation to actual costs, the extent to which the assumptions made in the impact assessment that accompanied this Regulation have been confirmed and the costs of compliance of operators and the impact on the investments. The Commission should also, in the light of technological developments, consider the availability and quality of services which are an alternative to roaming (such as VoIP).
- (50) Prior to the abovementioned review, and in order to ensure the continuous monitoring of roaming services in the Community, the Commission should prepare an interim report to the European Parliament and the Council which includes a general summary of the latest trends in roaming services and an intermediary assessment of the progress towards achieving the objectives of Regulation (EC) No 717/2007 as amended by this Regulation and of the possible alternative options for achieving these objectives.
- (51) Before making appropriate recommendations, the Commission should also assess whether the regulation of roaming services could be appropriately covered within the regulatory framework for electronic communications. It should thoroughly assess alternative methods of achieving the objectives of Regulation (EC) No 717/2007, such as:
- dealing with the problems at wholesale level, by introducing an obligation to provide reasonable and fair access on a non-discriminatory basis and/or on equitable reciprocal conditions,

- having an approach based on achieving prices and conditions for roaming customers similar to the competitive prices and conditions prevailing within the market of the visited network, including the possibility for the customer to obtain different prices from different operators in the market of the visited network,

- addressing problems in the framework of Community competition law,

In particular, the Commission should, in consultation with a body of European regulators for electronic communications, investigate and assess the competitive structure of the mobile market which leads to uncompetitive roaming prices, and should report to the European Parliament and Council its conclusions and proposals to address structural problems in mobile markets, in particular barriers to entry and expansion.

(52) Regulation (EC) No 717/2007 and Directive 2002/21/EC should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

Article 1

Amendments to Regulation (EC) No 717/2007/EC

Regulation (EC) No 717/2007/EC is hereby amended as follows:

[see consolidated text of Regulation (EC) No 717/2007/EC]

Article 2

Amendment to Directive 2002/21/EC

Article 1(5) of Directive 2002/21/EC is replaced by the following:

[see consolidated version of Directive 2002/21/EC]

Article 3

Entry into force

This Regulation shall enter into force on the day following its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 18 June 2009.

For the European Parliament

For the Council

The President

The President

H.-G. PÖTTERING

Š. FÜLE

REGULATION (EC) No 717/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 27 June 2007

on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC (*)

as amended by Regulation (EC) No 544/2009 ()
(unofficially consolidated version)**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee⁽¹⁾,

Having consulted the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty⁽²⁾,

Whereas:

- (1) The high level of the prices payable by users of public mobile telephone networks, such as students, business travellers and tourists, when using their mobile telephones when travelling abroad within the Community is a matter of concern for national regulatory authorities, as well as for consumers and the Community institutions. The excessive retail charges are resulting from high wholesale charges levied by the foreign host network operator and also, in many cases, from high retail mark-ups charged by the customer's own network operator. Reductions in wholesale charges are often not passed on to the retail customer. Although some operators have recently introduced tariff schemes that offer customers more favourable conditions and lower prices, there is still evidence that the relationship between costs and prices is not such as would prevail in fully competitive markets.
- (2) The creation of a European social, educational and cultural area based on the mobility of individuals should facilitate communication between people in order to build a real "Europe for Citizens".
- (3) Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive)⁽³⁾, Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive)⁽⁴⁾, Directive 2002/21/EC

of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)⁽⁵⁾, Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive)⁽⁶⁾ and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)⁽⁷⁾ (hereinafter together referred to as "the 2002 regulatory framework for electronic communications") aim to create an internal market for electronic communications within the Community while ensuring a high level of consumer protection through enhanced competition.

- (4) This Regulation is not an isolated measure, but complements and supports, insofar as Community-wide roaming is concerned, the rules provided for by the 2002 regulatory framework for electronic communications. That framework has not provided national regulatory authorities with sufficient tools to take effective and decisive action with regard to the pricing of roaming services within the Community and thus fails to ensure the smooth functioning of the internal market for roaming services. This Regulation is an appropriate means of correcting this situation.
- (5) The 2002 regulatory framework for electronic communications draws on the principle that ex ante regulatory obligations should only be imposed where there is not effective competition, providing for a process of periodic market analysis and review of obligations by national regulatory authorities, leading to the imposition of ex ante obligations on operators designated as having significant market power. The elements constituting this process include the definition of relevant markets in accordance with the Commission's Recommendation⁽⁸⁾ on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC (hereinafter referred to as "the Recommendation"), the analysis of the defined markets in accordance with the Commission's guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic

(*) OJ L 108, 24.4.2002, p. 33.

(**) OJ L 167, 29.6.2009, p. 12.

(1) OJ C 324, 30.12.2006, p. 42.

(2) Opinion of the European Parliament of 23 May 2007 (not yet published in the Official Journal) and Council Decision of 25 June 2007.

(3) OJ L 108, 24.4.2002, p. 7.

(4) OJ L 108, 24.4.2002, p. 21.

(5) OJ L 108, 24.4.2002, p. 33.

(6) OJ L 108, 24.4.2002, p. 51.

(7) OJ L 201, 31.7.2002, p. 37. Directive as amended by Directive 2006/24/EC (OJ L 105, 13.4.2006, p. 54).

(8) OJ L 114, 8.5.2003, p. 45.

- communications networks and services ⁽⁹⁾, the designation of operators with significant market power and the imposition of ex ante obligations on operators so designated.
- (6) The Recommendation identifies as a relevant market susceptible to ex ante regulation the wholesale national market for international roaming on public mobile networks. However, the work undertaken by the national regulatory authorities (both individually and within the European Regulators Group) in analysing the wholesale national markets for international roaming has demonstrated that it has not yet been possible for a national regulatory authority to address effectively the high level of wholesale Community-wide roaming charges because of the difficulty in identifying undertakings with significant market power in view of the specific circumstances of international roaming, including its cross-border nature.
- (7) As regards the retail provision of international roaming services, the Recommendation does not identify any retail market for international roaming as a relevant market, owing among other things to the fact that international roaming services at retail level are not purchased independently but constitute only one element of a broader retail package purchased by customers from their home provider.
- (8) In addition, the national regulatory authorities responsible for safeguarding and promoting the interests of mobile customers normally resident within their territory are not able to control the behaviour of the operators of the visited network, situated in other Member States, on whom those customers depend when using international roaming services. This obstacle could also diminish the effectiveness of measures taken by Member States based on their residual competence to adopt consumer protection rules.
- (9) Accordingly, there is pressure for Member States to take measures to address the level of international roaming charges, but the mechanism for ex ante regulatory intervention by national regulatory authorities provided by the 2002 regulatory framework for electronic communications has not proved sufficient to enable those authorities to act decisively in the consumers' interest in this specific area.
- (10) Furthermore, the European Parliament resolution on European electronic communications regulation and markets 2004 ⁽¹⁰⁾ called on the Commission to develop new initiatives to reduce the high costs of cross-border mobile telephone traffic, while the European Council of 23 and 24 March 2006 concluded that focused, effective and integrated information and communication technology (ICT) policies both at European and national level are essential to achieving the renewed Lisbon Strategy's goals of economic growth and productivity and noted in this context the importance for competitiveness of reducing roaming charges.
- (11) The 2002 regulatory framework for electronic communications, on the basis of considerations apparent at that time, was aimed at removing all barriers to trade between Member States in the area that it harmonised, inter alia, measures which affect roaming charges. However, this should not prevent the adaptation of harmonised rules in step with other considerations in order to find the most effective means of achieving a high level of consumer protection whilst improving the conditions for the functioning of the internal market.
- (12) The 2002 regulatory framework for electronic communications, in particular the Framework Directive, should therefore be amended to allow for a departure from the rules otherwise applicable, namely that prices for service offerings should be determined by commercial agreement in the absence of significant market power, and to thereby accommodate the introduction of complementary regulatory obligations which reflect the specific characteristics of Community-wide roaming services.
- (13) The retail and wholesale roaming markets exhibit unique characteristics which justify exceptional measures which go beyond the mechanisms otherwise available under the 2002 regulatory framework for electronic communications.
- (14) Regulatory obligations should be imposed at both retail and wholesale level to protect the interests of roaming customers, since experience has shown that reductions in wholesale prices for Community-wide roaming services may not be reflected in lower retail prices for roaming owing to the absence of incentives for this to happen. On the other hand, action to reduce the level of retail prices without addressing the level of the wholesale costs associated with the provision of these services could risk disrupting the orderly functioning of the Community-wide roaming market.
- (15) These regulatory obligations should take effect as soon as possible, while providing the operators concerned with a reasonable period to adapt their prices and service offerings to ensure compliance, and apply directly in all Member States.
- (16) A common approach should be employed for ensuring that users of terrestrial public mobile telephone networks when travelling within the Community do not pay excessive prices for Community-wide roaming services when making or receiving voice calls, thereby achieving a high level of consumer protection while safeguarding competition between mobile operators and preserving both incentives for innovation and consumer choice. In view of the cross-border nature of the services concerned, this common approach is needed so that mobile operators can operate within a single coherent regulatory framework based on objectively established criteria.
- (17) The most effective and proportionate approach to regulating the level of prices for making and receiving intra-Community roaming calls is the setting at Community level of a maximum average per-minute charge at wholesale level and the

⁽⁹⁾ OJ C 165, 11.7.2002, p. 6.

⁽¹⁰⁾ OJ C 285 E, 22.11.2006, p. 143.

- limiting of charges at retail level through the introduction of a Eurotariff. The average wholesale charge should apply between any pair of operators within the Community over a specified period.
- (18) The Eurotariff should be set at a level which guarantees a sufficient margin to operators and encourages competitive roaming offerings at lower rates. Operators should actively offer a Eurotariff to all their roaming customers, free of charge, and in a clear and transparent manner.
- (19) This regulatory approach should ensure that retail charges for Community-wide roaming provide a more reasonable reflection of the underlying costs involved in the provision of the service than has been the case. The maximum Eurotariff that may be offered to roaming customers should therefore reflect a reasonable margin over the wholesale cost of providing a roaming service, whilst allowing operators the freedom to compete by differentiating their offerings and adapting their pricing structures to market conditions and consumer preferences. This regulatory approach should not apply to value added services.
- (20) This regulatory approach should be simple to implement and monitor in order to minimise the administrative burden both for the operators which are affected by its requirements and for the national regulatory authorities charged with its supervision and enforcement. It should also be transparent and immediately understandable to all mobile customers within the Community. Furthermore it should provide certainty and predictability to operators providing wholesale and retail roaming services. The level in monetary terms of the maximum per-minute charges at wholesale and retail level should therefore be specified in this Regulation.
- (21) The maximum average per-minute charge at wholesale level so specified should take account of the different elements involved in the making of a Community-wide roaming call, in particular the cost of originating and terminating calls over mobile networks and including overheads, signalling and transit. The most appropriate benchmark for call origination and for call termination is the average mobile termination rate for mobile network operators in the Community, based on information provided by the national regulatory authorities and published by the Commission. The maximum average per-minute charge established by this Regulation should therefore be determined taking into account the average mobile termination rate, which offers a benchmark for the costs involved. The maximum average per-minute charge at wholesale level should decrease annually to take account of reductions in mobile termination rates imposed by national regulatory authorities from time to time.
- (22) The Eurotariff applicable at retail level should provide roaming customers with the assurance that they will not be charged an excessive price when making or receiving a regulated roaming call, whilst leaving the home operators sufficient margin to differentiate the products they offer to customers.
- (23) All consumers should have the option of choosing without additional charges or preconditions a simple roaming tariff which will not exceed regulated rates. A reasonable margin between wholesale costs and retail prices should ensure that operators cover all their specific roaming costs at retail level including appropriate shares of marketing costs and handset subsidies and are left with an adequate residual to yield a reasonable return. A Eurotariff is an appropriate means to provide both the consumer with protection and the operator with flexibility. In line with the wholesale level the maximum levels of the Eurotariff should decrease annually.
- (24) New roaming customers should be fully informed of the range of tariffs that exist for roaming within the Community, including the tariffs which are compliant with the Eurotariff. Existing roaming customers should be given the opportunity to choose a new tariff compliant with the Eurotariff or any other roaming tariff within a certain time frame. For existing roaming customers who have not made their choice within this time frame, it is appropriate to distinguish between those who had already opted for a specific roaming tariff or package before the entry into force of this Regulation and those who had not. The latter should be automatically accorded a tariff that complies with this Regulation. Roaming customers who already benefit from specific roaming tariffs or packages which suit their individual requirements and which they have chosen on that basis should remain on their previously selected tariff or package if, after having been reminded of their current tariff conditions, they fail to express a choice within the relevant time period. Such specific roaming tariffs or packages could include, for example, roaming flat-rates, non-public tariffs, tariffs with additional fixed roaming charges, tariffs with per-minute charges lower than the maximum Eurotariff or tariffs with set-up charges.
- (25) Providers of retail Community-wide roaming services should have a period within which to adjust their prices to comply with the limits laid down in this Regulation.
- (26) Similarly, providers of wholesale Community-wide roaming services should have an adaptation period to comply with the limits laid down in this Regulation.
- (27) Since this Regulation provides that the Directives making up the 2002 regulatory framework for electronic communications are without prejudice to any specific measure adopted for the regulation of Community-wide roaming charges for mobile voice telephony calls, and since providers of Community-wide roaming services may be required by this Regulation to make changes to their retail roaming tariffs in order to comply with the requirements of this Regulation, such changes should not trigger for mobile customers any right under national laws transposing the 2002 regulatory framework for electronic communications to withdraw from their contracts.
- (28) This Regulation should not prejudice innovative offers to consumers which are more advantageous than the maximum Eurotariff as defined in this Regulation, but rather should encourage

innovative offers to roaming customers at lower rates. This Regulation does not require roaming charges to be reintroduced in cases where they have been abolished altogether, nor does it require existing roaming charges to be increased to the level of the limits set out in this Regulation.

- (29) Home providers may offer a fair-use, all-inclusive, monthly flat-rate to which no charge limits apply. This flat-rate could cover Community-wide roaming voice and/or data communication services (including Short Message Service (SMS) and Multimedia Messaging Service (MMS)) within the Community.
- (30) To ensure that all users of mobile voice telephony may benefit from the provisions of this Regulation, the retail pricing requirements should apply regardless of whether roaming customers have a pre-paid or a post-paid contract with their home provider, and regardless of whether the home provider has its own network, is a mobile virtual network operator or is a reseller of mobile voice telephony services.
- (31) Where Community providers of mobile telephony services find the benefits of interoperability and end-to-end connectivity for their customers jeopardised by the termination, or threat of termination, of their roaming arrangements with mobile network operators in other Member States, or are unable to provide their customers with service in another Member State as a result of a lack of agreement with at least one wholesale network provider, national regulatory authorities should make use, where necessary, of the powers under Article 5 of the Access Directive to ensure adequate access and interconnection in order to guarantee such end-to-end connectivity and the interoperability of services, taking into account the objectives of Article 8 of the Framework Directive, in particular the creation of a fully functioning single market for electronic communications services.
- (32) In order to improve the transparency of retail prices for making and receiving regulated roaming calls within the Community and to help roaming customers make decisions on the use of their mobile telephones while abroad, providers of mobile telephony services should enable their roaming customers easily to obtain information free of charge on the roaming charges applicable to them when making or receiving voice calls in a visited Member State. Moreover, providers should give their customers, on request and free of charge, additional information on the per-minute or per-unit data charges (including VAT) for the making or receiving of voice calls and also for the sending and receiving of SMS, MMS and other data communication services in the visited Member State.
- (33) Transparency also requires that providers furnish information on roaming charges, in particular on the Eurotariff and the all-inclusive flat-rate should they offer one, when subscriptions are taken out and each time there is a change in roaming charges. Home providers should provide information on roaming charges by appropriate means such as invoices, the internet, TV advertisements or direct mail. Home providers should ensure that all their roaming customers are aware of the availability of regulated tariffs and should send a clear and unbiased communication to these customers describing the conditions of the Eurotariff and the right to switch to and from it.
- (34) The national regulatory authorities which are responsible for carrying out tasks under the 2002 regulatory framework for electronic communications should have the powers needed to supervise and enforce the obligations under this Regulation within their territory. They should also monitor developments in the pricing of voice and data services for mobile customers when roaming within the Community including, where appropriate, the specific costs related to roaming calls made and received in the outermost regions of the Community and the need to ensure that these costs can be adequately recovered on the wholesale market, and that traffic steering techniques are not used to limit choice to the detriment of customers. They should ensure that up-to-date information on the application of this Regulation is made available to interested parties and publish the results of such monitoring every six months. Information should be provided on corporate, post-paid and pre-paid customers separately.
- (35) In-country roaming in the outermost regions of the Community where mobile telephony licences are distinct from those issued in respect of the rest of the national territory could benefit from rate reductions equivalent to those practised on the Community roaming market. The implementation of this Regulation should not give rise to less favourable pricing treatment for customers using in-country roaming services as opposed to customers using Community-wide roaming services. To this end, the national authorities may take additional measures consistent with Community law.
- (36) In view of the fact that, in addition to voice telephony, new mobile data communication services are gaining ever more ground, this Regulation should make it possible to monitor market developments in those services too. The Commission, therefore, should also monitor the market for roaming data communication services, including SMS and MMS.
- (37) Member States should provide for a system of penalties to be applied in the event of breach of this Regulation.
- (38) Since the objectives of this Regulation, namely to establish a common approach to ensure that users of public mobile telephone networks when travelling within the Community do not pay excessive prices for Community-wide roaming services when making or receiving voice calls, thereby achieving a high level of consumer protection while safeguarding competition between mobile operators, cannot be sufficiently achieved by the Member States in a secure, harmonised and timely manner and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the

principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

- (39) This common approach should be established for a limited time period. This Regulation may, in the light of a review to be carried out by the Commission, be extended or amended. The Commission should review the effectiveness of this Regulation and the contribution which it makes to the implementation of the regulatory framework and the smooth functioning of the internal market and also examine the impact of this Regulation on the smaller mobile telephony providers in the Community and their position in the Community-wide roaming market,

HAVE ADOPTED THIS REGULATION:

Article 1

Subject matter and scope

1. This Regulation introduces a common approach to ensuring that users of public mobile communications networks when travelling within the Community do not pay excessive prices for Community-wide roaming services in comparison with competitive national prices, when making calls and receiving calls, when sending and receiving SMS messages and when using packet switched data communication services, thereby contributing to the smooth functioning of the internal market while achieving a high level of consumer protection, fostering competition and transparency in the market and offering both incentives for innovation and consumer choice.

It lays down rules on the charges that may be levied by mobile operators for the provision of Community-wide roaming services for voice calls and SMS messages originating and terminating within the Community and for packet switched data communication services used by roaming customers while roaming on a mobile communications network in another Member State. It applies both to charges levied between network operators at wholesale level and, where appropriate, to charges levied by home providers at retail level.

2. This Regulation also lays down rules aimed at increasing price transparency and improving the provision of information on charges to users of Community-wide roaming services.

3. This Regulation constitutes a specific measure within the meaning of Article 1(5) of the Framework Directive.

4. The charge limits set out in this Regulation are expressed in euro. Where charges governed by Articles 3, 4, 4a and 4b and Article 6a(3) and (4) are denominated in other currencies, the initial limits pursuant to those Articles shall be determined in those currencies, in the case of Articles 3 and 4 by applying the reference exchange rates prevailing on 30 June 2007, and in the case of Articles 4a and 4b and Article 6a(3) and (4) by applying the reference exchange rates published on 6 May 2009 by the European Central Bank in the Official Journal of the European Union. For the purposes of the subsequent reductions in those limits provided for in Articles 3(2), 4(2) and 6a(4), the revised values shall be determined by applying the reference exchange rates so published one month preceding the date from which the revised values apply.

The same reference exchange rates shall be applied to revise annually the value of the charges governed by Articles 4a and 4b and Article 6a(3) where these charges are denominated in currencies other than the euro.

Article 2

Definitions

1. For the purposes of this Regulation, the definitions set out in Article 2 of the Access Directive, Article 2 of the Framework Directive, and Article 2 of the Universal Service Directive shall apply.

2. In addition to the definitions referred to in paragraph 1, the following definitions shall apply:

- (a) 'Eurotariff' means any tariff not exceeding the maximum charge, provided for in Article 4, which a home provider may levy for the provision of regulated roaming calls in compliance with that Article;
- (b) 'home provider' means an undertaking that provides a roaming customer with terrestrial public mobile communications services either via its own network or as a mobile virtual network operator or reseller;
- (c) 'home network' means a terrestrial public mobile communications network located within a Member State and used by a home provider for the provision of terrestrial public mobile communications services to a roaming customer;
- (d) 'Community-wide roaming' means the use of a mobile telephone or other device by a roaming customer to make or receive intra-Community calls, to send or receive SMS messages, or to use packet switched data communications, while in a Member State other than that in which that customer's home network is located, by means of arrangements between the operator of the home network and the operator of the visited network;
- (e) 'regulated roaming call' means a mobile voice telephony call made by a roaming customer, originating on a visited network and terminating on a public communications network within the Community or received by a roaming customer, originating on a public communications network within the Community and terminating on a visited network;
- (f) 'roaming customer' means a customer of a provider of terrestrial public mobile communications services, by means of a terrestrial public mobile network situated in the Community, whose contract or arrangement with his home provider permits the use of a mobile telephone or other device to make or to receive calls, to send or receive SMS messages, or to use packet switched data communications on a visited network by means of arrangements between the operator of the home network and the operator of the visited network;
- (g) 'visited network' means a terrestrial public mobile communications network situated in a Member State other than that of the home

network and permitting a roaming customer to make or receive calls, to send or receive SMS messages or to use packet switched data communications, by means of arrangements with the operator of the home network;

- (h) 'Euro SMS tariff' means any tariff not exceeding the maximum charge provided for in Article 4b, which a home provider may levy for the provision of regulated roaming SMS messages in accordance with that Article;
- (i) 'SMS message' means a Short Message Service text message, composed principally of alphabetical and/or numerical characters, capable of being sent between mobile and/or fixed numbers assigned in accordance with national numbering plans;
- (j) 'regulated roaming SMS message' means an SMS message sent by a roaming customer, originating on a visited network and terminating on a public communications network within the Community or received by a roaming customer, originating on a public communications network within the Community and terminating on a visited network;
- (k) 'regulated data roaming service' means a roaming service enabling the use of packet switched data communications by a roaming customer by means of his mobile telephone or other mobile device while it is connected to a visited network. A regulated data roaming service does not include the transmission or receipt of regulated roaming calls or SMS messages, but does include the transmission and receipt of MMS messages.

Article 3

Wholesale charges for the making of regulated roaming calls

1. The average wholesale charge that the operator of a visited network may levy from the operator of a roaming customer's home network for the provision of a regulated roaming call originating on that visited network, inclusive inter alia of origination, transit and termination costs, shall not exceed EUR 0,30 per minute.
2. The average wholesale charge referred to in paragraph 1 shall apply between any pair of operators and shall be calculated over a twelve-month period or any such shorter period as may remain before the end of the period of application of a maximum average wholesale charge as provided for in this paragraph or the expiry of this Regulation. The maximum average wholesale charge shall decrease to EUR 0,28 and EUR 0,26, on 30 August 2008 and on 1 July 2009 respectively and shall further decrease to EUR 0,22 and EUR 0,18, on 1 July 2010 and on 1 July 2011 respectively.
3. The average wholesale charge referred to in paragraph 1 shall be calculated by dividing the total wholesale roaming revenue received by the total number of wholesale roaming minutes sold for the provision of wholesale roaming calls within the Community by the relevant operator over the relevant period. The operator of the visited network shall be permitted to make a distinction between peak and off-peak charges.

However, with effect from 1 July 2009, the average wholesale charge referred to in paragraph 1 shall be calculated by dividing the total wholesale roaming revenue received by the total number of wholesale roaming minutes actually used for the provision of wholesale roaming calls within the Community by the relevant operator over the relevant period, aggregated on a per second basis adjusted to take account of the possibility for the operator of the visited network to apply an initial minimum charging period not exceeding 30 seconds.

Article 4

Retail charges for regulated roaming calls

1. Home providers shall make available and actively offer to all their roaming customers, clearly and transparently, a Eurotariff as provided for in paragraph 2. This Eurotariff shall not entail any associated subscription or other fixed or recurring charges and may be combined with any retail tariff.

When making this offer, home providers shall remind any of their roaming customers who, before 30 June 2007, had chosen a specific roaming tariff or package of the conditions applicable to that tariff or package.

2. The retail charge (excluding VAT) of a Eurotariff which a home provider may levy from its roaming customer for the provision of a regulated roaming call may vary for any roaming call but shall not exceed EUR 0,49 per minute for any call made or EUR 0,24 per minute for any call received. The price ceiling for calls made shall decrease to EUR 0,46 and EUR 0,43, and for calls received to EUR 0,22 and EUR 0,19, on 30 August 2008 and on 1 July 2009 respectively. The price ceiling for calls made shall further decrease to EUR 0,39 and EUR 0,35 and for calls received to EUR 0,15 and EUR 0,11 on 1 July 2010 and on 1 July 2011 respectively.

With effect from 1 July 2010, home providers shall not levy any charge from their roaming customers for the receipt by them of a roaming voicemail message. This shall be without prejudice to other applicable charges such as those for listening to such messages.

With effect from 1 July 2009 every home provider shall charge its roaming customers for the provision of any regulated roaming call to which a Eurotariff applies, whether made or received, on a per second basis.

By way of derogation from the third subparagraph, the home provider may apply an initial minimum charging period not exceeding 30 seconds to calls made which are subject to a Eurotariff.

3. All roaming customers shall be offered a tariff as set out in paragraph 2.

All existing roaming customers shall be given the opportunity by 30 July 2007 to opt deliberately for a Eurotariff or any other roaming tariff, and shall be allowed a period of two months within which to make their choice known to their home provider. The requested tariff shall be activated no later than one month after receipt by the home provider of the customer's request.

Roaming customers who within that period of two months have not expressed their choice shall automatically be provided with a Eurotariff as set out in paragraph 2.

However, roaming customers who before 30 June 2007 had already made a deliberate choice of a specific roaming tariff or package other than the roaming tariff which they would have been accorded in the absence of such choice, and who fail to express a choice pursuant to this paragraph, shall remain on their previously chosen tariff or package.

4. Any roaming customer may request, at any point after the process set out in paragraph 3 has been completed, to switch to or from a Eurotariff. Any switch must be made within one working day of receipt of the request and free of charge and shall not entail conditions or restrictions pertaining to other elements of the subscription, save that where a roaming customer who has subscribed to a special roaming package which includes more than one roaming service (namely, voice, SMS and/or data) wishes to switch to a Eurotariff, the home provider may require the switching customer to forego the benefits of the other elements of that package. A home provider may delay a switch until the previous roaming tariff has been effective for a minimum specified period not exceeding three months.

Article 4a

Wholesale charges for regulated roaming SMS messages

1. With effect from 1 July 2009, the average wholesale charge that the operator of a visited network may levy from the operator of a roaming customer's home network, for the provision of a regulated roaming SMS message originating on that visited network, shall not exceed EUR 0,04 per SMS message.

2. The average wholesale charge referred to in paragraph 1 shall apply between any pair of operators and shall be calculated over a twelve-month period or any such shorter period as may remain before the expiry of this Regulation.

3. The average wholesale charge referred to in paragraph 1 shall be calculated by dividing the total wholesale revenue received by the operator of the visited network from each operator of a home network for the origination and transmission of regulated roaming SMS messages within the Community in the relevant period by the total number of such SMS messages originated and transmitted on behalf of the relevant operator of a home network within that period.

4. The operator of a visited network shall not levy from the operator of a roaming customer's home network any charge, separate from the charge referred to in paragraph 1, for the termination of a regulated roaming SMS message sent to a roaming customer while roaming on its visited network.

Article 4b

Retail charges for regulated roaming SMS messages

1. Home providers shall make available to all their roaming customers, clearly and transparently, a Euro SMS tariff as provided for in paragraph 2. The Euro SMS tariff shall not entail any associated subscription or other fixed or recurring charges and may be combined with any retail tariff, subject to the other provisions of this Article.

2. With effect from 1 July 2009, the retail charge (excluding VAT) of a Euro SMS tariff which a home provider may levy from its roaming customer for a regulated roaming SMS message sent by that roaming customer may vary for any roaming SMS message but shall not exceed EUR 0,11.

3. Home providers shall not levy any charge from their roaming customers for the receipt by them of a regulated roaming SMS message.

4. From 1 July 2009 home providers shall apply a Euro SMS tariff to all existing roaming customers automatically, with the exception of such roaming customers who have already made a deliberate choice of a specific roaming tariff or package by virtue of which they benefit from a different tariff for regulated roaming SMS messages than they would have been accorded in the absence of such a choice.

5. From 1 July 2009 home providers shall apply a Euro SMS tariff to all new roaming customers who do not make a deliberate choice to select a different roaming SMS tariff or a tariff package for roaming services which includes a different tariff for regulated roaming SMS messages.

6. Any roaming customer may request to switch to or from a Euro SMS tariff at any time. Any switch must be made within one working day of receipt of the request and free of charge and shall not entail conditions or restrictions pertaining to elements of the subscription other than roaming. A home provider may delay such a switch until the previous roaming tariff has been effective for a minimum specified period not exceeding three months. A Euro SMS tariff may always be combined with a Eurotariff.

7. No later than 30 June 2009, home providers shall inform all their roaming customers individually about the Euro SMS tariff, that it will apply from 1 July 2009 at the latest to all roaming customers who have not made a deliberate choice of a special tariff or package applicable to regulated SMS messages, and about their right to switch to and from it in accordance with paragraph 6.

Article 4c

Technical characteristics of regulated roaming SMS messages

No home provider or operator of a visited network shall alter the technical characteristics of regulated roaming SMS messages in such a way as to make them differ from the technical characteristics of SMS messages provided within its domestic market.

Article 5

[deleted by Regulation (EC) No 544/2009]

Article 6

Transparency of retail charges for regulated roaming calls and SMS messages

1. To alert a roaming customer to the fact that he will be subject to roaming charges when making or receiving a call or when sending an SMS message, each home provider shall, except when the customer has notified his

home provider that he does not require this service, provide the customer, automatically by means of a Message Service, without undue delay and free of charge, when he enters a Member State other than that of his home network, with basic personalised pricing information on the roaming charges (including VAT) that apply to the making and receiving of calls and to the sending of SMS messages by that customer in the visited Member State.

This basic personalised pricing information shall include the maximum charges the customer may be subject to under his tariff scheme for:

- (a) making calls within the visited country and back to the Member State of his home network, as well as for calls received; and
- (b) sending regulated roaming SMS messages while in the visited Member State.

It shall also include the free of charge number referred to in paragraph 2 for obtaining more detailed information and information on the possibility of accessing emergency services by dialling the European emergency number 112 free of charge.

A customer who has given notice that he does not require the automatic Message Service shall have the right at any time and free of charge to require the home provider to provide the service again.

Home providers shall provide blind or partially sighted customers with this basic personalised pricing information automatically, by voice call, free of charge, if they so request.

2. In addition to paragraph 1, customers shall have the right to request and receive, free of charge, and irrespective of their location within the Community, more detailed personalised pricing information on the roaming charges that apply in the visited network to voice calls, SMS, MMS and other data communication services, and information on the transparency measures applicable by virtue of this Regulation, by means of a mobile voice call or by SMS. Such a request shall be to a free of charge number designated for this purpose by the home provider.

3. Home providers shall provide all users with full information on applicable roaming charges, in particular on the Eurotariff and the Euro SMS tariff, when subscriptions are taken out. They shall also provide their roaming customers with updates on applicable roaming charges without undue delay each time there is a change in these charges.

Home providers shall take the necessary steps to secure awareness by all their roaming customers of the availability of the Eurotariff and the Euro SMS tariff. They shall in particular communicate to all roaming customers by 30 July 2007 the conditions relating to the Eurotariff and by 30 June 2009 the conditions relating to the Euro SMS tariff, in each case in a clear and unbiased manner. They shall send a reminder at reasonable intervals thereafter to all customers who have opted for another tariff.

Article 6a

Transparency and safeguard mechanisms for regulated data roaming services

1. Home providers shall ensure that their roaming customers, both before and after the conclusion of a contract, are kept adequately informed of the charges which apply to their use of regulated data roaming services, in ways which facilitate customers' understanding of the financial consequences of such use and permit them to monitor and control their expenditure on regulated data roaming services in accordance with paragraphs 2 and 3.

Where appropriate, home providers shall inform their customers, before the conclusion of a contract and on a regular basis thereafter, of the risk of automatic and uncontrolled data roaming connection and download. Furthermore, home providers shall explain to their customers, in a clear and easily understandable manner, how to switch off these automatic data roaming connections in order to avoid uncontrolled consumption of data roaming services

2. From 1 July 2009 at the latest, an automatic message from the home provider shall inform the roaming customer that he is roaming and provide basic personalised tariff information on the charges applicable to the provision of regulated data roaming services to that roaming customer in the Member State concerned, except where the customer has notified his home provider that he does not require this information.

Such basic personalised tariff information shall be delivered to the roaming customer's mobile telephone or other device, for example by an SMS message, an e mail or a pop-up window on the computer, every time the roaming customer enters a Member State other than that of his home network and initiates for the first time a regulated data roaming service in that particular Member State. It shall be provided free of charge at the moment the roaming customer initiates a regulated data roaming service, by an appropriate means adapted to facilitate its receipt and easy comprehension.

A customer who has notified his home provider that he does not require the automatic tariff information shall have the right at any time and free of charge to require the home provider to provide this service again.

3. By 1 March 2010, each home provider shall grant to all their roaming customers the opportunity to opt deliberately and free of charge for a facility which provides information on the accumulated consumption expressed in volume or in the currency in which the roaming customer is billed for regulated data roaming services and which guarantees that, without the customer's explicit consent, the accumulated expenditure for regulated data roaming services over a specified period of use does not exceed a specified financial limit.

To this end, the home provider shall make available one or more maximum financial limits for specified periods of use, provided that the customer is informed in advance of the corresponding volume amounts. One of these limits (the default financial limit) shall be close to, but not exceed, EUR 50 of outstanding charges per monthly billing period (excluding VAT).

Alternatively, the home provider may establish limits expressed in volume, provided that the customer is informed in advance of the corresponding financial amounts. One of these limits (the default volume limit) shall have a corresponding financial amount not exceeding EUR 50 of outstanding charges per monthly billing period (excluding VAT).

In addition, the home provider may offer to its roaming customers other limits with different, that is, higher or lower, maximum monthly financial limits.

By 1 July 2010, the default limit in the second and third subparagraphs shall be applicable to all customers who have not opted for another limit.

Each home provider shall also ensure that an appropriate notification is sent to the roaming customer's mobile telephone or other device, for example by an SMS message, an e-mail or a pop-up window on the computer, when the data roaming services have reached 80 % of the agreed financial or volume limit. Customers shall have the right to require their operators to stop sending such notifications and shall have the right at any time and free of charge to require the home provider to provide the service again.

When this financial or volume limit would otherwise be exceeded, a notification shall be sent to the roaming customer's mobile telephone or other device. This notification shall indicate the procedure to be followed if the customer wishes to continue provision of those services and the cost associated with each additional unit to be consumed. If the roaming customer does not respond as prompted in the notification received, the home provider shall immediately cease to provide and to charge the roaming customer for regulated data roaming services, unless and until the roaming customer requests the continued or renewed provision of those services.

From 1 November 2010, whenever a roaming customer requests to opt for or to remove a "financial or volume limit" facility, the change must be made within one working day of receipt of the request, free of charge, and shall not entail conditions or restrictions pertaining to other elements of the subscription.

4. With effect from 1 July 2009:

- (a) the average wholesale charge that the operator of a visited network may levy from the operator of a roaming customer's home network for the provision of regulated data roaming services by means of that visited network shall not exceed a safeguard limit of EUR 1,00 on 1 July 2009, EUR 0,80 on 1 July 2010 and EUR 0,50 on 1 July 2011 per megabyte of data transmitted. The application of this safeguard limit shall not lead to any distortion or restriction of competition in the wholesale data roaming market in accordance with Article 8(2)(b) of the Framework Directive;
- (b) this average wholesale charge shall apply between any pair of operators and shall be calculated over a twelve-month period or any such shorter period as may remain before the expiry of this Regulation;
- (c) the average wholesale charge referred to in point (a) shall be calculated by dividing the total wholesale revenue received by the operator of the visited network from each operator of a home network for the provision of regulated data roaming services in the relevant period by the total number of megabytes of data actually consumed by the provision of those services within that period, aggregated on a per kilobyte basis.

Article 7

Supervision and enforcement

1. National regulatory authorities shall monitor and supervise compliance with this Regulation within their territory.

2. National regulatory authorities shall make up to date information on the application of this Regulation, in particular Articles 3, 4, 4a, 4b and 6a, publicly available in a manner that enables interested parties to have easy access to it.

3. National regulatory authorities shall in preparation for the review provided for in Article 11, monitor developments in wholesale and retail charges for the provision to roaming customers of voice and data communications services, including SMS and MMS, including in the outermost regions referred to in Article 299(2) of the Treaty. National regulatory authorities shall also be alert to the particular case of involuntary roaming in the border regions of neighbouring Member States and monitor whether traffic steering techniques are used to the disadvantage of customers. They shall communicate the results of such monitoring to the Commission, including separate information on corporate, post-paid and pre-paid customers, every six months.

4. National regulatory authorities shall have the power to require undertakings subject to obligations under this Regulation to supply all information relevant to the implementation and enforcement of this Regulation. Those undertakings shall provide such information promptly on request and to the timescales and level of detail required by the national regulatory authority.

5. National regulatory authorities may intervene on their own initiative in order to ensure compliance with this Regulation. In particular, they shall, where necessary, make use of the powers under Article 5 of the Access Directive to ensure adequate access and interconnection in order to guarantee the end to end connectivity and interoperability of roaming services, for example where subscribers are unable to exchange regulated roaming SMS messages with subscribers of a terrestrial mobile network in another Member State as a result of the absence of an agreement enabling the delivery of those messages.

6. Where a national regulatory authority finds that a breach of the obligations set out in this Regulation has occurred, it shall have the power to require the immediate cessation of such a breach.

Article 8

Dispute resolution

1. In the event of a dispute in connection with the obligations laid down in this Regulation between undertakings providing electronic communications networks or services in a Member State, the dispute resolution procedures laid down in Articles 20 and 21 of the Framework Directive shall apply.

2. In the event of an unresolved dispute involving a consumer or end-user and concerning an issue falling within the scope of this Regulation, the Member States shall ensure that the out-of-court dispute resolution

procedures laid down in Article 34 of the Universal Service Directive are available.

Article 9

Penalties

Member States shall lay down the rules on penalties applicable to infringements of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission no later than 30 March 2008 or, in the case of the additional requirements introduced in Article 3(2) and (3), Article 4(2) and (4) and Articles 4a, 4b, 4c, 6, 6a and 7 by Regulation (EC) No 544/2009 (), no later than 30 March 2010 and shall notify it without delay of any subsequent amendment affecting them.

Article 10

Amendment to Directive 2002/21/EC (Framework Directive)

The following paragraph shall be added to Article 1 of Directive 2002/21/EC (Framework Directive):

"5. This Directive and the Specific Directives shall be without prejudice to any specific measure adopted for the regulation of international roaming on public mobile telephone networks within the Community.

Article 11

Review

1. The Commission shall review the functioning of this Regulation and, after a public consultation, shall report to the European Parliament and the Council no later than 30 June 2011. The Commission shall evaluate in particular whether the objectives of this Regulation have been achieved. In so doing, the Commission shall review, inter alia:

- the developments in wholesale and retail charges for the provision to roaming customers of voice, SMS and data communication services, and the corresponding development in mobile communications services at domestic level in the Member States, both for pre-paid and post-paid customers separately, and in the quality and speed of these services,
- the availability and quality of services including those which are an alternative to roaming

(voice, SMS and data), in particular in the light of technological developments,

- the extent to which consumers have benefited through real reductions in the price of roaming services or in other ways from reductions in the costs of the provision of roaming services and the variety of tariffs and products which are available to consumers with different calling patterns,
- the degree of competition in both the retail and wholesale markets, in particular the competitive situation of smaller, independent or newly started operators, including the competition effects of commercial agreements and the degree of interconnection between operators.

The Commission shall also assess methods other than price regulation which could be used to create a competitive internal market for roaming and in so doing shall have regard to an analysis carried out independently by a body of European regulators for electronic communications. On the basis of this assessment the Commission shall make appropriate recommendations.

2. In addition, the Commission shall, no later than 30 June 2010, prepare an interim report to the European Parliament and the Council, which shall include a summary of the monitoring of the provision of roaming services in the Community and an assessment of the progress towards achieving the objectives of this Regulation, including by reference to the matters referred to in paragraph 1.

Article 12

Notification requirements

Member States shall notify to the Commission the identity of the national regulatory authorities responsible for carrying out tasks under this Regulation.

Article 13

Entry into force and expiry

This Regulation shall enter into force on the day following that of its publication in the Official Journal of the European Union.

It shall expire on 30 June 2012.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 27 June 2007.

For the European Parliament

The President

H.-G. PÖTTERING

For the Council

The President

A. MERKEL

RECOMMENDATIONS

COMMISSION

COMMISSION RECOMMENDATION

of 17 December 2007

on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services

(notified under document number C(2007) 5406)

(Text with EEA relevance)

(2007/879/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ⁽¹⁾, and in particular Article 15(1) thereof,

Directive 2002/21/EC. The objective of any *ex ante* regulatory intervention is ultimately to produce benefits for end-users by making retail markets competitive on a sustainable basis. The definition of relevant markets can and does change over time as the characteristics of products and services evolve and the possibilities for demand and supply substitution change. With the Recommendation 2003/311/EC having been in force for more than four years, it is now appropriate to revise the initial edition on the basis of market developments. Hence, this Recommendation replaces Commission Recommendation 2003/311/EC ⁽²⁾.

Whereas:

- (1) Directive 2002/21/EC establishes a legislative framework for the electronic communications sector that seeks to respond to convergence trends by covering all electronic communications networks and services within its scope. The aim of the regulatory framework is to reduce *ex ante* sector-specific rules progressively as competition in the market develops.
- (2) The purpose of this Recommendation is to identify those product and service markets in which *ex ante* regulation may be warranted in accordance with Article 15(1) of
- (3) Article 15(1) of Directive 2002/21/EC requires the Commission to define markets in accordance with the principles of competition law. Competition law principles are therefore used in this Recommendation to set product market boundaries within the electronic communications sector, while the identification or selection of defined markets for *ex ante* regulation depends on those markets having characteristics which may be such as to justify the imposition of *ex ante* regulatory obligations. The terminology used in this Recommendation is based on terminology used in Directive 2002/21/EC and Directive 2002/22/EC; the Explanatory Note to this Recommendation describes the evolving technologies in relation to these markets. In accordance with Directive 2002/21/EC, it is for national regulatory authorities to define relevant markets appropriate to national circumstances, in particular relevant geographic markets within their territory.

⁽¹⁾ OJ L 108, 24.4.2002, p. 33. Directive as amended by Regulation (EC) No 717/2007 (OJ L 171, 29.6.2007, p. 32).

⁽²⁾ OJ L 114, 8.5.2003, p. 45.

- (4) The starting point for the identification of markets in this Recommendation is the definition of retail markets from a forward-looking perspective, taking into account demand-side and supply-side substitutability. Having defined retail markets, it is then appropriate to identify relevant wholesale markets. If the downstream market is supplied by a vertically-integrated undertaking or undertakings, there may be no (merchant) wholesale market in the absence of regulation. Consequently, if the market warrants identification, it may be necessary to construct a notional upstream wholesale market. Markets in the electronic communications sector are often of a two-sided nature, in that they comprise services provided over networks or platforms that bring together users on either side of the market; for example end-users that exchange communications, or senders and receivers of information or content. These aspects need to be taken into account when considering the identification and definition of markets, as they can affect both the way markets are defined and whether they have the characteristics which may justify the imposition of *ex ante* regulatory obligations.
- (5) In order to identify markets that are susceptible to *ex ante* regulation, it is appropriate to apply the following cumulative criteria. The first criterion is the presence of high and non-transitory barriers to entry. These may be of a structural, legal or regulatory nature. However, given the dynamic character and functioning of electronic communications markets, possibilities to overcome barriers to entry within the relevant time horizon should also be taken into consideration when carrying out a prospective analysis to identify the relevant markets for possible *ex ante* regulation. Therefore the second criterion admits only those markets whose structure does not tend towards effective competition within the relevant time horizon. The application of this criterion involves examining the state of competition behind the barriers to entry. The third criterion is that application of competition law alone would not adequately address the market failure(s) concerned.
- (6) The main indicators to be considered when assessing the first and second criteria are similar to those examined as part of a forward-looking market analysis, in particular, indicators of barriers to entry in the absence of regulation, (including the extent of sunk costs), market structure, market performance and market dynamics, including indicators such as market shares and trends, market prices and trends, and the extent and coverage of competing networks or infrastructures. Any market which satisfies the three criteria in the absence of *ex ante* regulation is susceptible to *ex ante* regulation.
- (7) Newly emerging markets should not be subject to inappropriate obligations, even if there is a first mover advantage, in accordance with Directive 2002/21/EC. Newly emerging markets are considered to comprise products or services, where, due to their novelty, it is very difficult to predict demand conditions or market entry and supply conditions, and consequently difficult to apply the three criteria. The purpose of not subjecting newly emerging markets to inappropriate obligations is to promote innovation as required by Article 8 of the Directive 2002/21/EC; at the same time, foreclosure of such markets by the leading undertaking should be prevented, as also indicated in the Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications and services ⁽¹⁾. Incremental upgrades to existing network infrastructure rarely lead to a new or emerging market. The lack of substitutability of a product has to be established from both demand and supply-side perspectives before it can be concluded that it is not part of an already existing market. The emergence of new retail services may give rise to a new derived wholesale market to the extent that such retail services cannot be provided using existing wholesale products.
- (8) As far as barriers to entry are concerned, two types are relevant for the purpose of this Recommendation: structural barriers and legal or regulatory barriers.
- (9) Structural barriers to entry result from original cost or demand conditions that create asymmetric conditions between incumbents and new entrants impeding or preventing market entry of the latter. For instance, high structural barriers may be found to exist when the market is characterised by absolute cost advantages, substantial economies of scale and/or economies of scope, capacity constraints and high sunk costs. To date, such barriers can still be identified with respect to the widespread deployment and/or provision of local access networks to fixed locations. A related structural barrier can also exist where the provision of service requires a network component that cannot be technically duplicated or only duplicated at a cost that makes it uneconomic for competitors.

⁽¹⁾ OJ C 165, 11.7.2002, p. 6.

- (10) Legal or regulatory barriers are not based on economic conditions, but result from legislative, administrative or other state measures that have a direct effect on the conditions of entry and/or the positioning of operators on the relevant market. An example of a legal or regulatory barrier preventing entry into a market is a limit on the number of undertakings that have access to spectrum for the provision of underlying services. Other examples of legal or regulatory barriers are price controls or other price-related measures imposed on undertakings, which affect not only entry but also the positioning of undertakings on the market. Legal or regulatory barriers, which can be removed within the relevant time horizon, should not normally be deemed to constitute an economic barrier to entry, such as to fulfil the first criterion.
- (11) Barriers to entry may also become less relevant with regard to innovation-driven markets characterised by ongoing technological progress. In such markets, competitive constraints often come from innovative threats from potential competitors that are not currently in the market. In innovation-driven markets, dynamic or longer-term competition can take place among firms that are not necessarily competitors in an existing 'static' market. This Recommendation does not identify markets where barriers to entry are not expected to persist over a foreseeable period. In assessing whether barriers to entry are likely to persist in the absence of regulation, it is necessary to examine whether the industry has experienced frequent and successful entry and whether entry has been or is likely in the future to be sufficiently immediate and persistent to limit market power. The relevance of barriers to entry will depend *inter alia* on the minimum efficient scale of output and the costs which are sunk.
- (12) Even when a market is characterised by high barriers to entry, other structural factors in that market may mean that the market tends towards an effectively competitive outcome within the relevant time horizon. Market dynamics may for instance be caused by technological developments, or by the convergence of products and markets which may give rise to competitive constraints being exercised between operators active in distinct product markets. This may also be the case in markets with a limited — but sufficient — number of undertakings having diverging cost structures and facing price-elastic market demand. There may also be excess capacity in a market that would normally allow rival firms to expand output very rapidly in response to any price increase. In such markets, market shares may change over time and/or falling prices may be observed. Where market dynamics are changing rapidly, care should be taken in choosing the relevant time horizon so as to reflect the pertinent market developments.
- (13) The decision to identify a market as susceptible to *ex ante* regulation should also depend on an assessment of the sufficiency of competition law to address the market failures that result from the first two criteria being met. Competition law interventions are unlikely to be sufficient where the compliance requirements of an intervention to redress a market failure are extensive or where frequent and/or timely intervention is indispensable.
- (14) The application of the three criteria should limit the number of markets within the electronic communications sector where *ex ante* regulatory obligations are imposed and thereby contribute to the aim of the regulatory framework to reduce *ex ante* sector-specific rules progressively as competition in the markets develops. These criteria should be applied cumulatively, so that failure to meet any one of them would indicate that a market should not be identified as susceptible to *ex ante* regulation.
- (15) Regulatory controls on retail services should only be imposed where national regulatory authorities consider that relevant wholesale measures or measures regarding carrier selection or pre-selection would fail to achieve the objective of ensuring effective competition and the fulfilment of public interest objectives. By intervening at the wholesale level, including with remedies which may affect retail markets, Member States can ensure that as much of the value chain is open to normal competition processes as possible, thereby delivering the best outcomes for end-users. This Recommendation therefore mainly identifies wholesale markets, the appropriate regulation of which is intended to address a lack of effective competition that is manifest on end-user markets. Should a national regulatory authority demonstrate that wholesale interventions have been unsuccessful, the relevant retail market may be susceptible to *ex ante* regulation provided that the three criteria set out above are met.
- (16) The process of identifying markets in this Recommendation is without prejudice to markets that may be defined in specific cases under competition law. Moreover, the scope of *ex ante* regulation is without prejudice to the scope of activities that may be analysed under competition law.

(17) The markets listed in the Annex have been identified on the basis of these three cumulative criteria. For markets not listed in this Recommendation national regulatory authorities should apply the three-criteria test to the market concerned. For the markets in the Annex to Recommendation 2003/311/EC of 11 February 2003, which are not listed in the Annex to this Recommendation, national regulatory authorities should have the power to apply the three-criteria test in order to assess whether, on the basis of national circumstances, a market is still susceptible to *ex ante* regulation. For markets listed in this Recommendation a national regulatory authority may choose not to carry out a market analysis procedure if it determines that the three criteria are not satisfied for the particular market. National regulatory authorities may identify markets that differ from those listed in this Recommendation, provided that they act in accordance with Article 7 of Directive 2002/21/EC. Failure to notify a draft measure which affects trade between Member States as described in Recital 38 of Directive 2002/21/EC may result in infringement proceedings being taken. Markets other than those listed in this Recommendation should be defined on the basis of competition principles laid down in the Commission Notice on the definition of relevant market for the purposes of Community competition law⁽¹⁾ and be consistent with the Commission Guidelines on market analysis and the assessment of significant market power⁽²⁾ whilst satisfying the three criteria set out above.

(18) The fact that this Recommendation identifies those product and service markets in which *ex ante* regulation may be warranted does not mean that regulation is always warranted or that these markets will be subject to the imposition of regulatory obligations set out in the specific Directives. In particular, regulation cannot be imposed or must be withdrawn if there is effective competition on these markets in the absence of regulation, that is to say, if no operator has significant market power within the meaning of Article 14 of Directive 2002/21/EC. Regulatory obligations must be appropriate and be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Directive 2002/21/EC, in particular maximising benefits for users, ensuring no distortion or restriction of competition, encouraging efficient investment in infrastructure and promoting innovation, and encouraging efficient use and management of radio frequencies and numbering resources.

(19) This Recommendation has been subject to a public consultation and to consultation with national regulatory authorities and national competition authorities,

HEREBY RECOMMENDS:

1. In defining relevant markets appropriate to national circumstances in accordance with Article 15(3) of Directive 2002/21/EC, national regulatory authorities should analyse the product and service markets identified in the Annex to this Recommendation.
2. When identifying markets other than those set out in the Annex, national regulatory authorities should ensure that the following three criteria are cumulatively met:
 - (a) the presence of high and non-transitory barriers to entry. These may be of a structural, legal or regulatory nature;
 - (b) a market structure which does not tend towards effective competition within the relevant time horizon. The application of this criterion involves examining the state of competition behind the barriers to entry;
 - (c) the insufficiency of competition law alone to adequately address the market failure(s) concerned.
3. This Recommendation is without prejudice to market definitions, results of market analyses and regulatory obligations adopted by national regulatory authorities in accordance with Articles 15(3) and 16 of Directive 2002/21/EC prior to the date of adoption of this Recommendation.
4. This Recommendation is addressed to the Member States.

Done at Brussels, 17 December 2007.

For the Commission
Neelie KROES
Member of the Commission

⁽¹⁾ OJ C 372, 9.12.1997, p. 5.

⁽²⁾ OJ C 165, 11.7.2002, p. 6.

ANNEX

Retail level

1. Access to the public telephone network at a fixed location for residential and non-residential customers.

Wholesale level

2. Call origination on the public telephone network provided at a fixed location.

For the purposes of this Recommendation, call origination is taken to include call conveyance, delineated in such a way as to be consistent, in a national context, with the delineated boundaries for the market for call transit and for call termination on the public telephone network provided at a fixed location.

3. Call termination on individual public telephone networks provided at a fixed location.

For the purposes of this Recommendation, call termination is taken to include call conveyance, delineated in such a way as to be consistent, in a national context, with the delineated boundaries for the market for call origination and the market for call transit on the public telephone network provided at a fixed location.

4. Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location.
5. Wholesale broadband access.

This market comprises non-physical or virtual network access including 'bit-stream' access at a fixed location. This market is situated downstream from the physical access covered by market 4 listed above, in that wholesale broadband access can be constructed using this input combined with other elements.

6. Wholesale terminating segments of leased lines, irrespective of the technology used to provide leased or dedicated capacity.
 7. Voice call termination on individual mobile networks.
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COMMISSION STAFF WORKING DOCUMENT

EXPLANATORY NOTE

Accompanying document to the

Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services

(Second edition)

{{C(2007) 5406}}

EXPLANATORY MEMORANDUM

1. INTRODUCTION

This document provides the background to the review and revision of the Recommendation on relevant markets within the electronic communications sector that are susceptible to regulation under EU law. The initial Recommendation, which was adopted by the Commission in February 2003, is being revised in the light of market developments and the experience of applying the regulatory framework since July 2003.

The Lisbon European Council of March 2000 highlighted the potential for growth, competitiveness and job creation of the shift to a digital, knowledge-based economy. In particular it emphasised the importance of access to inexpensive, world-class communications infrastructure and services. When the European Council revitalised the Lisbon strategy in March 2005, it re-emphasised the need to promote innovation and to spread the EU citizens' access to the information society. It called for better regulation and a reduced administrative burden for entrepreneurs and for a completion of the internal market.

As part of the renewed Lisbon strategy for growth and jobs, the Commission proposed in June 2005 a new strategic framework, i2010 – European Information Society 2010, laying out broad policy orientations. The goal is to promote an open and competitive digital economy with an emphasis on ICT as a driver of inclusion and quality of life.

Accordingly, the legislative package for the electronic communications sector aims to establish a harmonised regulatory framework for networks and services across the EU and seeks to respond to convergence trends by covering all electronic communications networks and services within its scope. The EU legislative package had to be transposed into national law by 25th July 2003. Despite delays in several Member States, national implementation measures are now in place throughout the EU.

The regulatory framework for electronic communications networks and services comprises five Directives:

Directive of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services¹, hereinafter the Framework Directive;

Directive of the European Parliament and of the Council on the authorisation of electronic communications networks and services², hereinafter the Authorisation Directive;

Directive of the European Parliament and of the Council on access to, and interconnection of, electronic communications networks and associated facilities³, hereinafter the Access Directive;

¹ OJ L 108, 24.4.2002, p.33.

² OJ L 108, 24.4.2002, p.21.

³ OJ L 108, 24.4.2002, p.7.

Directive of the European Parliament and of the Council on universal service and users' rights relating to electronic communications networks and services⁴, hereinafter the Universal Service Directive;

Directive of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector⁵.

Article 15(1) of the Framework Directive requires the adoption of a Recommendation on Relevant Product and Service Markets. The Commission adopted the initial edition of this Recommendation on 11 February 2003. The Recommendation identified those product and service markets within the electronic communications sector, whose characteristics may be such as to justify the imposition of regulatory obligations set out in the specific Directives. The markets identified in the Recommendation were defined in accordance with the principles of competition law, without prejudice to markets that may be defined in specific cases under competition law.

Under Article 15(1) of the Framework Directive the Commission is required to regularly review the Recommendation. In June 2006, the Commission launched a public consultation on a review of the Recommendation. The views gathered in this consultation have provided input to the revision of the Recommendation. This Explanatory Memorandum sets out in greater detail the reasoning behind the proposed changes to the Recommendation.

The Recommendation should be considered in conjunction with the 'Guidelines for market analysis and the assessment of significant market power' referred to in Article 15(2) of the Framework Directive⁶ (hereinafter, "the Guidelines"). National regulatory authorities ("NRAs") are required, taking utmost account of this Recommendation and the Guidelines, to define relevant markets appropriate to national circumstances, in particular relevant geographic markets within their territory, in accordance with the principles of competition law and to analyse those product and service markets, taking the utmost account of the Guidelines. On the basis of this market analysis, NRAs will determine whether or not these markets are effectively competitive and impose, amend, or withdraw regulatory obligations accordingly.

The regulatory framework is aimed at ensuring harmonisation across the single market and guaranteeing legal certainty. This Recommendation plays an important role in achieving both of these objectives, as it seeks to ensure that the same product and services markets will be subject to a market analysis in all Member States and that market players will be aware in advance of the markets to be analysed. It will only be possible for NRAs to regulate markets which differ from those identified in this Recommendation where this is justified by national circumstances in the sense that the three cumulative criteria referred to in recital four of this Recommendation are met, and where the Commission does not raise any objections, in accordance with the procedures referred to in Article 7(4) of the Framework Directive.

Competing network infrastructures are essential for achieving sustainable competition in networks and services in the long term. When there is effective competition, the framework requires ex-ante regulatory obligations to be lifted. Where competition is not yet effective granting others access to facilities in a way that levels the playing field but does not remove

⁴ OJ L 108, 24.4.2002, p.51.

⁵ OJ L 201, 31.7.2000, P.37.

⁶ OJ C 165;11.7.2002, p.6.

incentives for new infrastructure investment ensures that users enjoy choice and competition during the transition to a fully competitive market. Investment in new and competing infrastructure will bring forward the day when such transitional access obligations can be further relaxed.

NRAs define relevant markets appropriate to national circumstances, taking utmost account of the product markets listed in the Recommendation, in particular relevant geographic markets within their territory. The definition of relevant markets can and does change over time as the characteristics of products and services evolve and the possibilities for demand and supply substitution change. This is particularly important where the characteristics of products and services are continually evolving, where new products and services appear and where the way in which such products and services are produced and delivered evolves as a result of technological development. The convergence phenomenon where similar services can be delivered over different types of network is one example. This means that it will be necessary to continue periodically re-examining the markets identified in this revised Recommendation. At the same time the underlying purpose of the regulatory framework (and its ex ante market analysis and possible regulation) is to deal with predictable problems of lack of effective competition that have their origin in structural factors in the industry. The fact that the framework deals with situations where any lack of effective competition is durable means that a degree of continuity (as opposed to frequent revisions of this Recommendation) is warranted. With the Recommendation having been in force for more than three years, the time is now ripe to revise the initial edition on the basis of market developments.

2. MARKET DEFINITION, IDENTIFYING MARKETS AND DEFINITION OF OTHER MARKETS

2.1. Methodologies used to define markets

In the regulatory framework, markets are defined in accordance with the principles of competition law, as explained in the Commission Notice on Market Definition⁷ and the Guidelines.

The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings face. The objective is to identify those actual and potential competitors of the undertakings that are capable of constraining their behaviour and of preventing them from behaving independently. The market definition arrived at can depend on the relative weight given to demand-side and supply-side substitutability, and can also depend on the prospective time horizon considered. It is important to bear in mind that market definition for the purposes of the Recommendation is not an end in itself but is a means of assessing effective competition for the purposes of ex ante regulation.

As stated in the Commission's Guidelines and Access Notice⁸, there are in the electronic communications sector at least two main types of relevant markets to consider, that of services or facilities provided to end-users (retail markets) and that of access to facilities for operators necessary to provide such services to end-users (wholesale markets). Within these two types of markets, further market distinctions may be made depending on demand and supply-side characteristics.

⁷ OJ C 372, 9.12.1997, p.5.

⁸ OJ C 265, 22.8.1998, p.2.

The starting point for the identification of markets susceptible to ex ante regulation is the definition of retail markets over a given time horizon⁹, taking into account demand-side and supply-side substitutability¹⁰. Having defined retail markets, which are markets involving the supply and demand of end-users, it is then appropriate to identify the corresponding wholesale markets which are markets involving the demand and supply of products to a third party wishing to supply end-users.

As the market analyses carried out by NRAs have to be forward-looking, markets are defined prospectively¹¹. Their definitions take account of expected or foreseeable technological or economic developments over a reasonable horizon linked to the timing of the next market review. Moreover, given the possibility to review a market at regular intervals, a NRA would be justified in taking into account past performance and existing market position as well as expectations concerning forthcoming developments¹².

Markets defined in the Recommendation are without prejudice to the markets defined in specific cases under competition law. Markets identified in the Recommendation, while based on competition law methodologies, will not necessarily be identical to markets defined in individual competition law cases. As explained in paragraph 27 of the Guidelines, the starting point for carrying out a market analysis for the purpose of Article 15 of the Framework Directive is not the existence of an agreement or concerted practice within the scope of Article 81 EC Treaty, nor a concentration within the scope of the Merger Regulation, nor an alleged abuse of dominance within the scope of Article 82 EC Treaty, but is based on an overall forward-looking assessment of the structure and the functioning of the market under examination. NRAs and competition authorities, when examining the same issues in the same circumstances and with the same objectives, should in principle reach the same conclusions. However, given the differences outlined above, the possibility that markets defined for the purposes of competition law and markets defined for the purpose of sector-specific regulation may not be identical cannot be excluded.

2.2. The basis for identifying markets that are susceptible to ex ante regulation in this Recommendation

Article 15(1) of the Framework Directive requires that the Recommendation identify those product and service markets within the electronic communications sector, the characteristics of which may be such as to justify the imposition of regulatory obligations set out in the specific Directive¹³. It is therefore appropriate first to consider the characteristics that may render a particular market susceptible to ex ante regulation.

⁹ Ex ante regulation addresses lack of effective competition that is expected to persist over a given horizon. Therefore, the time horizon for market definition and identification for the purposes of this Recommendation should tie in with the period during which possible ex ante regulatory remedies are likely to be imposed. The period may depend on whether an existing obligation is being maintained or reviewed, or a new obligation is being imposed.

¹⁰ See section 2 of the SMP Guidelines.

¹¹ Framework Directive recital 27.

¹² See paragraph 20 of the SMP Guidelines.

¹³ Whereas for the initial Recommendation Annex I to the Framework Directive listed a number of markets that were to be included, this is no longer the case for the current second edition of the Recommendation.

In this context, it should be borne in mind that the Framework Directive is based on the premise that there is a need for ex ante obligations in certain circumstances in order to ensure the development of a competitive market (see e.g. recital 25).

So far the experience of liberalisation in the European Union has been that entry barriers often constitute a significant impediment to the development of competitive markets in the electronic communications sector. These barriers to entry may be legal or regulatory barriers. There are also structural barriers to entry which may, for example, result from continuing control over legacy infrastructure that is impossible or difficult to duplicate, network externalities or economies of scale and scope. Where barriers to entry are high, even an undertaking that is more efficient than the incumbent is unlikely to be able to enter a market and create competition to the benefit of the consumer in the absence of regulatory intervention. The existence of high barriers to entry in a market is therefore considered a first indication that regulatory intervention may be required in order to ensure the development of a competitive market.

In view of the character of electronic communications markets, for regulatory intervention to be justified, market characteristics should be analysed not only in a *static* but also in a *dynamic* manner. Does the market, in the absence of regulation, tend towards effective competition? Market dynamics may make barriers to entry disappear over time, for example as a result of technological developments. Convergence of previously distinct markets may increase competition. Or simply, there may be sufficient players active in the market for effective competition to emerge behind the barriers to entry. Possibilities for the market to tend towards a competitive outcome, in spite of high barriers to entry, need also to be taken into consideration in analysing whether market characteristics may justify ex ante regulation.

Thirdly, recital 27 of the Framework Directive indicates that, in addition, ex ante regulatory obligations (with respect to electronic communications networks and services) should only be imposed where Community competition law remedies are not sufficient to address the problem¹⁴. Ex ante regulation and competition law serve as complementary instruments in achieving their respective policy objectives¹⁵ in the electronic communications sector and in dealing with lack of effective competition. At the same time, a principle underlying the regulatory framework is that ex ante regulation should only be imposed where competition law remedies are insufficient and should be rolled back when it is no longer needed.

It is therefore considered that the criteria for identifying markets for the purposes of ex ante regulation should include an overall assessment of the effectiveness of competition law alone in addressing the market failures concerned. Such an assessment will draw on the experience gained from the application of competition law and the imposition of ex ante regulatory obligations in the electronic communications sector as a complementary instrument. Only markets where national and Community competition law is not considered sufficient by itself

¹⁴ Recital 27 also indicates that newly emerging markets, where de facto the market leader is likely to have a substantial market share, should not be subjected to inappropriate obligations. The Commission considers that 'emerging markets' are markets which are so new and volatile that it is not possible to determine whether or not the '3 criteria' test described below is met.

¹⁵ Article 8 of the Framework Directive requires NRAs to pursue a number of objectives including: ensuring users derive maximum benefit in terms of choice, price and quality; ensuring there is no distortion or restriction of competition; encouraging efficient investment in infrastructure and promoting innovation; encouraging efficient use and effective management of radio frequencies and numbering resources.

to redress market failures and to ensure effective and sustainable competition over a foreseeable time horizon should be identified for potential ex ante regulation.

For the aforementioned reasons, it is considered that the following specific cumulative criteria are appropriate to identify which electronic communications markets are susceptible to ex ante regulation.

The first criterion is that a market is subject to high and non-transitory entry barriers. The presence of high and non-transitory entry barriers, although a necessary condition, is not of itself a sufficient condition to warrant inclusion of a given defined market. Given the dynamic character of electronic communications markets, possibilities for the market to tend towards a competitive outcome, in spite of high and non-transitory barriers to entry, need also to be taken into consideration.

The second criterion, therefore, is that a market has characteristics such that it will not tend over time towards effective competition. This criterion is a dynamic one and takes into account a number of structural and behavioural aspects which on balance indicate whether or not, over the time period considered, the market has characteristics which may be such as to justify the imposition of regulatory obligations as set out in the specific Directives of the new regulatory framework.

The third criterion considers the insufficiency of competition law by itself to deal with the market failure (without ex ante regulation), taking account of the particular characteristics of the electronic communications sector.

(i) Barriers to entry and to the development of competition

With respect to the first criterion, two types of barriers to entry, and to the development of competition in the electronic communications sector, appear to be relevant: structural barriers and legal or regulatory barriers.

A structural barrier to entry exists when the state of the technology, and its associated cost structure, and/or the level of demand, are such that they create asymmetric conditions between incumbents and new entrants impeding or preventing market entry of the latter. For instance, high structural barriers may be found to exist when the market is characterised by absolute cost advantages, substantial economies of scale and/or economies of scope, capacity constraints, and high sunk cost. Such barriers can still be identified with respect to the widespread deployment and/or provision of local access networks to fixed locations.

An important qualification of the first criterion is whether high entry barriers are likely to be non-transitory in the context of a modified Greenfield approach (i.e. in the absence of regulation in the market concerned under this regulatory framework but including regulation which exists outside this framework). In this respect it is not sufficient to examine whether entry has occurred or is likely to occur in the market at all. The NRA will therefore examine whether the industry has experienced entry and whether entry has been or is likely in the future to be sufficiently immediate and persistent to limit market power. Small-scale entry (e.g. in a limited geographic area) may not be considered sufficient since it may be unlikely to exercise any constraint on the dominant undertaking(s). Barriers to entry will also depend on the minimum efficient scale of output, and the fraction of costs which are sunk.

A specific and different type of barrier to the development of effective competition can also occur in the electronic communications sector where interconnection is required to enable a calling party to make a call to a specific subscriber number. In cases where a charge is levied for terminating the call, (which is passed on as a retail charge to the calling party), the terminating network operator can affect competition adversely by raising a rival's costs or by passing on inefficiencies to competitors. This barrier by itself need not lead to an absence of competition. For example, where the receiver rather than the calling party is responsible for paying any charge associated with incoming calls or traffic, the incentive to raise termination charges above costs is absent. Technological solutions might also provide a way round the technical barrier.

Legal or regulatory barriers are not based on economic conditions, but result from legislative, administrative or other state measures that have a direct effect on the conditions of entry and/or the positioning of operators on the relevant market.

Examples are legal limits on the granting of rights of way or rights of use of frequencies. The latter limitation is typically linked to a related technical or technological barrier, e.g. a constraint on the amount of spectrum that can be assigned and consequently a limit on the number of undertakings that can enter a market. Additional entry is blocked unless additional spectrum becomes available or secondary trading of spectrum is permitted. A significant legal or regulatory barrier to entry may also exist when entry into a particular market is rendered non-viable as a result of regulatory requirements, and in addition this situation is expected to persist for a foreseeable period. Regulatory requirements may lead to some services being provided at below cost or at rates of return that deter entry. One example is the retail pricing of access to the public telephone network (and local calls) at a fixed location or address. In cases where services fail to cover their forward-looking incremental costs, entry into local access is deterred. Tariff re-balancing will address such a barrier. However, broader policy concerns and objectives may mean that the situation persists for a significant period. For legal or regulatory barriers to be considered valid for the purposes of this three-criteria test, such barriers should be necessary to manage a legitimate public policy objective. In the event that legal or regulatory barriers cannot be removed without significant negative effects on such legitimate public policy considerations and within a reasonable time frame, a non-transitory entry barrier could be said to exist.

(ii) Dynamic aspects – no tendency to effective competition

The second criterion is that the market has characteristics such that it will not tend towards effective competition without ex ante regulatory intervention. The application of this criterion involves examining the state of competition behind the barrier to entry, taking account of the fact that even when a market is characterised by high barriers to entry, other structural factors or market characteristics and developments may mean that the market tends towards effective competition. This is for instance the case in markets with a limited, but sufficient, number of undertakings behind the entry barrier having diverging cost structures and facing price-elastic market demand. In such markets, market shares may change over time and/or falling prices may be observed.

There may also be excess capacity in a market that would allow rival firms to expand output very rapidly in response to any price increase, provided that there are no barriers to expansion behind the barriers to entry. Such barriers to expansion could exist, for example, if small-scale entry does not allow firms to move from the fringe to the core of the market occupied by the established firm(s).

Market dynamics may also be changed by technological developments or by the convergence of products and markets. Innovation-driven markets characterised by ongoing technological progress may indeed tend towards effective competition. In such markets, competitive constraints often come from innovative threats from potential competitors that are not currently in the market. In such innovation-driven and/or converging markets, dynamic or longer-term competition can take place among firms that are not necessarily competitors in an existing “static” market.

The tendency towards effective competition does not necessarily imply that the market will reach the status of effective competition within the period of review. It simply means that there is clear evidence of dynamics in the market within the period of review which indicates that the status of effective competition will be reached in the longer-run without ex ante regulation in the market concerned. Where market dynamics are changing rapidly care should be taken in choosing the period of review so as to reflect the pertinent market developments. Anticipated events must be expected within a meaningful timeframe and on the basis of concrete elements (e.g. business plans, investments made, new technologies being rolled out) rather than something which may be theoretically possible.

The simple fact that market shares have begun to decrease in recent years or uncertain technological future developments are in themselves insufficient to find that the market tends towards effective competition.

In general, the later effective competition is expected to materialise in the future, the more likely it is that the second criterion will be fulfilled.

(iii) Relative efficiency of competition law and complementary ex ante regulation

The final decision to identify a market that fulfils the first two criteria (high and persistent entry barriers and absence of characteristics such that the market would tend towards effective competition) as justifying possible ex ante regulation, should depend on an assessment of the insufficiency of competition law by itself (without ex ante regulation) to address the market failure.

Ex ante regulation would be considered to constitute an appropriate complement to competition law in circumstances where the application of competition law would not adequately address the market failures concerned. Such circumstances would for example include situations where the regulatory obligation necessary to remedy a market failure could not be imposed under competition law (e.g. access obligations under certain circumstances or specific cost accounting requirements), where the compliance requirements of an intervention to redress a market failure are extensive (e.g. the need for detailed accounting for regulatory purposes, assessment of costs, monitoring of terms and conditions including technical parameters and so on) or where frequent and/or timely intervention is indispensable, or where creating legal

certainty is of paramount concern (e.g. multi-period price control obligations). However, differences between the application of competition law and ex ante regulation in terms of resources required to remedy a market failure should not in themselves be relevant.

In practice NRAs should consult with their National Competition Authority (NCA) and take into account that body's opinion when deciding whether use of both complementary regulatory tools is appropriate to deal with a specific issue, or whether competition law instruments are sufficient.

In summary, whether an electronic communications market is susceptible to ex ante regulation would depend on the persistence of high entry barriers, on the lack of a tendency towards effective competition and on the insufficiency of competition law by itself (without ex ante regulation) to address persistent market failures. For those markets listed, the Recommendation creates a presumption for the NRA that the three criteria are met and therefore NRAs do not need to reconsider the three criteria. However, it is open to a NRA to assess the three criteria in terms of whether they are satisfied for their specific market if the NRA believes that this would be appropriate. The results of any such analysis should follow the normal market notification procedure.

The three-criteria test focuses on market characteristics. It is intended to determine where persistent market failures, that ultimately cause consumer harm, are most likely to exist. As such the three-criteria test is different from the SMP assessment. Whereas the three-criteria test focuses on the general structure and characteristics of a market in order to identify those markets whose characteristics are such that they need to be analysed in more detail on a national basis by NRAs, the SMP assessment focuses on the market power of a specific operator in a given market with a view to determining whether that operator should or should not be made subject to ex ante regulation in that particular market. Meeting the three-criteria test does not automatically mean that regulation is warranted. Regulation will only be warranted if on a market that meets the three-criteria test, one or more operators are found to have significant market power¹⁶. NRAs should follow the same basic criteria and principles when they identify markets other than those appearing in this Recommendation. The Commission will use these criteria when making future revisions to this Recommendation.

2.3. The definition by NRAs of other relevant markets

In this Recommendation, care has been taken to identify on an EU-wide basis markets whose characteristics may be such as to justify the imposition of regulatory obligations as set out in the specific Directives. This list of relevant markets may not be exhaustive in the context of national circumstances, which may vary from Member State to Member State.

Should an NRA identify an instance of consumer harm that cannot be addressed by imposing regulation on a market in the Recommendation it may consider defining a new market. NRAs should ensure that such a market (i) is defined on the basis of competition principles laid down in the Commission Notice on the definition of relevant market for the purposes of Community competition law, (ii) is consistent with the Commission Guidelines on market analysis and the assessment of significant market power, and (iii) satisfies the three criteria set out above. Since the imposition of ex ante regulation on a market would in most cases potentially affect trade between Member States as described in recital 38 of the Framework

¹⁶ See section 4 below for a market-by-market overview.

Directive, the Commission considers that the identification, analysis and regulation of a market that differs from those of the Recommendation is subject to the procedure provided for in Article 7 of the Framework Directive.

There may, moreover, be a number of ways in which the borderlines of a specific product or service market may be drawn differently at a national level than set out in the Recommendation, for the purposes of market analysis. For example, in the first round of market analyses certain NRAs have, on the basis of specific national circumstances and consistent with competition law principles, segmented the wholesale terminating segments of leased lines into various product markets according to the capacity of the leased lines.

When NRAs consider redefining markets more narrowly or more broadly for reasons related to national market circumstances, such market definition must be consistent with competition law principles as set out in the Guidelines. This also applies in relation to defining the geographic scope of a market (section 2.4).

2.4. The definition of relevant geographic markets

According to established case law, a relevant geographic market comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which area the conditions of competition are similar or sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different¹⁷.

In the electronic communications sector, the geographical scope of the relevant market has traditionally been determined by reference to two main criteria: the area covered by the network and the scope of application of legal and other regulatory instruments (para. 59 Guidelines). This corresponds generally to the territory of the Member State concerned since the consideration centres on the scope of the potential SMP operator's network and whether that potential SMP operator acts uniformly across its network area or whether it faces such different conditions of competition that its activity is constrained in some areas but not in others.

However, investment in alternative infrastructure is often uneven across the territory of a Member State, and in many countries there are now competing infrastructures in parts of the country, typically in urban areas. Where this is the case, an NRA could in principle find sub-national geographic markets. The NRA would need to identify the competitors of the potential SMP operator(s) and assess the area of supply of these competitors. Competitors include both actual competitors providing competing offers in the relevant product market and entrants who are likely to enter the market in the case of a small but non-transitory price increase of the incumbents' offer on that market. According to competition law principles, only short-term entry (i.e. less than one year) is taken into account for the purpose of market definition. The fact that competitors have a supply area which is not national does not suffice to conclude that there are distinct markets. Further evidence relating to demand-side and supply-side substitutability on the relevant market will have to be considered. Regional competitors can indeed exercise a competitive pressure reaching beyond the area in which they are present when the potential SMP operator applies uniform tariffs and the regional competitor is too large to ignore. Moreover, there should be evidence that the pressure for

¹⁷ Guidelines on market analysis, quoted at paragraph 56.

regional price differences comes from customers and competitors and is not merely reflecting variations in the underlying costs.

In the absence of sub-national markets, the existence of geographically differentiated constraints on a SMP operator who operates nationally, such as different levels of infrastructure competition in different parts of the territory, could be taken into account in the context of remedies.

2.5. The analysis of markets identified as susceptible to ex ante regulation

Certain of the markets identified in the Recommendation are interrelated and for NRAs there is a logical sequence for analysing these markets.

In general, the market to be analysed first is the one that is most upstream in the vertical supply chain. Taking into account the ex ante regulation imposed on that market (if any), an assessment should be made as to whether there is still SMP on a forward-looking basis on the related downstream market(s). This methodology has become known as the “modified greenfield approach”. Thus the NRA should work its way along the vertical supply chain until it reaches the stage of the retail market(s). A downstream market should only be subject to direct regulation if competition on that market still exhibits SMP in the presence of wholesale regulation on the related upstream market(s).

For example, with regard to wholesale broadband access, it is recommended that NRAs first analyse the market for local loop unbundling. Taking into account regulation imposed on that market, the market for wholesale broadband access should then be analysed. If that market continues to exhibit SMP on a forward looking basis despite the presence of LLU regulation (unless the NRA finds that the market no longer fulfils the three-criteria test and excludes it from regulation on that basis), appropriate regulation on the wholesale broadband access market should be imposed.

Likewise, NRAs should take into account regulation imposed on the market for wholesale (physical) network infrastructure access when analysing the wholesale market for fixed origination. Remedies imposed on the markets for local loop unbundling should then be taken into account when assessing SMP on a forward-looking basis on the retail fixed access market.

Given that the analysis of these markets must be conducted within the context of the entire value chain from the wholesale input market through to the final output market, it is imperative that, for NRAs to be in a position to carry out their tasks, they should have access to data at all levels in the value chain. This is particularly pertinent in relation to the retail level. As noted elsewhere by the Commission¹⁸, NRAs have all the necessary powers under the current framework to ensure that they are in a position to obtain such data. In the specific context of accounting separation, such data requirements may be extensive in order to ensure coherence, given the extent of joint and common costs which may transcend both SMP and non-SMP markets. Therefore an accounting separation obligation may require the preparation and disclosure of information for markets where an operator does not have SMP.

¹⁸ 2005/698/EC Commission Recommendation of 19 September 2005 on Accounting Separation and Cost Accounting Systems under the Regulatory Framework for Electronic Communications.

In addition to cost accounting data requirements, an NRA must be in a position to gather whatever data is necessary in order to make an assessment of market dynamics and market evolution, such as price or tariff data, market shares, etc. Article 5 of the Framework Directive provides the legal basis for such data collection.

2.6. Remedies

Remedies are the final part of a process which starts with market definition and identification as a market susceptible to ex ante regulation, is followed by market analysis and, in the event of an SMP designation, and moves to corrective action. Markets susceptible to ex-ante regulation are selected on the basis of the criteria set out in section 2.2. The identification of a market for analysis does not of itself mean that that market requires regulatory intervention. It is only where NRAs find that effective competition is lacking on a given market that they impose remedies. Even then there needs to be careful consideration of which remedy should be applied. The regulatory framework is very flexible. NRAs have a suite of regulatory tools at their disposal, as set out in Directive 2002/19/EC and Directive 2002/22/EC. When imposing a specific obligation on an undertaking with significant market power, the NRA will need to demonstrate that the obligation in question is based on the nature of the problem identified, proportionate and justified in the light of the NRA's basic objectives as set out in Article 8 of the Framework Directive.

These basic objectives require NRAs to:

- promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services;
- contribute to the development of the internal market;
- promote the interests of the citizens of the European Union.

The Framework Directive also requires NRAs to seek to agree between themselves on the types of instruments and remedies best suited to address particular types of situations in the marketplace. In particular, as noted in the Guidelines on market analysis, in order to establish that a proposed remedy is compatible with the principle of proportionality, the action to be taken must pursue a legitimate aim and the means employed to achieve the aim must be both necessary and the least burdensome, i.e. it must be the minimum necessary to achieve the aim.

A number of considerations are set out in the Directives qualifying the use of specific remedies. In particular, before imposing the more onerous remedies, NRAs need to be mindful of the initial investment by the facility owner, bearing in mind the risks involved in making the investment. The NRAs have a duty to safeguard competition in the long term, which will inter alia be a function of the need to assess the technical and economic viability of using or installing competing facilities and the effect of such an intervention on possible investment in those facilities. This is especially important where new technologies or networks are being deployed in unproven markets.

In principle, the proposed obligations should pertain to the relevant product market in which SMP has been found. However, in dealing with lack of effective competition arising from a position of SMP in an identified market, it may be necessary to impose several obligations to remedy the competition problem relating to services both inside and outside the market. In principle, an NRA may impose obligations in an area outside but closely related to the relevant market under review, provided such imposition constitutes:

- the most appropriate, proportionate and efficient means of remedying the lack of effective competition found on the relevant market; and
- an essential element in support of obligation(s) imposed on the relevant SMP market without which those obligations would be ineffective.

For instance, an obligation of accounting separation may cover the disclosure of information related to a market on which the operator does not have SMP, which is closely associated with the markets on which the operator does have SMP.

3. HORIZONTAL ISSUES

In the application of market reviews a number of general themes remain relevant. These include the issues of self-supply, bundling, next generation networks (NGNs), emerging markets and price and margin squeezes.

3.1. Self-Supply

The issue of how to take into account the self-provision of wholesale inputs arises frequently in both defining and analysing markets. In some cases, what is under consideration is the self-supply of the incumbent operators. In others, it is the self supply of alternative operators.

In many cases the incumbent is the only firm that is in a position to provide a potential wholesale service. It is likely that there is no merchant market as this is often not in the interest of the incumbent operator. Where there is no merchant market and where there is consumer harm, it is justifiable to construct a notional market when potential demand exists. Here the implicit self-supply of this input by the incumbent to itself should be taken into account.

In cases where there is likely demand substitution, i.e. where wholesale customers are interested in procuring from alternative operators, it may be justified to take the self-supply concerned into consideration for the sake of market delineation. However, this is not justified if alternative operators face capacity constraints, or their networks lack the ubiquity expected by access seekers, and/or if alternative providers have difficulty in entering the merchant market readily.

3.2. Bundling

Communications companies provide a multitude of services to their customers, which are often sold as a bundle¹⁹. In most cases the individual services in the bundle are not good demand-side substitutes for each other yet may be considered to be part of the same retail market if there is no more independent demand for individual parts of the bundle. On the supply side, bundling two or more components into one product is driven by savings in production, distribution and transaction costs, and the ability to improve the quality of the product. Bundling may also be related to the technology used where a given network can be configured to provide a large range of services.

¹⁹ Bundling refers to situations where a package of two or more goods is offered. Cases where only the bundle is available and not the components are referred to as pure bundling. Cases where both the bundle and the components are available on the market are referred to as mixed bundling if the bundle is sold at a discount to the sum of the prices of the components.

On the demand side, consumers may have a preference for a bundle if there are significant transactional costs. In this case, consumers may prefer to purchase the services as a bundle and from a single supplier. Hence the bundle may become the relevant product market. Whilst certain bundles are well established (voice and SMS on mobile), others are at an earlier stage of development such as bundles of television and internet. If, in the presence of a small but significant non-transitory increase in price there is evidence that a sufficient number of customers would “unpick” the bundle and obtain the service elements of the bundle separately, then it can be concluded that the service elements constitute the relevant markets in their own right and not the bundle.

3.3. Next Generation Networks (NGNs)

'Next generation networks' (NGN) cover modernisation of the 'core' part of the network (i.e. moving to an all-IP architecture), and the 'access' part of the network (i.e. rolling out optical fibre all or part of the way to the customers' premises).

Most operators have plans to migrate to NGNs with the aims of reducing operational costs and offering new and innovative high speed services to customers, but the relative priority being given to core and access network modernisation varies between operators, depending on the state of their network and the competitive environment. While the costs of modernisation are substantial, NGNs also offer significant long-term operational savings and, in addition, provide a platform that will support new, innovative – and potentially profitable – services. Such changes will continue over a much longer period than the period covered by this revised Recommendation.

Because of the large investments in NGNs, some incumbents have called for a firm date to be set for the withdrawal of sector-specific ex ante regulation; others for 'regulatory holidays' for major new investments. Incumbents particularly criticise mandated access to their infrastructure and the price at which this is imposed (which they usually consider to be too low). On the other hand, new entrants fear that incumbents would be able to limit the availability of access, undermining existing investment. They therefore see that ex ante regulation and open access provisions on incumbents' networks correlate strongly with increased investment and innovation.

In general, migration to next generation core networks has fewer regulatory implications. The EU's market-based approach to the regulation of services is independent of the technology used in the core network. To the extent that the new 'all-IP' core networks continue to support existing services, those services will be regulated as before; to the extent that next generation core networks allow new markets to be developed based on new products and services, those new markets will be treated in accordance with the procedures set out in the regulatory framework (see also section 3.4 below on emerging markets).

Deployment of NG access networks raises complex challenges on how to maintain a 'level playing field' for all competitors. Many incumbents are rolling out fibre to the street cabinet (FTTC) and then using VDSL technology over the copper sub-loop between the street cabinet and the customer's premises. Other operators, where the network architecture does not support this model, are planning for fibre to the home (FTTH). Some NG access models will result in a completely different local network architecture, where the intermediate node at the level of the 'central office' or 'main distribution frame' will eventually cease to exist.

In the case of VDSL and fibre to the street cabinet, the number of street cabinets is an order of magnitude greater than the number of MDF sites, and this can pose both economic and technical difficulties for competitors that currently offer broadband services using ULL and ADSL equipment at the MDF site. Their ability to roll out infrastructure similar to that of the incumbent is limited. In the local access network, costs are concentrated in civil engineering works. These works can amount to 50%-80% of the total cost per customer depending on the deployed solution and specific local characteristics (such as customer density, availability of ducts, labour cost and digging conditions). Incumbents and cable TV companies can use their existing ducts and rights-of-way to minimise these costs. Other competitors do not have the same advantages, except in rare cases where they may be granted access to other utilities' facilities.

Deployment of NG access networks modifies the competitive environment in a number of markets, in particular LLU and wholesale broadband access. However, as long as competitive conditions have not changed, the move to NGNs does not provide an opportunity to roll back regulation on existing services. For some time, competitors will have an ongoing need for access to copper at the MDF level or to bitstream type services at different levels in the network.

Planned changes in the access network may potentially make it more difficult to continue to carry forward regulated remedies such as local loop unbundling (at established access points), that are designed to address the lack of effective competition in the provision of broadband services.

In applying remedies, regulators need to find ways to promote the deployment of new and more efficient network architectures while at the same time recognising the investments made by new entrants on the basis of current architectures. National authorities will need to carefully follow and evaluate developments in order to ensure that appropriate access remedies are maintained for the forward-looking periods for which competition is judged to be ineffective, and to avoid undermining or discouraging efficient entry. Remedies such as duct sharing, access to dark fibre, mandated backhaul from the street cabinet, and new forms of bitstream access, could be considered where these are appropriate. This may call for some transitional arrangements to be considered, to allow time for adaptation of existing business models.

The effects of NG access networks on the ULL and wholesale broadband access markets are discussed in more detail in section 4.2.2.

The transition to all-IP networks and the increasing ability of end-users to configure some of their own electronic communications services may begin to undermine the market-power problems that have been identified to date with call termination on (fixed) networks. However, the impact of these technological developments is still unclear and will need to be further assessed in subsequent editions of this Recommendation.

3.4. Emerging Markets

Recital 27 of the Framework Directive notes that newly emerging markets, where de facto the market leader is likely to have a substantial market share, should not be subjected to inappropriate obligations.

The purpose of refraining from intervening on newly emerging markets is to promote competition and innovation. At the same time the Guidelines on market analysis make it clear that foreclosure of such markets by the leading undertaking should be prevented.

In general, new and emerging markets are unstable, exhibiting uncertainty of supply and demand and fluctuations in market shares. They are characterised by a significant degree of innovation which can lead to abrupt and unexpected changes (as opposed to a natural evolution over time).

The Commission considers that ‘emerging markets’ are markets which are so new that it is not possible to establish whether or not the ‘three-criteria’ test is met. Only markets which satisfy the three criteria warrant consideration for ex ante economic regulation, although consumer protection rules may nonetheless apply.

When new products or services are launched, it is often unclear whether the same service could be provided in some other manner. As a market matures, however, it is easier to determine the nature of entry barriers and how long they are likely to persist. If there are no entry barriers and the service matures successfully and starts to become a mass market, entry should be expected under normal circumstances. Announcements that firms intend to enter independently would certainly point to the fact that entry barriers are not high. However, caution must be exercised in relation to making the opposite assumption as announcements may not be made in advance of market entry.

Even when entry barriers can be identified and their non-transitory nature confirmed, there is still the question of the dynamic behind the entry barrier. It may be that new services are associated with considerable expenditure on networks, content and other services. This may lead to a firm realising that the only way to recoup this investment over a reasonable period of time is to allow third-party access. Provided that it is offered in an open and pro-competitive way, such access could help to provide a level of service competition and move the market away from an outcome that causes considerable harm to consumers. Notwithstanding, the normal considerations relating to the second criterion also apply.

The differentiation between old and new markets needs to be analysed carefully. Technological developments and new investments such as an upgrade of an existing service do not automatically lead to a new or emerging market. For example, retail broadband markets have tended to evolve in terms of bandwidth or speed, and other product characteristics. In this case, infrastructure investments can have an impact on the end-user product, and it will be necessary to ascertain whether the end-user considers the new and the previous products to be substitutes. In the early phase of the market, it may be difficult to identify any switching between the two products. However, an NRA will have to anticipate or forecast end-users’ behaviour and apply a forward-looking approach. If the forecast determines that the upgraded or newly developed product will substitute the previous product, and the latter will disappear from the market, then the upgraded or newly developed product cannot constitute a new market. The lack of substitutability of a product has to be established from both demand- and supply-side perspectives before it can be excluded from the markets in question.

3.5. Price and margin squeezes

When there is regulation at wholesale and/or retail level, the possibility of price or margin squeezes can result from regulatory intervention and it should be assessed in that context.

That often involves checking the structure of regulated prices or the aggregate of services over which possible margin squeezes might arise. Article 5 of the Framework Directive provides NRAs with the legal basis to obtain any and all pertinent information, regardless of whether the market is identified in the annex to the Recommendation. This applies not only to costs but also to retail pricing in order to allow the NRA to establish and monitor justified and appropriate remedies with respect to wholesale access.

For the assessment of a margin squeeze it is irrelevant whether both wholesale and retail prices are regulated or only one of the two. The relevant questions in this context are (i) whether the spread between wholesale and retail prices cover the retail costs of the dominant firm and (ii) whether the dominant firm is free to avoid the margin squeeze on its own initiative.

Given that a price squeeze test is one element of the overall assessment, involvement of, or collaboration with, the national competition authority is desirable.

4. EXAMINATION OF MARKETS IN ORDER TO IDENTIFY RELEVANT MARKETS FOR THE PURPOSES OF THE RECOMMENDATION

This section examines the broad market areas within the electronic communications sector, analyses briefly the general market structure of the relevant retail and wholesale markets within those broad areas, and identifies the specific markets that are susceptible to ex ante regulation.

A key aim of the regulatory framework is to enhance user and consumer benefits in terms of choice, price and quality by promoting and ensuring effective competition. It is only where consumer harm could be expected in the absence of regulatory intervention that a market should be susceptible to ex ante regulation. The starting point is therefore a characterisation of retail markets, followed by a description and definition of related wholesale markets.

NRAs have powers as a last resort and after due consideration to impose retail regulation on an undertaking with significant market power. However, regulatory controls on retail services should only be imposed where NRAs consider that relevant wholesale or related measures would fail to achieve the objective of ensuring effective competition²⁰. In principle, lack of effective competition may occur at the retail level or the wholesale level or both. That means that NRAs may need to examine the overall degree of market power of undertakings and the impact on effective competition. The identification of a retail market (as part of the value chain) for the purposes of ex ante market analysis does not imply, where there is a finding of a lack of effective competition by a NRA, that regulatory remedies would be applied to a retail market. Regulatory controls on retail services can only be imposed where relevant wholesale measures would fail to achieve the objective of ensuring effective competition at retail level.

Markets should be examined in a way that is independent of the network or infrastructure being used to provide services, as well as in accordance with the principles of competition law. For the purposes of the second edition of the Recommendation, the starting point for market definition and identification is those markets that were identified in the initial Recommendation.

²⁰ Universal Service Directive recital 26.

4.1. Product and service markets in the electronic communications sector

Electronic communications networks and services are defined in the Framework Directive. Electronic communications services include telecommunications services and transmission services in networks used for broadcasting, but exclude services providing or exercising editorial control over content transmitted using electronic communications networks and services. They do not include information society services, as defined in Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks²¹.

In the initial Recommendation, a general division was made between services provided at fixed locations and those provided to non-fixed locations. Overwhelmingly, despite some moves towards hybrid²² or converged offerings, this distinction is considered to be still valid, because there is as yet insufficient evidence that the pricing of mobile services (to non-fixed locations) systematically constrains the pricing of services to fixed locations (or vice versa)²³. A general distinction was also made between voice services and non-voice (data) services. These distinctions for the purposes of analysing markets do not imply an advance judgement that these services constitute separate markets. However, at the current time voice and data services are still considered overall to be sufficiently distinct in terms of demand substitution that they are analysed separately. At a wholesale level, this distinction between voice and non-voice services may be less easy. For example, a transmission channel may carry (or be capable of carrying) both voice and non-voice services²⁴. These issues are dealt with in the relevant analysis sections.

Across the EU, different Member States have communication network topologies which differ significantly from each other. Since the adoption of the initial Recommendation, diversity has even increased as a consequence of the accession of ten new Member States, the varying pace of broadband take-up, and the differing migration paths (in form and speed) towards next generation networks in the core of the network or in local access. Diverging national circumstances may lead NRAs to adopt a market definition different to what is proposed here, subject to the conditions set out in section 2.3 above.

4.2. Services provided at fixed locations

4.2.1. Public telephone services provided at fixed locations

The aim of this section is to (i) describe and define relevant retail markets for voice services provided at fixed locations²⁵, (ii) define the linked wholesale markets and (iii) identify those markets which warrant ex ante regulation.

²¹ Framework Directive Article 2.

²² A hybrid service is one where end-users are offered a combination of fixed and mobile services within one tariff package.

²³ See for example the Commission study of July 2006: A Review of certain markets included in the Commission's Recommendation on Relevant Markets subject to ex ante Regulation.

²⁴ This raises the question of technical neutrality with respect to the treatment of services and the means by which they are delivered. As well as recognising that some services may constitute substitutes, irrespective of technical provision, it is also necessary to recognise that different services may be characterised by different technical requirements within a given network, for example in terms of delay (real-time or not) and bandwidth (and the level and variance of these technical requirements).

²⁵ Dial-up Internet services are treated in section 4.2.2 on access to data and related services.

The initial Recommendation identified the following fixed telephony markets as susceptible to ex ante regulation:

- two retail markets for access to the public network at a fixed location, based on a distinction between residential and non-residential customers;
- two retail markets for local and/or national calls, based on a distinction between residential and non-residential customers;
- two retail markets for international calls, based on a distinction between residential and non-residential customers;
- a wholesale market for call origination at a fixed location;
- a wholesale market for call termination at a fixed location (single-network markets for call termination to end-users);
- a wholesale market for transit.

In addition, the initial Recommendation identified the wholesale market for unbundled access to metallic loops and sub-loops as a market susceptible to ex ante regulation. Local loop unbundling (LLU) allows alternative operators to provide retail access and voice services at a fixed location, as well as wholesale origination and termination services at a fixed location. Generally, however, alternative operators primarily invest in LLU to provide data services (mainly broadband Internet access), with voice services as a possible addition. Therefore, LLU was primarily examined in the context of data services in the initial Recommendation, and that is also the case in this revised Recommendation.

Retail Markets

The retail market at a general level can be described as the provision of a connection or access (at a fixed location or address) to the public telephone network for the purpose of making and/or receiving telephone calls and related services. The term "public telephone network" is used to preserve some continuity with the initial Recommendation and in accordance with the current directives. It is defined in Article 2 of Directive 2002/22/EC in such a way as to link access (for the purpose of making and/or receiving telephone calls) to services offered via a number or numbers in a national or international telephone numbering plan. Clearly it is possible (already) for end-users to 'make' and 'receive' voice and other calls (e.g. via IP-based connections) without exploiting the "public telephone network"; it is sufficient to have access to an electronic communications network that can be used for such purposes, e.g., broadband access. As networks are upgraded (see section 3.3 on next generation networks) the traffic associated with dedicated or managed telephone or voice services will be merged with other forms of traffic (such as data), although the existing numbering schemes for telephone services will be maintained. For this reason, under the revision of the regulatory framework, it is proposed to delete the definition of the "public telephone network" and retain but modify the definition of "publicly available telephone service". As a result of the evolution in the forms of access at fixed locations, and also the different ways of making voice calls, it will be necessary to decide whether or not such services constitute the same access market, or the same calls market, depending on whether or not they sufficiently constrain the ability to raise prices within the markets concerned.

Access (to the public telephone network at a fixed location) and related publicly available telephone services may be supplied by several possible means in respect of the undertaking providing the service and the technology that is used. The most common technology currently employed is via traditional telephone networks using metallic twisted pairs. Alternatives include cable TV networks offering telephone service, mobile cellular networks that have been adapted to provide an equivalent service to fixed locations or which are confined to a limited radius around a fixed location, and other wireless-based networks.

Broadband connections are also capable of facilitating delivery of narrowband services, though generally consumers will not upgrade to a broadband service solely for the purpose of accessing voice services. Consumers switch from narrowband to broadband connections primarily to get access to higher-speed Internet services. Such migration appears to be relatively independent of the price difference between both products in that the cross-price elasticity appears to be low. So far, many customers when switching to a broadband connection have kept their narrowband connection, indicating that both access products are used as complements rather than substitutes. NRAs should nevertheless examine the reasons for this and assess from a forward-looking perspective the likelihood of increased substitution, in particular in Member States where DSL-only offerings (so-called “naked DSL”) are available.

Households which choose only fixed narrowband access either have no demand for Internet access or their demand for Internet access is such that they would not respond to a small non-transitory price increase by upgrading to broadband. While households with broadband connections may be prepared to switch off their narrowband connections, those who are not broadband customers are not likely to switch given the focus of their demand. Therefore from such a starting point, i.e. fixed narrowband access in order to make use of narrowband services, broadband access is clearly not a substitute. Therefore, it is considered that fixed broadband access is not in the same market as fixed narrowband access. This is unlikely to change in the medium term.

For locations where there is demand for a large number of user connections, some form of dedicated access, such as leased lines, may be used. In general, as with broadband access, leased lines are not substitutable with fixed narrowband access. The retail and wholesale leased lines markets are analysed in section 4.2.3 below.

In the initial Recommendation, a distinction was made between residential and non-residential access. However, the market analyses and notifications under the Framework Directive have so far shown that the contractual terms of access, in most Member States, do not significantly and systematically differ between residential and non-residential access. Operators do not generally seek to classify different demand categories and do not normally register whether a particular access service is supplied to a residential or non-residential customer, so that collecting separate data for both groups of customers has in practice often proved to be difficult. From a supply perspective, since similar products (in particular public telephone network access lines) are often used by residential and non-residential users, suppliers to non-residential customers could generally divert their supplies to residential customers should prices to residential customers rise, and vice versa. On this basis, the Commission proposes in the draft revised Recommendation to define one single narrowband access market for residential and non-residential customers.

NRAs may, however, decide on the basis of national circumstances and in line with competition law principles to segment this market further where this would be appropriate

(for example, identifying distinct product markets for different types of access lines such as PSTN, ISDN2 and ISDN30 where it is found that no or very limited demand-side and supply-side substitution between such products exists).

Telephone services are usually supplied as overall packages of access and usage. Various options and packages may be available to end-users depending on their typical usage or calling patterns²⁶. Although many end-users appear to prefer to purchase both access and outgoing calls from the same undertaking, many others choose alternative undertakings to the one providing access (and the receipt of calls) in order to make some or all of their outgoing calls. An undertaking that attempted to raise the price of outgoing calls above the competitive level would face the prospect of end-users substituting alternative service providers. End-users can relatively easily choose alternative undertakings by means of short access codes, (carrier selection via contractual or pre-paid means) or by means of carrier pre-selection. Whilst undertakings that provide access compete on the market for outgoing calls, it does not appear to be the case that undertakings supplying outgoing calls via carrier selection or pre-selection would systematically enter the access market in response to a small but significant non-transitory increase in the price of access. Therefore, it is possible to identify separate retail markets for access and outgoing calls.

As regards outgoing calls, the initial Recommendation distinguished between local and national calls on the one hand and international calls on the other hand, essentially on the basis of supply-side substitution, as well as the differing demand characteristics. Such a distinction remains valid. Also on the basis of supply-substitution both markets include fixed-to-fixed as well as fixed-to-mobile calls.

The experience so far under the market review procedure indicates that voice over broadband (VoB) services have increasingly become available across the EU. Substitutability between VoB and narrowband telephony depends on a number of factors such as product characteristics, numbering, quality of service, prices, broadband penetration etc. In countries where broadband penetration is significant, VoB services may exercise a competitive constraint on narrowband telephony services, provided that it is not possible for the incumbent operator to price discriminate between consumers that only have a narrowband connection and consumers that also have a broadband connection. Where substitutability exists, VoB services should be treated as part of the retail calls markets. On the basis of quality differences and product characteristics (e.g. whether conventional handsets can be used and/or whether a connected computer must be switched on in order to receive calls), unmanaged VoB services appear for the time being to be less of a substitute for narrowband telephony than managed VoB, but that distinction may disappear over time as the quality of unmanaged VoB services improves and technical features change.

In the absence of any regulation (at retail or wholesale level), the incumbent public telephone network operator(s) would face little competitive constraint in terms of price or quality of services and customers would have little choice of supplier in relation to either access or calls (with the possible exception of large business users). The following sections highlight the wholesale inputs that need to be identified to assess competitive outcomes at the retail level. Finally, the issue of whether wholesale regulation alone could render retail markets

²⁶ The question of whether metered and un-metered (flat-rate) access to Internet are in the same or separate markets is considered in section 4.2.2.

effectively competitive is examined, in order to assess whether retail markets should remain susceptible to ex ante regulation.

Related Wholesale Markets

Wholesale call termination

Call termination is the least replicable element in the series of inputs required to provide retail call services and is therefore analysed first. Wholesale call termination is required in order to terminate calls to called locations or subscribers. Undertakings owning or operating networks to provide telephone services may interconnect at relatively high levels in the network, i.e. at a few interconnect points. Consequently, call termination arrangements may in practice comprise call conveyance as well as call termination. However, undertakings faced with a price increase in say national call termination could purchase call termination separately from the call conveyance part. Therefore, it makes sense to focus on call termination as the relevant call termination market.

In the initial recommendation the relevant market was as wide as each network operator. This was based on the fact that undertakings that supply wholesale call termination to other undertakings wishing to terminate calls did not price discriminate between termination charges to different subscribers or locations on their network.

In considering whether a wider definition is appropriate, it is necessary to examine the possibilities for demand and supply substitution that might constrain the setting of termination charges on a given network²⁷. If all (or at least a substantial number of) fixed locations or subscribers in a given geographical area were connected by two or more networks, then alternative possibilities would exist for terminating calls to given locations. Another possible source of supply substitution would occur if it was possible technically for calls to a given location or end-user to be terminated by an undertaking other than the one operating the network that serves the given location. Currently no such supply substitution is possible.

Call termination charges at a wholesale level on a given network might be constrained via demand substitution but there is currently no potential for demand substitution at the wholesale level. However, there are possibilities for demand substitution at the retail level. Examples could comprise any means of communication that constituted a reasonable alternative to making a call to the location or subscriber number concerned. Such alternatives might include terminating the call to the person concerned via a mobile network, a call using a call-back arrangement, a call that does not involve a specific call termination arrangement (e.g. where parties set up their own IP-based call) or communication via messages of varying kinds (e.g. email, voicemail, paging). It is also necessary that the alternative possibility leads to an effective constraint on the setting of call termination charges by making it unprofitable for a network to raise call termination charges.

Such alternatives for demand or supply substitution do not appear currently to provide sufficient discipline on call termination at fixed locations or an argument in favour of a wider market definition, so that the relevant market appears to be call termination on individual networks with consequent satisfaction of the first criterion (i.e. high and non-transitory

²⁷ It is also important to examine countervailing market power, in this case countervailing buyer power in negotiating call termination charges, but this is part of the effective competition analysis once the relevant market is defined.

barriers to entry). Each market for call termination on an individual fixed network is a monopolistic market with no tendency towards effective competition, where end-users are unable to systematically set up their own call termination, thus satisfying the second criterion. Effective regulation of termination services moreover requires frequent intervention on a coordinated basis and a detailed cost assessment. Termination rates should also be regulated ex ante in order to provide legal certainty to other operators when setting their retail tariffs, which are inter alia a function of the terminating charge. Competition law is therefore insufficient to address the market failure on this market.

However, such a market definition - call termination on individual networks - does not automatically mean that every network operator has significant market power; this depends on the degree of any countervailing buyer power²⁸ and other factors potentially limiting that market power. Networks, in exchanging traffic in the absence of regulation, will normally face some degree of buyer power that could limit their associated market power. Without any regulatory rules on interconnection, a network with few subscribers may have limited market power relative to a larger one in respect of call termination. The existence of a regulatory requirement to negotiate interconnection in order to ensure end-to-end connectivity (as required by the regulatory framework) redresses this imbalance of market power. However, such a requirement would not permit any attempt by a smaller network to initially set excessive termination charges. The existence of buyer power and the ability of network operators to raise termination rates above the competitive level should be examined on a case-by-case basis in the context of the SMP assessment on this market. Accordingly, one should examine the ability of network operators to raise termination rates not only vis-à-vis the incumbent fixed network operator but also vis-à-vis other operators that may have less buying power.

Wholesale access and call origination

After termination, access and call origination are the next least replicable elements of the wholesale inputs required to provide retail call services. At the retail level, a distinction has been made between access and outgoing calls. An undertaking may make a decision to enter the combined market for access and calls or simply enter part or all of the calls market. In assessing the relevant linked wholesale markets, it is necessary, therefore, to bear in mind that there are a number of means of addressing the retail markets.

With respect to access, the main alternatives are between building (i.e. duplicating the existing local access network) and buying (i.e. using any existing local access network) as indicated below. The latter option potentially includes any transmission path that is capable of supporting voice services, e.g. a leased circuit, an unbundled local loop or the wholesale provision of a digital subscriber line (DSL) or bit-stream services. Such alternatives are also capable of supporting the provision of data services or multiple voice channels and are considered in more detail below.

With respect to calls services, the main elements required to produce such services are call origination, call conveyance (including routing and switching) of varying kinds and call

²⁸ Considerations of relative market power are not limited to networks (of differing size or coverage) serving end-users at a fixed location or address but also apply to networks such as mobile cellular networks serving non-fixed locations. In circumstances where a 'fixed' network with significant market power is subject to a regulatory remedy (beyond the basic one to negotiate interconnect) such as regulated prices for call termination, market power relative to mobile networks would be affected.

termination. Related elements include signalling and the ancillary services needed, for example, for billing purposes. An undertaking that supplies retail telephone services could purchase these inputs separately or together, or produce all of them by constructing an extensive network, or purchase some and produce others.

One direct alternative to the purchase of call origination is to establish an access network (cable, fibre, wireless connection etc.) to the end-user location. Another alternative is to purchase or lease an established network connection to the end-user location (for example through local loop unbundling). Both alternatives entail considerable time and investments, a large proportion of which are sunk. Incumbents continue to enjoy, as regards the local access network, absolute cost advantages due to economies of scale and density. The market for fixed call origination consequently continues to exhibit high and non-transitory barriers to entry. Both the development of alternative access networks (cable, fibre, wireless, etc.) and the degree of local loop unbundling remain, for the time being, limited on a European scale. Where market entry has occurred, it has often been limited to particular geographical areas or to particular customer groups. Over the next three to four years, it is not expected that entry will occur on such a scale as to make this market tend towards effective competition. Finally, the remedies necessary to address the market failure (in particular access obligations) could not be imposed on the basis of competition law.

Wholesale call origination services (originating access or interconnection) can be provided in the form of minutes or in the form of capacity. They may also be supplied together with switching and/or call conveyance services (see below). The market identified for the purpose of this Recommendation is wholesale call origination services. The relevant market is considered to comprise call origination for telephone calls and for the purpose of accessing dial-up Internet service provision. Therefore the market is defined as call origination on the public telephone network provided at a fixed location.

Wholesale Transit Services

In addition to wholesale call origination and call termination, call conveyance or transit will be needed in order to complete a call. Call conveyance or transit interconnection involves transmission and/or switching or routing. For an undertaking providing services to a limited number of end-users, an alternative to using wholesale call conveyance services could be to use interconnected leased lines or dedicated trunk capacity. Transit services refer to the (long-distance) conveyance of switched calls on the public telephone network provided at a fixed location. This is a different product from, say, the provision of dedicated capacity in itself, even if some transit services are provided over leased circuits or links. The difference is that leased lines provide dedicated capacity between two fixed points whereas transit refers instead to switched calls on the public telephone network provided at a fixed location. Transit services therefore comprise conveyance both between switches on a given network and between switches on different networks, and including pure conveyance across a third network. Some parts of this transit service market are likely to become more competitive more quickly than others, but there cannot be a presumption that some switched call conveyance (from an incumbent to an entrant's network) is automatically different from other switched call conveyance (between two entrants' networks).

The provision of transit services (conveyance and interconnection) can be self-provided or bought directly, or the elements necessary for the provision of such services can be bought separately and the services can be combined together. The range of operators providing services or indeed the necessary network elements (both self-supplied and to third parties) is

almost entirely dependent on the traffic volumes on particular transit routes. While for certain busy routes self-provision or even merchant offers by alternative operators are likely, for other less busy or thinner routes this may not be the case, meaning that the ability to provide geographically ubiquitous transit services may depend on incumbent-provided transit services. It may be that as regards thin routes (where the volume and value of transactions is relatively small) in selected Member States, entry is unlikely even in the medium term suggesting that in such circumstances the first criterion may be met. This is likely to vary within and between Member States but the first criterion is more likely to be met where the market defined is limited to those thin routes which cannot support multiple operators if such a limitation is appropriate and supported by the market analysis.

In some Member States this market has been found to be effectively competitive, although this is not the case in the majority of them. In the latter, new entrants are still dependent on the incumbent for the provision of transit services on many routes.

However, the situation is evolving as both alternative long-distance infrastructures and networks are built and developed, and as incumbents upgrade their core networks. On the one hand, incumbents may still have significant scale advantages helped by their large sunk investments and their greater network reach. On the other hand, as there is evidence of alternative operators successfully investing in long-distance networks, entry barriers can no longer be said to be high and non-transitory.

Two other factors affect the actual or potential state of competition on this market. The first is that the market for transit services is complementary to the ones for call termination and call origination. Depending on where boundaries have typically been drawn between these markets, the state of competition in transit services may be more or less developed. The second is that the majority of entry in this market may be for self-supply and no merchant market has developed. This would explain why there is evidence of parallel long-distance networks being established, and of effective competition in trunk leased capacity markets in many Member States, but limited findings of effective competition in wholesale transit services. In addition, the likelihood of the incumbent being constrained in the provision of wholesale transit services may vary between Member States depending on the balance and relative proportions of denser and less dense traffic routes.

Where the presence of alternative sources of supply constrains the incumbent's behaviour even as regards thinner routes, the transit market may on a case-by-case basis be found not to meet the second criterion. However, since the assessment for the forward-looking period is that this market does not in general satisfy the first criterion, the market for wholesale transit services is withdrawn from the recommended list.

As with the initial Recommendation the delineation between call origination, call termination and transit services can vary, according to network topologies and market conditions, and it is left to NRAs to define those elements constituting each part. It should be noted by the NRAs that while there is a degree of discretion in deciding the appropriate elements constituting call origination, call termination and transit services, these elements are additive, the sum of the three making the whole. This means, for instance, that if call origination and call termination are already defined then a notional market for transit is also defined by default.

Retail Regulation

In the initial Recommendation, in keeping with Annex 1 of the Framework Directive, two access markets and four calls markets were identified as being susceptible to ex ante regulation. Retail regulation can only be justified if, with all regulatory remedies in place on wholesale markets including Carrier Selection and Carrier Pre-Selection (including wholesale line rental where appropriate), there remains a lack of effective competition at the retail level.

Regarding retail access to the public telephone network at a fixed location, the only wholesale regulation that could impact on competition in this market is the regulation of the wholesale infrastructure access market, which enables new entrants to provide narrowband access services to retail customers. However, exploiting wholesale infrastructure access requires time and significant investments, a large portion of which are sunk. Moreover, new entrants in principle do not lease infrastructure access to provide narrowband access only. Wholesale infrastructure access therefore does not remove the high and non-transitory barriers to entering the retail access market at a fixed location, nor does it make this market tend towards effective competition. Even in combination with the development of other infrastructures such as cable or fibre-to-the-home etc., such a tendency is not yet observed at the European level. Therefore, even in the presence of wholesale regulation, the retail market for access to the public telephone network at a fixed location remains susceptible to ex ante regulation.

As regards the retail calls markets at a fixed location, the conclusion is different. Wholesale regulation, including Carrier Selection and Carrier Pre-Selection obligations, significantly reduces the barriers to entering these markets. This is evidenced by large-scale market entry of alternative operators across Europe, to the detriment of incumbents which overall have been losing significant market share. Market entry of operators based on Carrier Selection, Carrier Pre-Selection and Wholesale Line Rental, in combination with VoB services in Member States where there is significant broadband penetration, implies that overall in the EU, retail fixed calls markets tend towards effective competition. Potential restrictions of competition may still arise, for example through price squeeze strategies of incumbent operators that remain dominant on related upstream markets. However, where such strategies constitute an abuse of dominance, competition law provides the appropriate instruments to deal with such market failures. In addition, Article 5 of the Framework Directive provides NRAs with the legal basis to obtain pertinent information not only about costs but also concerning retail pricing, in order to establish and monitor justified and appropriate remedies with respect to wholesale access.

Therefore, the retail calls markets are no longer considered susceptible to ex ante regulation on an EU-wide basis. However, if an NRA finds that national circumstances require a different conclusion, it is open to that NRA to demonstrate that one or more of the retail calls markets in its country continue to meet the three-criteria test. This may for example, be the case in Member States where Carrier Select and Carrier Pre-Select obligations have only recently been introduced or so far remain ineffective (e.g. because of particular consumer habits) and where broadband penetration is low and VoB offerings insignificant.

Conclusion

On the basis of the above, it is considered that the following specific markets related to the provision of public telephone services at fixed locations should be included in the revised Recommendation:

Retail level

- Access to the public telephone network at a fixed location for residential and non-residential customers.

Wholesale level

- Call origination on the public telephone network provided at a fixed location.
- Call termination on individual public telephone networks provided at a fixed location.

4.2.2 Access to data and related services at fixed locations

The aim of this section is to (i) describe and define relevant markets for access to generic data services (in particular the provision of Internet service) at fixed locations at a retail level, (ii) define the linked wholesale markets and (iii) identify the relevant markets which are susceptible to ex ante regulation.

In the area of data services at fixed locations, the initial Recommendation identified the following markets as susceptible to ex ante regulation:

- Wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services;
- Wholesale broadband access.

Retail Markets

The increased use of Internet for a mix of communications services has created potentially wide-ranging retail markets for access to data and related services at fixed locations. In general, the provision of retail Internet access consists of two parts: (i) the network or transmission service to and from the end-user's location and (ii) the provision of Internet services, in particular end-to-end connectivity with other end-users or hosts. These two services may be bundled together.

At the current time, it is possible to identify three commonly available forms of Internet access: (i) dial-up service, (ii) high bandwidth services using digital subscriber line (DSL) technologies (or equivalents) or cable modems and (iii) dedicated access²⁹.

In the period since the initial Recommendation large numbers of residential subscribers and small business users accessing Internet from fixed locations have switched from narrowband to broadband access either via cable modems or more commonly via DSL modems. Although so far consumers have switched to varying degrees across the Member States, the trend is clear and appears set to continue. Nevertheless, a significant number of users continue to have narrowband connections, including dial-up access via analogue telephone lines and ISDN³⁰.

²⁹ Higher bandwidth or broadband Internet services may be characterised as allowing downstream capacity to end-users in excess of 128 kbits/sec. The bandwidth of the service supplied may be asymmetric or symmetric. Dedicated access would typically involve the provision of symmetric bandwidth, with guarantees on contention rates or other quality of service parameters.

³⁰ See E-Communications Household Survey (Special Eurobarometer) published in April 2007.

From the demand-side perspective, substitutability between narrowband and broadband Internet access seems limited. There are a number of technical characteristics of broadband access that imply that certain applications are not viable over dial-up access. On this technical basis and from the standpoint of broadband, therefore, narrowband would be a separate market, because the services and/or the quality features of those services (including their uplink and downlink speed) which can be offered over a narrowband connection would not be seen as viable substitutes from the point of view of an end-user making use of a broadband connection³¹. In addition, a flat-rate or un-metered narrowband dial-up service may not be considered to be an ‘always-on’ service in the way that a broadband service typically is, as the service is likely to be interrupted if un-used for a given period. For a specific group of customers, in particular those which are less sensitive to bandwidth and speed, broadband access may be a substitute for narrowband access, but evidence shows that once customers have migrated from narrowband to broadband access, they are unlikely to switch back, even in response to a small but non-transitory increase in price. Substitutability is therefore primarily in one direction, from narrowband to broadband.

At the retail level, a number of broadband access possibilities at a fixed location exist, including DSL networks and cable TV networks that have been upgraded to provide a return path³². Satellite and terrestrial TV networks (provided they have adequate capacity and are linked to a return path) are also capable of providing data services and access to Internet³³. In certain Member States local fibre networks are being rolled out on a limited scale. In the future, fixed broadband access via wireless technologies or power-line technologies could become more common. Experience under the market analysis and Article 7 review procedures so far indicates that at retail level broadband access services over these platforms, where available, generally belong to a single product market. Likewise, within the category of DSL-based services, there is no evidence suggesting that retail broadband services using ADSL, ADSL2, ADSL2+, VDSL or other DSL technologies would not be part of a single product market. However, when defining markets taking into account this Recommendation, NRAs should analyse on a case-by-case basis substitutability of services provided using these various technologies, thereby taking the principle of technology-neutral regulation as a starting point.

Price differentials can be observed between narrowband and broadband access but these can vary and they may depend on the data-rate or qualitative features of the services offered, the availability of flat-rate narrow-band offers, the degree of competition between different forms of broadband access or other factors. It is therefore not easy to discern whether separate retail markets exist, simply on the basis of price differentials.

³¹ The above analysis may well lead to different results were the starting point to be services offered on narrowband connections. In other words, asymmetric substitutability may occur whereby under certain conditions a broadband connection may be a viable substitute for a narrowband connection, since it offers additional features, whereas a narrowband connection may not be a viable substitute for a broadband connection. As broadband offers gradually become available at higher average speeds, substitutability with narrowband access further decreases.

³² DSL remains the main technology for broadband access across the EU. The DSL share of fixed broadband lines in January 2007 was 81.8% compared to 15.5 % of lines provided by cable and 2.7 % by other technologies. DSL continues to grow in importance compared to cable.

³³ Internet access via the TV is becoming more common, although there are often limitations with respect to the content that can be accessed and the applications that can be used. In most cases a standard modem on a telephone line is used. However, the broadcast path could also be used in which case access would more closely resemble other higher-speed access methods.

At the same time, for the purposes of deriving wholesale markets, there are important distinguishing characteristics from a demand perspective between broadband services and dial-up or narrow-band service. At a retail level customers in the broadband market have a range of options to purchase connectivity at these speeds. Consumers can buy services from cable operators with upgraded networks using cable modems, they can buy services from new entrants using unbundled local loops that the entrant has modified or which have been modified for them, or the customer can buy these services directly from the incumbent. Other technologies such as wireless local loops are not widely available, but are capable of providing equivalent services. Between these options, provided prices are comparable, a consumer is likely to be indifferent.

In the narrowband market, dial-up services may be paid for on the basis of a subscription, usage or a combination of the two. Un-metered or flat-rate retail (subscription only) services are widely available in the Community.

Metered and un-metered (flat-rate) access can be considered to be part of the same market for a number of reasons. Firstly, the only difference between the products is the way in which tariffs are structured. Secondly, the two products appear to be substitutable for end-users, although there appears to be little evidence of end-users substituting metered service in response to price increases in un-metered services. Thirdly, if obligations exist to allow operators to buy wholesale call origination on an un-metered basis, supply substitution will be possible in that a hypothetical monopolist raising the price of un-metered access would induce other providers (of metered products) to offer an un-metered product at a lower, competitive price level. Therefore metered and un-metered call origination do not constitute distinct markets.

On the basis of the above, one can thus distinguish between: narrowband (dial-up) Internet access and broadband Internet access. The extent to which wholesale and/or retail regulation is warranted in order to ensure effective competition on these markets will be examined further hereafter. The relevant market for dedicated access is treated separately in section 2.2.3 below.

Wholesale inputs to broadband Internet access

In order for broadband access to Internet and related data services to be supplied to an end-user at a fixed location, a suitable transmission channel is required that is capable of passing data in both directions and at rates that are appropriate for the service demanded. Therefore, any undertaking providing services to end-users needs to build, establish or obtain access to a transmission channel to the end-customer locations that are served.

The least replicable element in the establishment of an access transmission channel to an end-user location is local access or the local loop. There are major obstacles, in terms of cost, time and legal barriers to duplicating the incumbent's local access network. Barriers to entering the local loop market are indeed high and non-transitory. Behind the barriers to entry, there is no tendency towards effective competition. While upgraded cable systems have become more widely developed and deployed in some parts of the Community, such systems overall still have a limited coverage. Moreover, the unbundling of cable networks at this stage does not appear technologically possible, or economically viable, so that an equivalent service to local loop unbundling cannot be provided over cable networks. Other access technologies including wireless local loops, digital broadcast systems and power-line systems are starting to become available, but only on a scale that imposes little if any constraint on the local loop operators.

Thirdly, competition law would be insufficient to redress the market failure on the local loop market, as the compliance requirements of intervention in this market are extensive (including the need for detailed accounting, assessment of costs and monitoring of terms and conditions including technical parameters). The local loop market, which is equivalent to physical or infrastructure-based local access for the purpose of supplying retail broadband service, hence meets the three-criteria test and continues to be susceptible to ex ante regulation.

As networks evolve in most Member States and existing metallic Loops are replaced partially by fibre, the successor to the existing local loop may be significantly shorter than today's local loops. Where the metallic local loop is shortened and where the access seeker has no infrastructure of its own to replicate the former (longer) loop and where no alternative infrastructure is likely to become available to allow such replication then access to either ducts or alternative network elements must be considered in order to make access to the local loop meaningful. In this context, access to ducts could be an important part of any remedy imposed to address problems associated with physical network access.

The initial Recommendation identified two wholesale markets that were linked to the broadband retail market: wholesale unbundled access (including shared access) to metallic loops and sub-loops, and wholesale broadband access. The reason for identifying a second separate wholesale market was based on the view that even regulated local loop access would be insufficient in most Member States to constrain potential market power at the retail level and a significant entry barrier would still exist. The fact that the two wholesale markets are linked in this way to the same broadband retail market implies that it is logical for national authorities to undertake a single overall analysis of the broadband market which examines in sequence the impact that (a) regulated infrastructure-based access and (b) regulated (non-physical) network-based access could be expected to have on any significant market power that is identified. Ten Member States have so far undertaken such a combined analysis.

During the application of the initial Recommendation it has also been relatively straightforward to separate these two wholesale markets, on the basis of their product characteristics and by virtue of demand and supply substitution. For example, the two services, access to unbundled loops and wholesale broadband access, can frequently be distinguished on the basis of the flexibility they give in supplying the retail service, or by means of the location at which access is obtained. Hence, unbundled loops typically give greater flexibility and control over the retail broadband service offered to the end-user and have typically been supplied at the main distribution frame (MDF). In contrast, wholesale broadband access in the form of a bit-stream service typically gives less flexibility over the retail service, and may be supplied at higher points in the network (such as regional interconnection points), as well as at the MDF.

Since the initial Recommendation, there have been significant developments concerning next generation networks, as described in section 3.3. In the context of supplying broadband (and related services), many undertakings with established infrastructures envisage installing fibre closer to end-users, both to increase capacity and broadband speeds, and to reduce operational costs. Such changes, which are expected to vary between Member States in terms of the type of network investments and the speed at which they occur, are likely to modify the demand and supply characteristics described above.

For example, the replacement of copper access lines between the MDF and (more) localised concentration points by fibre, implies that an undertaking that currently exploits access to unbundled loops at the MDF would have to consider the appropriateness of any alternatives.

Such alternatives could conceivably include building its own local access network, using access to sub-loops in combination with its own (extended) network, using sub-loops in combination with an appropriate backhaul service to the MDF location, or using a wholesale broadband service supplied at the MDF location or at a higher level in the network. In principle, on the basis of characteristics concerning the capability and the location of the service (as indicated above), and with respect to demand and supply substitution, it would be possible to determine whether these various potential services are in the same or separate relevant wholesale markets. However, at this stage, given that these network changes are still taking place, it is difficult to be absolutely precise about the boundaries of the relevant prospective wholesale markets that are linked to the retail broadband market, in terms of their various possible technical characteristics. This suggests a more generic and forward-looking approach to market identification in this area at EU level (based on the two currently defined wholesale markets), within which regulatory authorities can analyse markets, with the twin aim of facilitating as much infrastructure-based competition as is possible and addressing market power via appropriate access regulation where it is not.

The question then arises whether, in addition to unbundled local access (or its equivalent), the market for wholesale broadband access constitutes a distinct market and, if so, whether it should be identified as being susceptible to ex ante regulation. An operator using unbundled local loops (or an equivalent infrastructure-based input) would not normally consider wholesale broadband access to be a substitute even if the service provided by the wholesale broadband access provider allowed the supply of the same retail services that were provided over the unbundled loops. However, the propensity to switch between the two inputs could be expected to depend on the relative price and other terms (such as contract length), and on factors such as the two noted above, i.e. the location of access, and the latitude that the input confers in supplying a range of different retail products. Once an operator has invested in local loop unbundling, its preparedness to switch to wholesale broadband access could also depend on the investments that it has already made and whether they can easily be adapted or reversed.

Likewise, it is questionable whether an entrant using wholesale broadband access to deliver retail broadband services to the final user market could easily switch to using unbundled local loops to provide an equivalent service. From a demand perspective, a retail provider using wholesale broadband access will only consider unbundled local loops a substitute if it has all the other network elements needed to self-provide an equivalent wholesale service. The supply substitution possibilities depend on the same condition. Therefore, unbundled local loops and wholesale broadband access constitute distinct markets.

The local loop market is situated upstream from the wholesale broadband access market and regulation on the local loop market may facilitate market entry on the wholesale broadband access market. However, in view of the investment required for local loop unbundling (LLU) and the absolute cost advantages of the incumbent resulting from economies of density and scale, high barriers to entering the wholesale broadband access market remain even in the presence of regulated LLU. The wholesale broadband access market hence continues to meet the first criterion under the modified greenfield approach. Experience under the market analysis and Article 7 notification procedures so far indicates that the coverage of LLU in a given Member State, in combination with the existence of alternative broadband access networks such as cable, fibre and wireless, may imply that in a limited number of Member States the market for wholesale broadband access may tend towards effective competition behind the barriers to entry. This may be the case where both broadband penetration and unbundling rates are very high, and where alternative operators have started to provide

wholesale broadband access services in large parts of the country in competition with the incumbent, thereby providing a direct constraint on the market power of the incumbent in supplying wholesale access services. In addition, the level of competition at the retail level from both vertically integrated undertakings and those exploiting unbundled local loop access may be such as to exert an indirect constraint on the market for wholesale access services³⁴.

In general across the EU, however, this is not the case yet and is not foreseeable within the next few years. Therefore the wholesale broadband access market continues to meet the second criterion. In addition, where competition is not effective, competition law is not sufficient to redress the market failure as, under competition law, the provision of wholesale broadband access services could not in principle be mandated, and compliance requirements would in any case be high (including detailed monitoring of cost and technical conditions). Moreover, it is important to maintain co-ordination and consistency between regulation of wholesale broadband access and that of local loop unbundling. Since the third criterion is also met, the wholesale broadband access market continues to warrant inclusion in the revised draft Recommendation as a market susceptible to ex ante regulation.

In the initial Recommendation, the wholesale broadband access market was said to cover 'bitstream'³⁵ access that permits the transmission of broadband data in both directions and other wholesale access provided over other infrastructures, if and when they offer facilities equivalent to bitstream access. In this context, the question has arisen as to whether wholesale access to cable networks that provide a return path is part of the relevant market. Across the EU, cable represents 15.5% of broadband connections compared to 81.8% of DSL lines and its relative importance has been declining, although broadband delivered via cable has a high market share in Malta, Austria, Belgium, the Netherlands and Portugal³⁶. Experience under the market analysis and Article 7 notification procedures so far has indicated that, where cable networks exist, their geographical coverage is often limited and wholesale access to such networks does not constitute a direct substitute for DSL-based wholesale access products from the demand or the supply side, so that inclusion in the same product market is not justified³⁷. The presence of cable (or other broadband-capable networks) in a given Member State may, however, exercise an indirect constraint on the provider of DSL-based wholesale broadband access, through the substitutability between both products at retail level. Broadband subscribers may have a choice between the services provided by the integrated incumbent, by other vertically integrated companies (such as a cable operator), or by firms using inputs supplied by the incumbent. If alternative integrated undertakings have high market shares compared to firms exploiting inputs, (and the former choose not to offer wholesale inputs), it is likely that indirect constraints will be more important than direct ones. Such indirect pricing constraint, where it is found to exist, should be taken into account when assessing if the incumbent DSL operator has SMP on the relevant market.

³⁴ See case NL/2005/0281.

³⁵ For the purpose of this Recommendation bitstream is a service which depends in part on the Public Telephone Network and may include other networks such as the ATM network.

³⁶ Figures from CoCom Working Document, Broadband access in the EU.

³⁷ For existing wholesale customers, migrating from DSL-based access to cable-based access would give rise to substantial switching costs so that switching is unlikely to occur in reaction to a small but significant non-transitory price increase. Suppliers would also be in a position to price discriminate between existing wholesale customers and wholesale customers that have not yet committed to a particular technology so that existing customers would not benefit from any constraining effect of uncommitted customers.

Another similar question that has arisen is whether services using DSL technologies other than ADSL are part of the relevant market for wholesale broadband access. The speeds which DSL technologies are capable of providing are evolving continuously depending on network topology, and loop lengths or proximity to exchange points, etc. ADSL technologies are currently capable of supplying up to 28 Mbit/sec to end-users, providing the ancillary elements are suitable, and the future roll-out of VDSL allows for speeds of up to 100 Mbit/sec. The range of access speeds that are available at the retail level is typically evolving as a function of users' demands and willingness to pay, network capabilities, and retail competition from other infrastructures. To satisfy retail demand, wholesale broadband access services over any DSL technology appear to be substitutable, (subject to any constraints imposed by network capabilities or the speeds enabled by the prevailing technology), provided that any actual or perceived switching costs for end-users are not excessive. It remains open to individual NRAs to examine this issue in further detail on the basis of national circumstances.

Given the link between the retail broadband market and the two corresponding input markets identified in the initial Recommendation and also the varying ways in which supply and demand characteristics could evolve over the coming period, (and the speed at which they take place), it is proposed to identify two relevant markets as being susceptible to ex ante regulation as follows:

- wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location; and
- wholesale broadband access.
 - This market comprises non-physical or virtual network access including 'bit-stream' access at a fixed location. This market is situated downstream from the physical access covered by the first market listed above in that wholesale broadband access can be constructed using this input combined with other elements.

The point in the network at which the demand and supply of either of these separate markets is defined will depend on the market analysis and in particular on the network topology and the state of network competition. Depending on the way in which network upgrades occur or the particular demand and supply conditions evolve in Member States, these two wholesale markets may remain distinct, or conceivably merge into one. Consequently and for the reasons outlined above, it is recommended that the markets be analysed together.

Wholesale inputs to dial-up Internet access and services - wholesale call origination

Despite the growth of broadband access, narrowband dial-up access to the Internet remains an important end-user product.³⁸ An Internet service provider (ISP) supplying dial-up Internet access requires wholesale call origination and wholesale call termination as inputs as well as wholesale Internet connectivity. A wholesale product corresponding to the retail product for access to the public telephone network at a fixed location would be necessary for the provision of dial-up Internet services. Users encountering a hypothetical monopolist on the call origination market would be able to easily switch service provider through the use of

³⁸ 30% of the households in EU27 that use the Internet use narrowband access according to the Special Eurobarometer E-Communications survey of April 2007.

Carrier Pre Selection (CPS) or Carrier Selection (CS). Switching call origination service providers is in general both easy and cheap. This may result in there being more separate bills to be paid as the access provider and the service provider(s) cease to be the same entity or entities. While there is undoubtedly a range of customers who value the ease of single billing, it is not clear that this population would be significantly large to mitigate the disciplining role of those not concerned with single billing. Whether service is supplied on a metered or un-metered basis (or a combination of the two), call origination frequently takes place using appropriate number ranges which route calls to the network used by an ISP for onward connectivity with the public Internet. Depending on the specific call origination arrangements used, ISPs may compensate the originating network operators on behalf of their end-users or call origination may be paid for directly by end-users.

In general, end-users accessing the Internet via dial-up means at a fixed location use the undertaking that provides access to the public telephone network. The relevant market includes call origination both for the purpose of speech communications and for other forms of communication such as fax or data. Therefore, the relevant market for wholesale call origination for dial-up Internet service is call origination on the public telephone network provided at a fixed location (the same market defined in section 4.2.1).

Wholesale call termination (for dial-up Internet access)

In order to provide dial-up end-users with Internet access and connectivity, ISPs need to ensure that dial-up calls are terminated, i.e. go through a terminating operator en route to the servers of ISPs.

Wholesale call termination as part of Internet service provision is different from call termination on fixed or mobile networks for the completion of calls between two end-users. In the case of call termination for Internet service provision, end-users have a contractual relationship (implicit or explicit) with an ISP but normally have no notion of the undertaking terminating dial-up calls. The ISP chooses the terminating operator (or operators) receiving the dial-in calls and may itself pay the terminating charge³⁹. Since any terminating charge is incorporated into the overall amount that is charged by the ISP (and faced by the end-user), and end-users can switch between competing ISPs, ISPs have an incentive to minimise the termination charges that they pay.

In general, ISPs will have a wide choice with respect to terminating operators since entry into this market is relatively easy and there is evidence of ISPs switching terminating operators. Switching terminating operators is easy provided that such alternatives exist. However, in certain Member States it may be that there is less choice of terminating operators or that one or more operators that have market power on originating access are in a position to more fully exert that market power with respect to call termination. The more limited choice may occur because operators may need to build out networks in order to terminate dial-up calls under un-metered arrangements. Therefore if NRAs consider it necessary to define an Internet termination market where network duplication proves necessary to enter the termination market, they can do so by following the Art. 7 procedure.

³⁹ A number of actual business models may exist. In the metered approach, a portion of the retail usage charge may be passed from the originating to the terminating operator and on to the ISP. In a subscription model, the terminating operator may compensate the originating operator and charge this to the ISP.

Whilst the relevant wholesale call origination market fulfils the criteria to warrant identification in the Recommendation, the relevant wholesale call termination market does not do so for the purpose of this Recommendation.

Wholesale Internet connectivity

Irrespective of whether end-users access Internet via dial-up or broadband means, ISPs still need to ensure connectivity with other ISPs and their end-users.

To ensure that data packets sent by end-users reach the intended destinations and also that incoming traffic is received, undertakings need to make the necessary arrangements to permit connectivity with all other Internet end-users or at least with the networks that they use. This global connectivity can be arranged in a number of ways. It can be purchased from a network that is in a position by its own arrangements to guarantee such connectivity. It can be obtained by interconnecting and exchanging traffic with a sufficiently large number of networks so that all possible destinations are covered. Alternatively it can be arranged by a combination of interconnecting with certain networks and purchasing the remaining connectivity that is needed.

Two questions arise for the purposes of the Recommendation. Is it necessary to identify a market for Internet connectivity or packet delivery for the purposes of ex ante market analysis, and if so, what is the relevant market? There are a number of differences between the typical arrangements for terminating calls on the public telephone network and delivering packets to destination addresses on the public Internet. In the latter case, end-users are implicitly paying to both send and receive packets. It is not automatically or typically the case that incoming traffic is charged for and that this charge is passed to the traffic sender via the sender's network. As indicated above, traffic connectivity can be arranged in a number of ways.

Entry barriers to this market are low and although there is evidence of economies of scale and that the ability to strike mutual traffic exchange (peering) agreements is helped by scale, this alone cannot be construed as inhibiting competition. Therefore, unlike the case of call termination in section 4.2.1, there is no a priori presumption that ex ante market analysis is required. Therefore, no market for wholesale Internet connectivity (or delivery of incoming packets) is identified for the purposes of the Recommendation.

Conclusion

It is considered that the following specific markets relating to access to data and related services at fixed locations should be included in the revised Recommendation:

Wholesale level

- Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location; and
- Wholesale broadband access.
 - This market comprises non-physical or virtual network access including 'bit-stream' access at a fixed location. This market is situated downstream from the physical access covered by the first market listed above in that wholesale

broadband access can be constructed using this input combined with other elements.

- Call origination on the public telephone network provided at a fixed location.

4.2.3. *Dedicated connections and capacity (leased lines)*

The markets related to dedicated connections and capacity have a link to some of the markets defined with respect to access at fixed locations and the provision of services at fixed locations. For example, dedicated connections may be an alternative to unbundled local loops and vice versa in certain circumstances. Also dedicated trunk or long-distance connections may be an alternative to long-distance (transit) call conveyance. Lower-speed leased lines may be replaced in certain instances by standard broadband connections based on DSL or cable modems depending on quality of service requirements.

Dedicated capacity or leased lines may be required by end-users to construct networks or link locations or be required by undertakings that in turn provide services to end-users. Therefore it is possible to define retail and wholesale markets that are broadly parallel.

The key elements in the demand for and supply of dedicated connections are service guarantees, bandwidth, distance and the location or locations to be served. There may also be qualitative characteristics because in some cases distinctions are still made between voice grade and data grade circuits.

At the wholesale level, it is possible to distinguish separate markets, in particular between the terminating segments of a leased circuit (sometimes called local tails or local segments) and the trunk segments. What constitutes a terminating segment will depend on the network topology specific to particular Member States and will be decided upon by the relevant NRA.

While many trunk segments on major routes are likely to be effectively competitive in certain geographic areas in Member States, other trunk segments may not support alternative suppliers. Depending on the proportion of such routes in a given Member State, one may see a tendency towards effective competition where alternative operators have made sufficient investments in alternative infrastructures and are in competition with the incumbent on the merchant market. The trunk segment leased line market has so far been found not to meet the second criterion in one Member State and hence not to be susceptible to ex ante regulation. In a number of other Member States, the NRA has found the market for trunk segments of leased lines to be effectively competitive as a number of parallel networks have been established. This trend is likely to continue. Therefore the market for wholesale trunk segments of leased lines is withdrawn from the recommended list on the basis that there is a clear trend towards effective competition through parallel infrastructures, which also indicates that entry barriers are insufficiently high to warrant satisfaction of the first criterion.

Nevertheless a significant number of routes may continue to be served only by a single operator in particular where the route is thin. This will vary within and between Member States but often new entrants cannot be expected to compete with the established operator across the whole of the territory, individual NRAs may be in a position to demonstrate that trunk segments of leased lines continue to fulfil the three criteria and are susceptible to ex ante regulation. Whilst it might be considered that competition law can address the failure on such thin routes, it is unrealistic to rely solely on competition law for as long as the number of unduplicated trunk routes in a country remains high, considering the general costing and pricing principles that would have to be applied throughout the network.

In relation to terminating segments, the existence of high and non-transitory entry barriers and the absence of a tendency towards effective competition across the EU are more obvious. Often the terminating segments of leased lines rely in one form or another on the former incumbent's ubiquitous access network. The control over that ubiquitous access network continues to provide the incumbent with a legacy advantage on the terminating segments of the leased line market that new entrants, across the EU, have not yet overcome. Even more than with trunk segments, there is little dynamic towards effective competition and competition law cannot alone address the failures on the trunk segments market.

With SMP regulation applied where it is warranted at the wholesale level, there is not likely to be consumer harm on the retail leased lines market. Wholesale regulation, where appropriate, should be sufficient to ensure that there is competitive supply at the retail level. The minimum set of leased lines was included in the initial Recommendation in line with Annex 1 of the Framework Directive. However, it is not clear that there is any significant residual market failure that would be required in order for this market to warrant ex ante regulation. Putting consideration of its inclusion in the text of the Directives to one side we can examine whether this market satisfies the three criteria.

With wholesale regulation in place there should be few barriers to market entry into the retail market. Firms can make tenders to provide a widely based leased line offer to the customer's premises. Having overcome the problem of making a ubiquitous offer, then entry barriers into this market are no longer high. Thus, the retail market for the minimum set of leased lines will not be identified in this draft revised Recommendation. Consequently the Commission will propose to reduce the Minimum Set of Leased Lines to zero.

Conclusion

It is considered that the following specific market related to the provision of dedicated connections and capacity (leased lines) should be included in the Recommendation:

Wholesale level

- Wholesale terminating segments of leased lines, irrespective of the technology used to provide leased or dedicated capacity.

4.3. Services provided at non-fixed locations

The aim of this section is to (i) describe and define relevant markets for mobile services at a retail level, (ii) define the linked wholesale markets and (iii) identify the relevant markets which are susceptible to ex ante regulation.

In the area of services provided at non-fixed locations (mobile services), the initial Recommendation identified the following markets as susceptible to ex ante regulation:

- Wholesale access and call origination on public mobile telephone networks;
- Wholesale voice call termination on individual mobile networks;
- Wholesale national market for international roaming on public mobile networks.

Retail markets

Customers use mobile phones for different purposes, such as making a voice call or sending an SMS. Rather than using different providers of these services, customers appreciate the ease and convenience of having only one handset and SIM card. Thus, consumers purchase a bundle or “cluster” of services from one mobile operator which usually includes local national and international (and roamed) calls and SMS. In this manner mobile firms benefit from economies of scope and consumers benefit from a reduction in transaction costs. Thus, the relevant market should include a “cluster” of products, where non-substitutable services are included in the same market.

With respect to the overall retail mobile market, it remains unclear whether residential and most business customers can be considered to be part of the same market as there does not appear to be a clear way to separate them, even if there may be significant differential pricing of services in order to attract certain types of customer or use⁴⁰. With respect to demand substitution, end-users may be indifferent towards tariff packages designed for business or residential users provided the terms suit their usage profile. With respect to supply substitution, an undertaking serving the business market may easily switch to supplying residential users in response to a small but non-transitory price increase by a hypothetical monopolist.

However, it is clear that large business users are in a position to demand and get personalised offerings. These firms often tender to have their mobile communications needs fulfilled, and the contract terms are private information. Moreover, these users are closed user groups who care about both making and receiving calls. They internalise the externality caused by the Calling Party Pays (CPP) convention. For this reason, business users that have individually negotiated rates are explicitly excluded from the remainder of the analysis. The actual boundary between this group of business users and other business users may differ between Member States and it will be for NRAs to properly delineate where this lies.

Pre- and post-pay mobile services can also be considered to be part of the same market. Supply substitutability is relatively easy, as is demand substitutability (in particular from pre-pay to contractual terms).

Mobile telephone users have no apparent substitute for mobile access and there is no supply substitute unless new spectrum becomes available. Therefore it seems that access could be considered as a market that is separate from the supply of services over the network at a retail level. However, every end-user purchases access to a mobile network with the objective of making or receiving calls (and using SMS etc.) or both (nationally or whilst roaming internationally). Even if a user purchasing a service chose not to originate calls, their decision to have service must be based on a need for call termination (to receive calls) otherwise access would be meaningless. This has implications for the definition of corresponding wholesale market for termination.

Similar considerations exist for international roaming at a retail level. Retail international roaming services include the ability to make and to receive calls whilst in a country other than the one where the end-user has established his or her network subscription. From a demand perspective, the retail provision of international roaming services could be examined to see if it is a separate market. However, it is a standard part of the bundle of services offered by mobile operators. Moreover, roaming is likely to be even more marked by transactional complementarities than other services offered by mobile operators (where a consumer might

⁴⁰ One area where a specific business market might be identified is in the retail provision of national and international services (including international roaming) for large corporate customers. Such a market is not identified for the purpose of ex ante regulatory analysis.

like to sign contracts with different operators for different countries and for different times of the day etc.). Thus, retail roaming is part of the cluster of services purchased. Moreover, a domestic supplier of other mobile telephony services could respond to a price increase by a hypothetical monopolist by making agreements with foreign operators so as to supply retail roaming services.

Therefore it is possible to define a single cluster retail market that includes access, national, international and roaming calls and SMS.

Since the adoption of the initial Recommendation, mobile services have continued to spread, with mobile penetration reaching 103% of the EU25 population in 2006. Mobile number portability has become compulsory since 2003. Despite a slow start, number porting increased dramatically in 2005, with 28 million mobile number ports. Most of these happened, however, in only a number of countries. In over half of the Member States, mobile network operators have concluded wholesale access agreements with service providers and mobile virtual network operators (MVNOs) and in countries where this has happened competition tends to be more intense. The sector shows a trend towards consolidation, with transactions integrating competing mobile networks within certain Member States (the Netherlands, Austria) as well as pan-European transactions such as Telefonica/O2. At the same time, 3G operators are entering the market.

Related Wholesale Markets

In order to provide retail mobile services, operators need various wholesale inputs, including termination services, access and call origination services and international roaming services.

Wholesale call and SMS termination on mobile networks

As is the case for fixed telephony, termination services are the least replicable input for retail mobile services. Mobile call termination is an input both to the provision of mobile calls (that terminate on other mobile networks) but also to calls that are originated by callers on networks serving fixed locations that terminate on mobile networks. This also applies to SMS termination, although the majority of messages that are terminated originate from other mobile handsets⁴¹. Since the termination charge is set by the called network, which is chosen by the called subscriber, the calling party in general does not have the ability to affect or influence termination charges. This is the case under the calling party pays (CPP) principle which is currently common in Europe. As the market failure is potentially the same for both call and SMS termination and as both services are sold as part of the same mobile cluster at both retail and wholesale level, it seems appropriate for descriptive purposes to deal with them together, even though on the basis of demand and supply side characteristics they constitute separate markets.

The CPP convention allows the terminating operator to raise its prices without a constraint from either party to the call. The calling party pays a bundled fee and will not see a direct price signal. The receiving party makes no payment by convention so cannot constrain the ability of their terminating operator. To the extent that the increased price reduces the number of calls that a person receives they are worse off. However, this may not be really noticed and the person concerned will not be able to attribute this fall-off in calls to a higher termination rate. Thus, MNOs can readily raise the price of reaching any of their subscribers.

⁴¹ It should be noted that market constraints may work differently for SMS that are requested by the receiving party in that the receiver may be paying for part or all of the price of the service.

This externality, whereby the called party may independently and adversely affect the calling party, can potentially be internalised, so that the ability for a network to set excessive termination charges is constrained.

At a retail level, a call (or a SMS) to a given user or user's terminal is not a substitute for a call (or a SMS) to another user and this limitation on demand substitution follows through at the wholesale level. In respect of supply substitution, if the supplier of call termination raises its price, it is not easy for alternative suppliers to switch to supply that market because they would need the SIM card details of that user to do so. However, the market is wider than call termination on a given user terminal because it is not possible for an operator to readily price discriminate between termination charges to different users across their network. Therefore the relevant market is at least as wide as termination for each operator.

However, with such a starting point in market definition, the supplier and the product are perfectly linked. It is important therefore to consider the possibilities for demand and supply substitution that might constrain termination charges and also the behaviour of network operators in setting termination charges. A constraint would exist if, when a network operator tried to raise termination charges (or resisted lowering them), the overall impact were unprofitable. Such supply-side substitution is not currently possible but may become feasible at some point in the future.

This could become the case with software-enabled SIM cards, comparable to cases where operators establish preferred arrangements for their end-users when they are roaming internationally.

Nonetheless, it is clear that the first criterion of a high and non-transitory entry barrier is met for mobile termination of voice calls and SMS messages. The fact that a mobile operator has a collection of customers for which it has a monopoly for terminating traffic cannot be overcome by other operators regardless of their size.

In principle mobile termination charges might be constrained via demand substitution, but there is no potential for demand substitution at a wholesale level. Demand at the wholesale level is inextricably linked to supply. The operator (of the caller) is unable to purchase call or SMS termination on a given network from an alternative source (as indicated above).

However, there are various possibilities for demand substitution at the retail level. It may be that other forms of calls or communications are reasonably close substitutes for the calls considered above, such as call back and call forwarding, but in order for that potential substitution to broaden the market it would need to constrain the behaviour of the operator setting termination charges by lowering its overall profitability. Similar considerations could apply for SMS messaging.

There may be substitutes for different classes of call, for instance a possible substitute for a fixed to mobile call is a mobile to mobile call⁴². The substitute call would need to be on-net to lower profitability and constrain behaviour. In conjunction with the possibility for closed groups of users to exert buyer power (as described below), the potential substitution has a stronger impact because it could lead not only to the loss of termination charges but also to the loss of subscribers from one network to another.

A possible substitute for an off-net mobile call could be a mobile to fixed call. This would result in the loss of the termination charges but it is likely that the alternative call is only a

⁴² It is possible for these alternatives to be substitutes (as well as complements) even if broadly speaking the fixed market is defined separately from the mobile market.

close substitute in specific circumstances (e.g. knowing that the called party is close to a given fixed phone).

To summarise, some of these potential substitutions could constrain termination charges but empirical evidence does not seem to indicate that they actually do so. In practice, none of the above demand substitutes seem to operate at a level that would constrain the mobile operator's behaviour.

Another specific way in which end-users and their operators can avoid excessive termination charges is by tromboning (traffic re-file) or re-routing. However, in the EU higher accounting rates are charged for the termination of calls to mobile than to fixed subscribers, making tromboning unattractive, taking also into account the cost of re-routing traffic through foreign operators.

It is also possible to re-originate traffic so that it appears that it is coming from the mobile network on which calls are due to terminate. The latter practice is only viable for end-users that originate a significant amount of traffic for termination on a mobile network. However, it is possible for mobile operators to design differentiated tariff services in order to separate such user groups.

Another possible constraint on the ability of operators to set excessive termination charges may come from buyer power at the retail level. Two main types of buyer power may arise.

The first is where users of mobile phones are sufficiently concerned about receiving incoming calls that the price of incoming calls affects their choice of supplier. For this to exert a constraint on the pricing of termination it is necessary that such a factor be as important to users as the pricing of other services such as outgoing calls, rental subscriptions etc. Under the calling party pays (CPP) principle, the calling party pays for the call, and the called party does not, therefore there is no direct relationship between the charges applied and demand for the service by the user of the mobile network who receives the call. Mobile users have shown little price sensitivity in regard to how much it costs others to call them.

A second type of buyer power can come from closed user groups where a particular group of users (whether or not they pay for part of the bill associated with incoming calls) make so many calls between them that intra-group calls constitute a significant proportion of their bill. If a given network raised termination charges and thereby increased the price of incoming calls, group members could switch networks to be on a given network and take advantage of lower on-net prices. However, mobile operators are able to price-discriminate among the various categories of users and (through the use of on-net tariffs) offer closed economic user groups discounts for calls to particular mobile users etc. Thus, for on-net calls there is no market failure as the mobile operator has an incentive to encourage intensive use of its network.

The increased penetration of 3G handsets may pave the way for the emergence of push e-mail services (instant messaging) in the retail market, which could compete with SMS.

In general therefore, whilst it is apparent that end-users who subscribe to mobile services have a choice about the network to which they subscribe and that it is relatively easy to switch between networks, there is limited evidence of widespread constraints on the pricing of wholesale call termination.

The conclusion at the current time (under a calling party pays system) is that call termination by third parties on individual networks is the appropriate relevant market.

A market definition for call termination on each mobile network would imply that currently each mobile network operator is a single supplier on each market. However, whether every operator then has market power still depends on whether there is any countervailing buyer power, which would render any non-transitory price increase unprofitable.

The market identified in this Recommendation is the same as the one identified in the initial Recommendation, i.e. voice call termination on individual mobile networks. To the extent that the exchange and termination of SMS are considered to result in similar market power problems, it is open to NRAs to consider defining and notifying an additional separate market for SMS.

The decisions of some national appeals bodies have highlighted the potential bargaining that may occur due to countervailing buyer power. Whilst not stating that the level of termination rates is the result of a bargaining process, these decisions point to the need to fully examine the issue of countervailing buyer power on a case-by-case basis when analysing the existence of SMP on this market.

Access and Call Origination

Besides call termination, the key elements required to produce a retail service are network access and call origination. Network access and call origination are typically supplied together by a network operator so that both services can be considered as part of the same market at a wholesale level⁴³.

The relevant wholesale market is access and call origination on mobile networks. This market is still subject to entry barriers. Undertakings without spectrum assignments can only enter this market on the basis of future spectrum allocations and assignment or secondary trading of spectrum. This may not be an absolute entry barrier, however, if operators voluntarily share spectrum. Spectrum constraints must also be considered in the context of the Commission's proposal regarding spectrum liberalisation. However, technological changes and possibilities to increase the number of operators with assigned spectrum are likely to undermine such constraints in the medium to long term. An additional factor when considering entry barriers is that the number of mobile network operators that a national market can sustain from an economic perspective might be limited. Barriers to entry for a new network operator may be high and possibly non-transitory in certain countries irrespective of the availability of spectrum if the minimum economies of scale which are sustainable in view of the network roll-out costs restrict the number of entrants and technological development does not overcome these scale restrictions. Again, as technology changes and indeed with the possibility to share network elements such constraints are unlikely to persist in the medium to long term.

The degree of competition generally observed in this market at the retail level indicates that ex ante regulatory intervention at a wholesale level may not be warranted. In addition, in most Member States the wholesale mobile access and call origination market is effectively competitive as mobile network operators conclude access agreements on commercial terms. In some Member States, however, there are no mobile virtual network operators (MVNOs) or service providers on the market. As indicated above, retail markets where there are MVNO access agreements tend to be more competitive. There are two possible interpretations of this

⁴³ In fact it could be argued that access, call origination and call termination constitute one wholesale market and on the other hand that call termination is a separate stand-alone wholesale product. The former is sold to the retail arm of a network operator; the latter is sold to other networks.

phenomenon (which are not mutually exclusive): the first is that the introduction of MVNOs brings more competition to the market; the second is that competitive markets deliver voluntary wholesale access as a natural outcome.

In competitive markets, operators may have an incentive to conclude voluntary access agreements as can be observed in many Member States today. This may in particular be the case where operators have excess capacity and can identify market segments where they perform less well. In such circumstances, it may be in the individual interest of an MNO to sign an access agreement with a partner that can sell to these market segments more effectively. This in turn increases the intensity of competition on the retail market and such a market dynamic has been seen in the majority of Member States, although in most of them the service provider does not yet really own the customer relationship (i.e. is able to move with his customers to another MNO) nor can it freely determine its own products and prices (including wholesale termination, roaming and retail voice and data prices).

In some Member States, however, it could be that firms have an incentive to tacitly collude so as to dilute the normal competitive dynamic. In certain circumstances in the mobile sector, by refusing to grant access to their networks, mobile network operators may seek to prevent MVNOs or service providers from entering the retail market in order to protect rents at the retail level.

In such circumstances, although individually they have incentives to provide MVNO access, collectively MNOs may be better off if none of them grants such access as this could enable them to protect rents and they may tacitly collude to this effect. Such actions would have to be considered in a national context against the performance of the retail market and the circumstances of operators at a wholesale level. Normally, competition law can address problems of tacit collusion which occur at retail or wholesale level.

However, on the basis of current experience under the Article 7 procedure there is evidence that the market tends towards effective competition behind any entry barrier that may exist.

The market is therefore removed from the recommended list.

Wholesale international roaming

The wholesale international roaming market was included in the initial version of the Recommendation. Experience with market analysis has revealed that this market has exceptional characteristics which make it different from all the other markets discussed.

In this market very high consumer prices have persisted and the market has been characterised by rigidity in its structure and to a large extent in its pricing. The work undertaken by the national regulatory authorities (both individually and in the European Regulators Group) in analysing the wholesale national markets for international roaming in accordance with the 2002 framework has demonstrated that it has not been possible for a national regulator acting alone to effectively address the high level of wholesale international roaming charges on the basis of the normal market analysis procedures.

In order to address the excessively high level of wholesale international roaming charges and to respond to the difficulties faced by NRAs identified above, the EP and Council have adopted a Regulation⁴⁴ to address and decrease international roaming rates at both wholesale and retail levels across the EU.

⁴⁴ Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC, OJ L171, 29.6.2007, p. 3.

Following the entry into force of the EU Regulation in this area, this market is withdrawn from the recommended list.

Other Mobile data services

In addition to voice and SMS services mobile or wireless cellular networks can be used to access data and related services including Internet, mobile radio and TV services, etc.

Such retail services are currently less developed than their equivalent provision to fixed locations. Although new and many existing handsets or devices are capable of using mobile data services, market development in the EU is still in its early stages, and it remains to be seen how various services will be supplied and priced in the context of third generation networks.

It also still remains difficult to foresee how mobile data services and access to the Internet will develop generally. Many of the services that may be accessed through these networks are also available on a nomadic basis (i.e. access is possible at a number of locations or areas) using other technologies. The use of such alternative technologies may only offer limited mobility of access, but a significant use of mobile cellular networks also occurs in a nomadic context. At this stage these issues remain unresolved and there remains uncertainty as to whether the first criterion will apply. Moreover, it is not clear how competition will develop behind any entry barrier. For example, will 3G mobile firms attempt to create a walled garden or will they take an open approach to allowing their subscribers to use their networks to obtain or configure services?

Most of these issues can currently be dealt with only with a high degree of uncertainty. Thus, no retail or wholesale markets for data and related services are identified for the purposes of the revised draft Recommendation.

Conclusion

It is considered that the following specific market related to the provision of Voice Services provided at non-fixed locations should be included in the Recommendation:

Wholesale level

- Voice call termination on individual mobile networks.

4.4. Markets related to Broadcasting Transmission

Electronic communications services exclude services providing or exercising control over content transmitted using electronic communications networks and services. The provision of broadcasting content therefore lies outside the scope of this regulatory framework. On the other hand, the transmission of content constitutes an electronic communication service and networks used for such transmission likewise constitute electronic communications networks and therefore these services and networks are within the scope of the regulatory framework.

At the retail level, the market is characterised by the delivery of radio and television broadcasting and includes free-to-air broadcasting and pay broadcasting, as well as pay platforms and also the delivery or transmission of interactive services.

Radio and television broadcasting including free-to-air broadcasting is an example of a two-sided market where delivery platforms bring together users and providers of content, and in many cases, advertisers too. Households wish to see (or listen to) content. Free-to-air broadcasters produce content but use advertising income and/or state contribution to cover their costs. Advertisers, in turn, seek to reach households. For advertisers a prerequisite, in a free-to-air broadcaster, is that they reach the largest possible number of householders. Thus, free-to-air broadcasters are driven by the commercial need to satisfy the demands of advertisers to sign transmission agreements with any transmission platform that has been chosen by even a small (but significant) number of households. Failure to do this will result in an automatic fall in advertising revenue.

Pay broadcasters have a direct commercial relationship with the viewer (listener) as a subscriber. Similarly to free-to-air broadcasters, pay broadcasters are also interested in accessing as many transmission platforms as possible, as that maximises the number of potential subscribers.

Pay platforms aggregate free-to-air and pay channels into package offerings to the public for subscriptions and transmit this package of channels through their own platform (for example, in the case of a vertically integrated cable operator acting both as a pay platform and as a transmission service provider) or through a third party's transmission platform (for example, a satellite transmission service provider). Whereas the transmission services that a pay platform purchases (captively or on the merchant market) are electronic communications services and fall under the regulatory framework, the relationship between the individual broadcasters and the pay platform concerns a content aggregating service and does not fall under the regulatory framework.

Currently, end-users, depending on their particular circumstance, may receive radio and television broadcasting via (analogue or digital) terrestrial, (analogue or digital) cable, (analogue or digital) satellite or DSL networks. Whether services broadcast over these transmission systems potentially constitute separate retail markets or not depends on a number of factors, such as their price, the coverage or availability of the different transmission systems and the ability of end-users to switch between broadcasting or transmission platforms.

In particular, it is important to note that many households have free-to-air terrestrial broadcasts available, comprising the most popular channels or stations. In terms of TV, free-to-air terrestrial broadcasts are chosen by approximately 45% of EU households overall. Given the role of regulation – in particular ‘must-carry’, which is discussed in greater detail below – this allows households the possibility of receiving an adequate service without an on-going subscription. This may place a limit on the prices that subscription services provided over any platform can charge without losing a significant number of subscriptions.

A significant and increasing proportion of EU households are deciding to subscribe to either a satellite or cable pay platform. Across the EU 27 this amounts to about 60% of households in total. This proportion has risen from 41% in the EU-15 in the year 2000, and has increased markedly in recent years. There are individual Member States that do not exhibit such a pattern (Greece is one example). At the other extreme are Member States such as Austria, Belgium, the Netherlands and Germany, where the majority of households receive television via cable or satellite pay platform subscriptions. However, it is not clear if this trend will continue into the future as digital terrestrial platforms become more widespread and TV over

DSL broadband develops or as more companies move their content “into the clear” on satellite.

Increasingly cable and satellite services carry radio broadcasts too. In addition, radio broadcasts are very often made available as live streams on the websites of radio stations.

Although satellite coverage extends to most of the area of the Member States there are often rules that inhibit the adoption of this reception technology. Local planning rules are one such example. The Commission has taken action against a number of Member States to enforce the individual’s right to install a satellite dish. Indeed cable penetration is highest where such restrictions used to apply.

Satellite companies are now making arrangements to minimise inadvertent spill-over, which makes this technology a more and more attractive proposition for broadcasters as they are less likely to become embroiled in IPR disputes. This, in turn, may increase the degree of excess capacity in the satellite sector.

In all but a handful of Member States the majority of households have normally up to three potential means of receiving broadcast content. With technological developments in the area of digital terrestrial broadcasting and broadcasting over DSL networks, the number of alternative transmission channels from the point of view of households is expected to further increase. Consequently no retail market is identified for the purposes of the Recommendation. The remaining paragraphs deal with the related wholesale markets.

There are a number of reasons why it is considered appropriate to remove the existing wholesale market from the recommended list. Many of the comments received during the consultation indicated that significant market changes are underway. There is evidence of greater platform competition as the transition from analogue to digital delivery platforms occurs. One implication is that there are likely to be fewer capacity constraints on any given platform. A second is that many Member States are likely to have 3-4 competing platforms (terrestrial, satellite, cable and telecom-based) in contrast to 2-3 analogue platforms, one of which, satellite, developed much later. The transition from analogue to digital provides an impetus for platforms to compete and attract end-users, which in a two-sided market context, also means obtaining content. These changes indicate that despite the market entry barriers that may exist, the market dynamics are such that the second criterion is not satisfied.

In addition, it is necessary to consider whether potential market power problems can be addressed either by competition law (the third criterion) or indeed by other regulatory measures that are in place, in line with the principle of taking a modified greenfield approach.

Must-carry rules can be imposed under Article 31 of the Universal Service Directive (USD). Member States can impose must-carry obligations when a significant number of end users use a network as their principal means of receiving radio and television broadcasts. The approach to must-carry differs across the Community, and in some cases channels designated as must-carry have taken up a significant proportion of the available channels. However, the principle remains that perceived problems of access to transmission platforms for specified channels and services can be addressed via Article 31 USD where they meet a general interest objective.

Furthermore, according to Article 12 of the Framework Directive, where undertakings are deprived of access to viable alternatives because of the need to protect the environment, public health or public security or to meet town and country planning objectives, Member

States may impose the sharing of facilities or property (including physical co-location) on an undertaking operating an electronic communications network. Such sharing or coordination arrangements may include rules for apportioning the costs of facility or property sharing.

In addition, national competition authorities have dealt with certain access problems under competition rules.

Conclusion

On the basis that the wholesale market for broadcasting transmission services to deliver broadcast content to end-users is not deemed to meet the second criterion in a majority of Member States, and on the basis that access problems related to public interest objectives can be addressed under must-carry provisions, the market is withdrawn from the recommended list.

5. TRANSITION TO THE NEW RECOMMENDATION

The transition between editions of the Recommendation raises issues for all stakeholders. This is particularly the case where a market is being removed from the recommended list as this may occur during an on-going market review by an NRA, or shortly after an NRA has imposed remedies following a finding of SMP on such a market. The removal of a market from the initial Recommendation means that the Commission is of the opinion that in most circumstances this market no longer satisfies the three criteria. However, for these markets NRAs should have the power to apply the three-criteria test in order to assess whether on the basis of national circumstances a market would still be susceptible to ex ante regulation. In those cases, NRAs should append to their (new) analysis detailed reasoning outlining why, in their particular circumstances, the three criteria are satisfied.

NRAs do not have to demonstrate to the Commission that, in relation to the markets identified in this Recommendation, the three criteria are met.

An important transition aspect concerns the review of markets in this Recommendation and also of those markets which are no longer included but where remedies have already been imposed (under the initial Recommendation) commensurate with findings of SMP. Article 16(1) of the Framework Directive states that NRAs shall carry out an analysis of the relevant markets as soon as possible after the adoption of the Recommendation or any updating thereof. Allowing a regulatory measure or remedy to run its course, without risk of it being reversed mid-term, is an important element of regulatory commitment which reinforces the predictability of regulatory intervention.

The underlying principle therefore is that remedies that have been imposed should stay in place until a new market analysis is due and is undertaken. That implies that "as soon as possible" in Article 16(1) is interpreted as respecting regulatory measures that have already been notified and agreed. In addition, NRAs should undertake a new market analysis in order to maintain, amend or withdraw remedies imposed following an SMP finding, irrespective of whether the relevant market remains or has been removed from the Recommendation. For the avoidance of doubt, markets not identified in this Recommendation where remedies are in

place must be reassessed in order to justify their withdrawal⁴⁵. In accordance with Article 16(3) of the Framework Directive, when an NRA withdraws remedies imposed as a result of a market analysis, an appropriate period of notice shall be given to parties affected by the withdrawal of such obligations. Conversely, where no SMP has been found in a market which is no longer included in this Recommendation, NRAs have no obligation to review that market.

6. PUBLICATION OF THE RECOMMENDATION AND SUBSEQUENT REVISION

The Recommendation will be periodically reviewed by the Commission depending on the speed of market developments, the period needed by NRAs to undertake market analysis, the principle set out in section 1 that the imposition of ex ante regulation to address lack of effective competition implies a degree of continuity, and the need for predictability and legal security for market players.

National regulatory authorities will regularly review their market analysis on the basis of the market(s) identified in any updating of the Recommendation, as stated in Article 16 of the Framework Directive.

In reviewing this Recommendation, the Commission consulted Member States, NRAs and NCAs, and all interested parties via a public consultation.

⁴⁵ Art. 7(3) of the Access Directive.

RECOMMENDATIONS

COMMISSION

COMMISSION RECOMMENDATION

of 7 May 2009

on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU

(2009/396/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)⁽¹⁾ and in particular Article 19(1) thereof,

After consulting the Communications Committee,

Whereas:

- (1) According to Article 8(3) of Directive 2002/21/EC, National Regulatory Authorities (NRAs) shall contribute to the development of the internal market, inter alia, by cooperating with each other and with the Commission in a transparent manner to ensure the development of consistent regulatory practice. However, during the assessment of more than 850 draft measures notified under Article 7 of Directive 2002/21/EC it appeared that inconsistencies in the regulation of voice call termination rates still exist.
- (2) Although some form of cost orientation is generally provided for in most Member States, a divergence between price control measures prevails across the Member States. In addition to a significant variety in the chosen costing tools, there are also different

practices in implementing those tools. This widens the spread between wholesale termination rates applied across the European Union, which can only be partly explained by national specificities. The European Regulators Group (ERG) established by Commission Decision 2002/627/EC⁽²⁾ recognised this in its Common Position on symmetry of fixed call termination rates and symmetry of mobile call termination rates. NRAs have also, in a number of cases, authorised higher termination rates for smaller fixed or mobile operators on the grounds that these operators are new entrants into the market and have not benefited from economies of scale and/or are subject to differing cost conditions. These asymmetries exist both within and across national boundaries, although they are slowly decreasing. The ERG recognised in its Common Position that termination rates should normally be symmetric and asymmetry requires an adequate justification.

- (3) Significant divergences in the regulatory treatment of fixed and mobile termination rates create fundamental competitive distortions. Termination markets represent a situation of two-way access where both interconnecting operators are presumed to benefit from the arrangement but, as these operators are also in competition with each other for subscribers, termination rates can have important strategic and competitive implications. Where termination rates are set above efficient costs, this creates substantial transfers between fixed and mobile markets and consumers. In addition, in markets where operators have asymmetric market shares, this can result in significant payments from smaller to larger competitors. Furthermore, the absolute level of mobile termination rates remains high in a number of Member States compared to those applied in a number of countries outside of the European Union, and also compared to fixed termination rates generally, thus continuing to translate into high, albeit decreasing, prices for end-consumers. High termination rates tend to lead to high retail prices for originating calls and correspondingly lower usage rates, thus decreasing consumer welfare.

⁽¹⁾ OJ L 108, 24.4.2002, p. 23.

⁽²⁾ OJ L 200, 30.7.2002, p. 38.

- (4) The lack of harmonisation in the application of cost-accounting principles to termination markets to-date demonstrates a need for a common approach which will provide greater legal certainty and the right incentives for potential investors, and reduce the regulatory burden on existing operators that are currently active in several Member States. The objective of coherent regulation in termination markets is clear and recognised by the NRAs and has been repeatedly expressed by the Commission in the context of its assessment of draft measures under Article 7 of Directive 2002/21/EC.
- (5) Certain provisions of the regulatory framework for electronic communications networks and services require necessary and appropriate cost-accounting mechanisms and price control obligations to be implemented, namely Articles 9, 11 and 13 in conjunction with recital 20 of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) ⁽¹⁾.
- (6) Commission Recommendation 2005/698/EC of 19 September 2005 on accounting separation and cost accounting under the regulatory framework for electronic communications ⁽²⁾ has provided a framework for the consistent application of the specific provisions concerning cost accounting and accounting separation, with a view to improving the transparency of regulatory accounting systems, methodologies, auditing and reporting processes to the benefit of all parties involved.
- (7) Wholesale voice call termination is the service required in order to terminate calls to called locations (in fixed networks) or subscribers (in mobile networks). The charging system in the EU is based on Calling Party Network Pays, which means that the termination charge is set by the called network and paid by the calling network. The called party is not billed for this service and generally has no incentive to respond to the termination price set by its network provider. In this context, excessive pricing is the main competition concern of regulatory authorities. High termination prices are ultimately recovered through higher call charges for end-users. Taking into account the two-way access nature of termination markets, further potential competition problems include cross-subsidisation between operators. These potential competition problems are common to both fixed and mobile termination markets. Therefore, in the light of the ability and incentives of terminating operators to raise prices substantially above cost, cost orientation is considered the most appropriate intervention to address this concern over the medium term. Recital 20 of Directive 2002/19/EC notes that the method of cost recovery should be appropriate to the particular circumstances. In view of the specific characteristics of call termination markets and the associated competitive and distributional concerns, the Commission has for a long time recognised that setting a common approach based on an efficient cost standard and the application of symmetrical termination rates would promote efficiency, sustainable competition and maximise consumer benefits in terms of price and service offerings.
- (8) According to Article 8(1) of Directive 2002/21/EC, Member States shall ensure that when carrying out the regulatory tasks specified in that Directive and the specific directives, in particular those designed to ensure effective competition, NRAs take the utmost account of the desirability of making regulations technologically neutral. Article 8(2) of Directive 2002/21/EC further requires NRAs to promote competition by, amongst other things, ensuring that all users derive maximum benefit in terms of choice, price and quality of service and that there is no distortion or restriction of competition. In order to achieve these objectives and a consistent application in all Member States, the regulated termination rates should be brought down to the costs of an efficient operator as soon as possible.
- (9) In a competitive environment, operators would compete on the basis of current costs and would not be compensated for costs which have been incurred through inefficiencies. Historic cost figures therefore need to be adjusted into current cost figures to reflect the costs of an efficient operator employing modern technology.
- (10) Operators which are compensated for actual costs incurred for termination have few incentives to increase efficiency. The implementation of a bottom-up model is consistent with the concept of developing a network for an efficient operator whereby an economic/engineering model of an efficient network is constructed using current costs. It reflects the equipment quantity needed rather than that actually provided and it ignores legacy costs.
- (11) Given the fact that a bottom-up model is based largely on derived data, e.g. network costs are computed using information from equipment vendors, regulators may wish to reconcile the results of a bottom-up model with the results of a top-down model in order to produce as robust results as possible and to avoid large discrepancies in operating cost, capital cost and cost allocation between a hypothetical and a real operator. In order to identify and improve possible shortcomings of the bottom-up model, such as information asymmetry, the NRA may compare the results of the bottom-up modelling approach with those resulting from a corresponding top-down model which uses audited data.

⁽¹⁾ OJ L 108, 24.4.2002, p. 7.

⁽²⁾ OJ L 266, 11.10.2005, p. 64.

- (12) The cost model should be based on the efficient technological choices available in the time frame considered by the model, to the extent that they can be identified. Hence, a bottom-up model built today could in principle assume that the core network for fixed networks is Next-Generation-Network (NGN)-based. The bottom-up model for mobile networks should be based on a combination of 2G and 3G employed in the access part of the network, reflecting the anticipated situation, while the core part could be assumed to be NGN-based.
- (13) Taking account of the particular characteristics of call termination markets, the costs of termination services should be calculated on the basis of forward-looking long-run incremental costs (LRIC). In a LRIC model, all costs become variable, and since it is assumed that all assets are replaced in the long run, setting charges based on LRIC allows efficient recovery of costs. LRIC models include only those costs which are caused by the provision of a defined increment. An incremental cost approach which allocates only efficiently incurred costs that would not be sustained if the service included in the increment was no longer produced (i.e. avoidable costs) promotes efficient production and consumption and minimises potential competitive distortions. The further termination rates move away from incremental cost, the greater the competitive distortions between fixed and mobile markets and/or between operators with asymmetric market shares and traffic flows. Therefore, it is justified to apply a pure LRIC approach whereby the relevant increment is the wholesale call termination service and which includes only avoidable costs. A LRIC approach would also allow the recovery of all fixed and variable costs (as the fixed costs are assumed to become variable over the long run) which are incremental to the provision of the wholesale call termination service and would thereby facilitate efficient cost recovery.
- (14) Avoidable costs are the difference between the identified total long-run costs of an operator providing its full range of services and the identified total long-run costs of that operator providing its full range of services except for the wholesale call termination service supplied to third parties (i.e. stand-alone cost of an operator not offering termination to third parties). To ensure an appropriate attribution of the costs, a distinction needs to be made between those costs that are traffic-related, i.e. all those fixed and variable costs which rise with increased levels of traffic, and those costs that are non-traffic-related, i.e. all those costs which do not rise with increased levels of traffic. To identify the avoidable costs relevant for wholesale call termination, non-traffic-related costs should be disregarded. Then, it may be appropriate to attribute traffic-related costs firstly to other services (e.g. call origination, SMS, MMS, broadband, leased lines, etc.) with wholesale voice call termination being the final service to be taken into account. The cost allocated to the wholesale call termination service should thus be equal only to the additional cost incurred to provide the service. As a consequence, cost accounting based on a LRIC approach for wholesale call termination services in fixed and mobile markets should allow the recovery only of costs which would be avoided if a wholesale call termination service was no longer provided to third parties.
- (15) It can be seen that call termination is a service which generates benefits to both calling and called parties (if the receiver did not receive a benefit it would not accept the call), which in turn suggests that both parties have a part in the creation of costs. The use of cost causation principles to set cost-orientated prices would suggest that the creator of the costs should bear those costs. Recognising the two-sided nature of call termination markets with costs being driven by two sides, not all related costs need to be recovered via the regulated wholesale termination charge. However, for the purposes of this Recommendation, all of the avoidable costs of providing the wholesale call termination service can be recovered via the wholesale charge, i.e. all of those costs which increase in response to an increase in wholesale termination traffic.
- (16) In setting termination rates, any deviation from a single efficient cost level should be based on objective cost differences outside the control of operators. In fixed networks, no such objective cost differences outside the control of the operator have been identified. In mobile networks, uneven spectrum assignment may be considered an exogenous factor which results in per-unit-cost differences between mobile operators. Exogenous cost differences may arise where spectrum assignments have not taken place using market-based mechanisms but on the basis of a sequential licensing process. Where the spectrum assignment takes place through a market-based mechanism such as an auction or where there is a secondary market in place, frequency-induced cost differences become more endogenously determined and are likely to be significantly reduced or eliminated.
- (17) New entrants in mobile markets may also be subject to higher unit costs for a transitional period before having reached the minimum efficient scale. In such situations, NRAs may allow them, after having determined that there are impediments on the retail market to market entry and expansion, to recoup their higher incremental costs compared to those of a modelled operator for a transitional period of up to four years after market entry. Drawing upon the ERG Common Position, it is reasonable to envisage a time frame of four years for phasing out asymmetries based on the estimation that in the mobile market it can be expected to take three to four years after entry to reach a market

share of between 15 and 20 %, thereby approaching the level of the minimum efficient scale. This is distinct to the situation for new entrants in fixed markets which have the opportunity to achieve low unit costs by focusing their networks on high-density routes in particular geographic areas and/or by renting relevant network inputs from the incumbents.

- (18) A depreciation method that reflects the economic value of an asset is the preferred approach. If, however, the development of a robust economic depreciation model is not feasible, other approaches are possible, including straight-line depreciation, annuities and tilted annuities. The criterion for choosing among the alternative approaches is how closely they are likely to approximate an economic measure of depreciation. Thus, if the development of a robust economic depreciation model is not feasible, the depreciation profile of each major asset in the bottom-up model should be examined separately, and the approach which generates a depreciation profile similar to that of economic depreciation should be chosen.
- (19) With regard to efficient scale, different considerations apply in fixed and in mobile markets. The minimum efficient scale may be reached at different levels in the fixed and mobile sectors as this depends on the different regulatory and commercial environments applicable to each.
- (20) When regulating wholesale termination charges, NRAs should neither preclude nor inhibit operators from moving to alternative arrangements for the exchange of terminating traffic in the future to the extent that these arrangements are consistent with a competitive market.
- (21) A period of transition until 31 December 2012 should be considered long enough to allow NRAs to put the cost model in place and for operators to adapt their business plans accordingly while, on the other hand, recognising the pressing need to ensure that consumers derive maximum benefits in terms of efficient cost-based termination rates.
- (22) For NRAs with limited resources, an additional transitional period may exceptionally be needed in order to prepare the recommended cost model. In such circumstances, if an NRA is able to demonstrate that a methodology (e.g. benchmarking) other than a bottom-up LRIC model based on current costs results in outcomes consistent with this Recommendation and generates efficient outcomes consistent with those in a competitive market, it could consider setting interim prices based on an alternative approach until 1 July 2014. Where it would be objectively disproportionate for those NRAs with limited resources to apply the recommended cost methodology after this date, such NRAs may continue to apply an alternative methodology up to the date for review of this Recommendation, unless the body established for cooperation among NRAs and the Commission, including its related working groups, provides sufficient practical support and guidance to overcome this limitation of resources and, in particular, the cost of implementing the recommended methodology. Any such outcome resulting from alternative methodologies should not exceed the average of the termination rates set by NRAs implementing the recommended cost methodology.
- (23) This Recommendation has been subject to a public consultation,

HEREBY RECOMMENDS:

1. When imposing price control and cost-accounting obligations in accordance with Article 13 of Directive 2002/19/EC on the operators designated by National Regulatory Authorities (NRAs) as having significant market power on the markets for wholesale voice call termination on individual public telephone networks (hereinafter referred to as 'fixed and mobile termination markets') as a result of a market analysis carried out in accordance with Article 16 of Directive 2002/21/EC, NRAs should set termination rates based on the costs incurred by an efficient operator. This implies that they would also be symmetric. In doing so, NRAs should proceed in the way set out below.
2. It is recommended that the evaluation of efficient costs is based on current cost and the use of a bottom-up modelling approach using long-run incremental costs (LRIC) as the relevant cost methodology.
3. NRAs may compare the results of the bottom-up modelling approach with those of a top-down model which uses audited data with a view to verifying and improving the robustness of the results and may make adjustments accordingly.
4. The cost model should be based on efficient technologies available in the time frame considered by the model. Therefore the core part of both fixed and mobile networks could in principle be Next-Generation-Network (NGN)-based. The access part of mobile networks should also be based on a combination of 2G and 3G telephony.

5. The different cost categories referred to herein should be defined as follows:
- (a) 'Incremental costs' are those costs that can be avoided if a specific increment is no longer provided (also known as avoidable costs);
 - (b) 'Traffic-related costs' are all those fixed and variable costs which rise with increased levels of traffic.
6. Within the LRIC model, the relevant increment should be defined as the wholesale voice call termination service provided to third parties. This implies that in evaluating the incremental costs NRAs should establish the difference between the total long-run cost of an operator providing its full range of services and the total long-run costs of this operator in the absence of the wholesale call termination service being provided to third parties. A distinction needs to be made between traffic-related costs and non-traffic-related costs, whereby the latter costs should be disregarded for the purpose of calculating wholesale termination rates. The recommended approach to identifying the relevant incremental cost would be to attribute traffic-related costs firstly to services other than wholesale voice call termination, with finally only the residual traffic-related costs being allocated to the wholesale voice call termination service. This implies that only those costs which would be avoided if a wholesale voice call termination service were no longer provided to third parties should be allocated to the regulated voice call termination services. Principles for calculating the wholesale voice call termination service increment in fixed and mobile termination networks respectively are further elaborated in the Annex.
7. The recommended approach for asset depreciation is economic depreciation wherever feasible.
8. When deciding on the appropriate efficient scale of the modelled operator, NRAs should take into account the principles for defining the appropriate efficient scale in fixed and mobile termination networks as set out in the Annex.
9. Any determination of efficient cost levels which deviates from the principles set out above should be justified by objective cost differences which are outside the control of the operators concerned. Such objective cost differences may emerge in mobile termination markets due to uneven spectrum assignments. To the extent that additional spectrum acquired to provide wholesale call termination is included in the cost model, NRAs should review any objective cost differences regularly, taking into account, inter alia, whether on a forward-looking basis additional spectrum is likely to be made available through market-based assignment processes which might erode any cost differences arising from existing assignments or whether this relative cost disadvantage decreases over time as the volumes of the later entrants increase.
10. In case it can be demonstrated that a new mobile entrant operating below the minimum efficient scale incurs higher per-unit incremental costs than the modelled operator, after having determined that there are impediments on the retail market to market entry and expansion, the NRAs may allow these higher costs to be recouped during a transitional period via regulated termination rates. Any such period should not exceed four years after market entry.
11. This Recommendation is without prejudice to previous regulatory decisions taken by NRAs in respect of the matters raised herein. Notwithstanding this, NRAs should ensure that termination rates are implemented at a cost-efficient, symmetric level by 31 December 2012, subject to any objective cost differences identified in accordance with points 9 and 10.
12. In exceptional circumstances where an NRA is not in a position, in particular due to limited resources, to finalise the recommended cost model in a timely manner and where it is able to demonstrate that a methodology other than a bottom-up LRIC model based on current costs results in outcomes consistent with this Recommendation and generates efficient outcomes consistent with those in a competitive market, it could consider setting interim prices based on an alternative approach until 1 July 2014. Where it would be objectively disproportionate for those NRAs with limited resources to apply the recommended cost methodology after this date, such NRAs may continue to apply an alternative methodology up to the date for review of this Recommendation, unless the body established for cooperation among NRAs and the Commission, including its related working groups, provides sufficient practical support and guidance to overcome this limitation of resources and, in particular, the cost of implementing the recommended methodology. Any such outcome resulting from alternative methodologies should not exceed the average of the termination rates set by NRAs implementing the recommended cost methodology.

13. This Recommendation will be reviewed not later than four years after the date of application.

14. This Recommendation is addressed to the Member States.

Done at Brussels, 7 May 2009.

For the Commission
Viviane REDING
Member of the Commission

ANNEX

Principles for the calculation of wholesale termination rates in fixed networks

The relevant incremental costs (i.e. avoidable costs) of the wholesale call termination service are the difference between the total long-run costs of an operator providing its full range of services and the total long-run costs of that operator not providing a wholesale call termination service to third parties.

A distinction needs to be made between traffic-related costs and non-traffic-related costs to ensure the appropriate attribution of those costs. The non-traffic-related costs should be disregarded for the purpose of calculating wholesale termination rates. From the traffic-related costs only those costs which would be avoided in the absence of a wholesale call termination service being provided should be allocated to the relevant termination increment. These avoidable costs may be calculated by allocating traffic-related costs first to services other than wholesale call termination (e.g. call origination, data services, IPTV, etc.) with only the residual traffic-related costs being allocated to the wholesale voice call termination service.

The default demarcation point between traffic- and non-traffic-related costs is typically where the first point of traffic concentration occurs. In a PSTN network this is normally deemed to be the upstream side of the line card in the (remote) concentrator. The broadband NGN equivalent is the line card in the DSLAM/MSAN⁽¹⁾. Where the DSLAM/MSAN is located in a street cabinet, then it needs to be considered whether the former loop between the cabinet and the exchange/MDF is a shared medium and should be treated as part of the traffic-sensitive cost category, in which case the traffic-/non-traffic-related demarcation point will be located in the street cabinet. If dedicated capacity is allocated to the voice call termination service irrespective of the technology deployed, then the demarcation point remains at the level of the (remote) concentrator.

Following the approach outlined above, examples of costs which would be included in the termination service increment would include additional network capacity needed to transport additional wholesale termination traffic (e.g. additional network infrastructure to the extent that it is driven by the need to increase capacity for the purposes of carrying the additional wholesale termination traffic) as well as additional wholesale commercial costs directly related to the provision of the wholesale termination service to third parties.

To determine the efficient scale of an operator for the purposes of the cost model, NRAs should take into account that in fixed networks operators have the opportunity to build their networks in particular geographic areas and to focus on high-density routes and/or to rent relevant network inputs from the incumbents. When defining the single efficient scale for the modelled operator, NRAs should therefore take into account the need to promote efficient entry while also recognising that under certain conditions smaller operators can produce at low unit costs in smaller geographic areas. Furthermore, smaller operators that cannot match the largest operators' scale advantages over broader geographic areas can be assumed to purchase wholesale inputs rather than self-provide termination services.

Principles for the calculation of wholesale termination rates in mobile networks

The relevant incremental costs (i.e. avoidable costs) of the wholesale call termination service are the difference between the total long-run costs of an operator providing its full range of services and the total long-run costs of an operator not providing a wholesale call termination service to third parties.

A distinction needs to be made between traffic-related costs and non-traffic-related costs to ensure the appropriate attribution of those costs. The non-traffic-related costs should be disregarded for the purpose of calculating wholesale termination rates. From the traffic-related costs only those costs which would be avoided in the absence of a wholesale call termination service being provided should be allocated to the relevant termination increment. These avoidable costs may be calculated by allocating traffic-related costs first to services other than wholesale call termination (e.g. call origination, SMS, MMS, etc.) with only the residual traffic-related costs being allocated to the wholesale voice call termination service.

The costs of the handset and the SIM card are not traffic-related and should be excluded from any costing model for wholesale voice call termination services.

Coverage can be best described as the capability or option to make a single call from any point in the network at a point in time, and capacity represents the additional network costs which are necessary to carry increasing levels of traffic. The need to provide such coverage to subscribers will cause non-traffic-related costs to be incurred which should not be attributed to the wholesale call termination increment. Investments in mature mobile markets are more driven by capacity increases and by the development of new services and this should be reflected in the cost model. The incremental cost of wholesale voice call termination services should therefore exclude coverage costs but should include additional capacity costs to the extent that they are caused by the provision of wholesale voice call termination services.

⁽¹⁾ Digital Subscriber Line Access Multiplexer/Multi-Service Access Node.

The costs of spectrum usage (the authorisation to retain and use spectrum frequencies) incurred in providing retail services to network subscribers are initially driven by the number of subscribers and thus are not traffic-driven and should not be calculated as part of the wholesale call termination service increment. The costs of acquiring additional spectrum to increase capacity (above the minimum necessary to provide retail services to subscribers) for the purposes of carrying additional traffic resulting from the provision of a wholesale voice call termination service should be included on the basis of forward-looking opportunity costs, where possible.

Following the approach outlined above, examples of costs which would be included in the termination service increment would include additional network capacity needed to transport additional wholesale traffic (e.g. additional network infrastructure to the extent that it is driven by the need to increase capacity for the purposes of carrying the additional wholesale traffic). Such network-related costs could include additional Mobile Switching Centres (MSCs) or backbone infrastructure directly required to carry the terminating traffic for third parties. Furthermore, where certain network elements are shared for the purposes of supplying origination and termination services, such as cell sites or Base Transceiver Stations (BTS), these network elements will be included in the termination cost model to the extent that they are needed because of the additional capacity necessary to carry terminating traffic by third parties. In addition, the additional spectrum costs and wholesale commercial costs directly related to the provision of the wholesale termination service to third parties would also be taken into account. This implies that coverage costs, unavoidable business overhead costs and retail commercial costs are not included.

To determine the minimum efficient scale for the purposes of the cost model, and taking account of market share developments in a number of EU Member States, the recommended approach is to set that scale at 20 % market share. It may be expected that mobile operators, having entered the market, would strive to maximise efficiency and revenues and thus be in a position to achieve a minimum market share of 20 %. In case an NRA can prove that the market conditions in the territory of that Member State would imply a different minimum efficient scale, it could deviate from the recommended approach.



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accompanying the

COMMISSION RECOMMENDATION

on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU

EXPLANATORY NOTE

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EXPLANATORY NOTE

1. INTRODUCTION

This document provides the background to the Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU. A key observation during the assessment of more than 850 notifications under Article 7 of the Framework Directive¹ concerns inconsistencies in the application of remedies to voice call termination markets². Although some form of cost orientation is provided for in most Member States, it has not been implemented in a consistent manner throughout the EU and a considerable divergence between average termination rates, particularly as regards mobile termination rates, still exists across Member States the magnitude of which cannot be solely explained by differences in underlying costs³.

Additionally, National Regulatory Authorities (NRAs) have, in a number of cases, authorised higher termination rates for smaller fixed or mobile operators on the grounds that these operators are new entrants into the market and have not benefited from economies of scale and/or are subject to differing cost conditions. These asymmetries still exist, although they are slowly decreasing⁴. Furthermore, the absolute level of termination rates remains high in a number of Member States, thus continuing to translate into high, albeit decreasing, prices for end-consumers.

A number of inconsistencies in the regulation of mobile call termination rates have also been identified by the European Regulators Group (ERG)⁵, in particular in relation to the form of price regulation, treatment of asymmetries and the implementation of glide paths.

The above indicates significant differences in the regulatory treatment of terminating operators both within and across national boundaries. The distinct approach taken in different Member States as regards market players operating in similar conditions is difficult to justify.

The lack of harmonisation in the application of cost-accounting principles to termination markets to-date demonstrates a need for common guidelines and a common approach as to the implementation and interpretation of cost orientation obligations in termination markets which is, pursuant to Article 13 in conjunction

¹ Article 7 of Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communication networks and services ("the Framework Directive"), OJ L 108, 24.4.2002, p. 33.

² See the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on market reviews under the EU Regulatory Framework (2nd report), COM(2007) 401 final of 11.7.2007.

³ These differences are illustrated in the Annex below.

⁴ According to the European Regulators Group Common Position on symmetry of fixed call termination rates and symmetry of mobile call termination rates (ERG (07) 83 final 080312) ("ERG Common Position on symmetry"), average asymmetry of mobile termination rates (within individual countries) decreased from 1.4 €-cents in January 2004 to 0.9 €-cents in January 2007. The ERG has recognised in its Common Position on symmetry that termination rates should normally be symmetric and that asymmetry requires an adequate justification.

⁵ See the ERG Common Position on symmetry.

with Recital 20 of the Access Directive⁶, the appropriate method in markets where competition is inefficient. This will provide greater legal certainty and the right incentives for potential investors. It will also reduce the regulatory burden on existing operators that are currently active on a pan-European basis. The objective of coherent regulation in termination markets is clear and recognised by the NRAs.

This common approach builds on the decisional practice of the Commission to-date and is set out in the Recommendation. The objective of the Recommendation is to define and set out clear common principles, in accordance with the current regulatory framework, on:

- (a) the regulation of cost-oriented fixed and mobile termination rates in the EU, including common principles on the concepts of an efficient operator and symmetric regulation; and
- (b) the identification and calculation of efficient costs consistent with those incurred in a competitive market.

The Recommendation also considers how the termination rates might be regulated in a changing technological environment, e.g. in the presence of Next Generation Networks (NGNs).

The Recommendation furthermore considers approaches other than cost-based regulation of termination rates. These alternative approaches may help alleviate the competitive and regulatory issues inherent in the Calling Party Pays (CPP) convention.

The remainder of this document is structured as follows:

- Chapter 2: Rationale for regulating fixed and mobile call termination markets
- Chapter 3: Commission decisional practice/ERG experience
- Chapter 4: Common principles for regulating termination markets
- Chapter 5: The application of cost-based remedies
- Chapter 6: Forward-looking considerations
- Chapter 7: Implementation of the Recommendation.

⁶ Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, OJ L 108, 24.4.2002, p. 7.

2. RATIONALE FOR REGULATING FIXED AND MOBILE CALL TERMINATION MARKETS⁷

2.1. General competition issues in fixed and mobile termination markets

Call termination can only be supplied by the network provider to which the called party is connected. There are currently no demand- or supply-side substitutes for call termination on an individual network. Therefore, each network constitutes a separate relevant market and each network operator has a monopolistic position on the market for terminating calls on its own network.

Moreover, under the prevailing CPP principle in the EU, the calling party pays entirely for the call, and the wholesale termination rate paid by the originating operator is normally passed on to its end customer. As the called party is not billed for incoming calls, it is generally indifferent to the termination charge set by its network provider (i.e. the terminating operator) and has little or no incentive to change its own network provider in the event that those charges are raised⁸.

Consequently, in the absence of other factors such as countervailing buyer power, the criteria necessary to merit *ex-ante* regulation are normally met, and the terminating operator is designated as having significant market power (SMP).

The main potential competition concern, common to both fixed and mobile termination markets, is that of *excessive pricing*, implying that operators may extract excessive profits at the wholesale level. Moreover, fixed and mobile terminating operators are vertically integrated into retail calls markets and compete with their wholesale customers on those markets. Consequently, terminating operators have incentives to raise rivals' costs by setting termination prices at a level that impedes their ability to compete in downstream retail markets.

Termination has been analysed as a situation of “two-way” interconnection whereby two wholesale prices have to be negotiated and each operator could potentially use the price charged for termination on its own network as leverage in the relevant negotiations. This may lead to efficient rates being negotiated, particularly among symmetrically sized networks, which is more likely in mobile markets. This type of interaction may, however, still facilitate anti-competitive behaviour in the form of excessive pricing. High termination charges may be used to foreclose a new entrant network, where a large proportion of originated calls are off-net. High termination rates may also facilitate collusive behaviour between two or more terminating operators.

In the past, negotiations between fixed and mobile operators typically evolved differently because mobile operators could raise the initially unregulated mobile termination rates without experiencing a reciprocal increase in the often tightly regulated fixed termination rate (FTR). This raised allocative-efficiency concerns

⁷ This assessment of competition problems in call termination markets is largely based on the prevailing interconnection arrangements in the fixed (PSTN) and mobile telephone networks.

⁸ A different rationale applies to numbers used by Service Providers (SP). A called SP is sensitive to the level of termination charges — which directly affect its revenues — and may therefore switch between providers of termination services.

where there is an implicit cross-subsidy from fixed network operators and their customers to mobile operators and mobile customers.

Furthermore, with the evolution of fixed–mobile hybrid services and a move towards convergence, a different regulatory treatment of fixed and mobile termination rates raises a possible inconsistency issue. The regulatory model underlying the FTR regulation assumes that operators will recover the cost of the local loop via retail subscription charges, and that these costs are not included in the FTR paid by other operators, including mobile operators. This is not the case in mobile networks where the access network costs are largely recovered via the termination rate. This needs to be considered in order to ensure that competitive distortions do not arise and that allocative-efficiency concerns as described above are addressed.

2.2. Rationale for cost-based pricing

In the light of the ability and incentives of terminating operators to raise prices substantially above cost, cost orientation is the most appropriate intervention to address this concern over the medium term. Cost orientation addresses both productive- and allocative-efficiency concerns. From a productive-efficiency perspective, low termination rates facilitate low retail call charges and higher consumption. It is also important that the relevant price is based on the costs of an *efficient* operator. If the regulation of termination charges was based on the *actual* costs of the operator, this would not provide the right incentives for operators to innovate and increase efficiency, as their inefficiency would be covered by their competitors. This will also give rise to allocative-efficiency concerns as customers of other operators would ultimately bear the costs of the inefficient operators.

Allocative efficiency suggests that one group of customers should not subsidise another group of customers. Apart from the fixed-to-mobile cross-subsidisation outlined above, this is also relevant within markets (e.g. in mobile markets). Late entrants argue that due to large traffic imbalances and on-net/off-net price differentiation they cannot compete effectively at the retail level. A large proportion of calls originated on late entrant networks is terminated on other networks, i.e. off-net. If new entrants pay a regulated termination charge in excess of actual costs they effectively give a transfer to the large network. As a result, their ability to offer retail rates comparable to the retail rates of an established operator, which terminates a majority of its calls on-net, is impeded.

3. COMMISSION DECISIONAL PRACTICE/EUROPEAN REGULATORS GROUP (ERG) EXPERIENCE

3.1. Key insights from the Article 7 procedure to-date

Any Recommendation regarding greater harmonisation of regulation in the EU must be guided by regulatory experience as well as by Commission decisional practice. In line with the Commission Recommendation on relevant markets, all NRAs have notified the markets for fixed and mobile call termination and imposed *ex ante* obligations on all SMP operators. Regulatory practice has demonstrated, however, that NRAs do not employ a consistent set of remedies in these markets. Differences exist in regulating different operators within a Member State, and across Member States. This has led the Commission to comment *inter alia* on three principal sources

of inconsistencies: the type of price control, the cost model used, as well as the issue of asymmetric termination rates.

3.1.1. *Type of price control*

One NRA decided not to impose price regulation on alternative operators, citing their higher cost of call termination, their significantly smaller scope of operation than that of the incumbent operator, the decreasing termination rates of alternative operators, absent regulation and their limited asymmetry in comparison with the incumbent⁹. In this instance, the Commission invited the NRA to impose effective price regulation also on the alternative operators if the downward trend of unregulated fixed termination rates did not continue, or if the asymmetry with the incumbent's rates increased. Similarly, when an NRA decided not to impose obligations of cost orientation, cost accounting and accounting separation¹⁰, the Commission stated that some form of cost control, such as benchmarking against a larger operator which is under a cost-orientation obligation, should also be imposed on smaller operators.

Where an NRA decided that the imposition of cost-orientation and cost-accounting obligations may be disproportionate¹¹, the Commission reiterated the need for a cost control to be imposed on smaller operators, e.g. by benchmarking against a larger operator whose termination rates are cost-oriented. The Commission has also noted that a glide path towards an efficient rate should be established without delay as any grace period could remove the incentive to become cost-effective as quickly as possible¹². The Commission also encourages an NRA to complement the imposed cost-orientation remedies by an appropriate *ex ante* price control obligation supported by an appropriate cost-accounting methodology¹³.

3.1.2. *Cost models used*

In its responses under the Article 7 procedure, the Commission has noted the importance of regulating termination rates based on the costs of an efficient operator. The Commission has also encouraged NRAs to develop cost models which take into account the necessity for alternative operators to become efficient over time¹⁴. At the same time, the Commission has acknowledged that these models could reflect objective cost differences which are outside the control of the operators concerned¹⁵.

In several cases the Commission indicated the necessity of also imposing an obligation of accounting separation, which would allow internal transfers to be visible. The Commission found that imposition of accounting separation as a separate measure would facilitate effective price control, increase transparency and decrease the risk of cross-subsidisation¹⁶.

⁹ Cases PL/2006/0502, PL/2007/0633, PL/2007/0641.

¹⁰ Case FI/2003/0029.

¹¹ Case FR/2005/0228.

¹² Case IE/2008/0746.

¹³ Case FI/2006/0403.

¹⁴ Cases IT/2006/0384, PL/2006/0502, EE/2007/0598.

¹⁵ Cases IT/2006/0384, EE/2007/0598, LV/2006/0464.

¹⁶ Cases PL/2006/0379, DE/2005/0234 and DE/2006/0421.

As regards the selection of the appropriate type of cost model, the Commission has encouraged an NRA to impose a cost-calculation obligation and to assess whether a forward-looking long-run incremental cost model (LRIC) would not be the most appropriate model for calculating termination rates, notably in terms of tariffs, and potential excessive costs and inefficiencies of the mobile operators¹⁷. In addition, the Commission indicated that it is important that LRIC models use current costs and not historical costs which risk over-estimating the appropriate costs¹⁸.

In terms of costs included in the relevant cost model, the Commission has noted that, as wholesale call termination services are traffic-related services, relevant costs considered for wholesale call termination charging purposes are typically those costs which vary in response to increased levels of wholesale call termination traffic, i.e. the additional costs involved in providing the service in question¹⁹. The Commission has further noted that there are costs of spectrum usage which are not traffic-related and, as such, should not be calculated as part of the wholesale call termination service²⁰. Where spectrum is included in the cost model, the value of 3G licences should be calculated at current value on a forward-looking basis and not on the basis of spectrum values which approximate past levels. In that respect, termination rates should be set at the cost which would be faced by an efficient operator providing the relevant service. The Commission stated that this consideration was particularly relevant for spectrum fees which had been written off by operators since the relevant frequencies had been auctioned and for which there may be an overstatement of the opportunity cost of 3G spectrum. Therefore, with a view to allowing end-users to obtain the benefits of regulation, the Commission invited the NRA concerned to reconsider the valuation of 3G licences²¹.

3.1.3. *Symmetry of remedies*

In several cases, the Commission has stated that in circumstances where a NRA intends to impose different remedies on different operators within similarly defined markets, such differential treatment should be adequately reasoned²².

More specifically, the Commission considered that termination rates should normally be symmetric and that asymmetry requires an adequate justification. The Commission recognised that in certain exceptional cases asymmetry might be justified by objective cost differences outside the control of the operators concerned. Such possible justifications could be objective network cost differences, for instance owing to cost differences between the operation of a GSM900 network and a DCS1800 network²³, or substantial differences in the date of market entry²⁴. However, the Commission has also emphasised that the fact that an operator entered

¹⁷ Case PL/2006/0379.

¹⁸ Case UK/2006/0498.

¹⁹ Case EL/2008/0786.

²⁰ Case IT/2008/0802.

²¹ Case UK/2006/0498.

²² Cases FI/2003/0029, FI/2003/0031, HU/2005/0152, DK/2005/0207, FR/2005/0228, IT/2006/0384, PL/2006/0502, EE/2007/0598.

²³ However, in cases BE/2006/0433 and LV/2006/0464 the Commission stated that it expects the differences related to technology to be small.

²⁴ Cases DE/2006/0421, BE/2006/0433, FR/2006/0461, LV/2006/0464, LV/2007/0574, FR/2007/0596, ES/2007/0654, IT/2007/0659.

the market later and that it therefore has a smaller market share can only justify higher termination rates for a limited transitory period. The persistence of a higher termination rate would not be justified after a period long enough for the operator to adapt to market conditions and become efficient over time, and could even discourage smaller operators from seeking to expand their market share²⁵.

The Commission has also commented upon traffic imbalances in the context of mobile termination markets by stating that such traffic imbalances may in fact be caused by the current asymmetric level of mobile termination rates, as well as by an on-net/off-net retail price differentiation which is within the control of the operators. The Commission also stressed the importance of reducing termination rates to the level of costs of an efficient operator, which would take into account objective cost differences²⁶.

Finally, the Commission, indicating the EU-wide importance of regulating mobile termination rates effectively and in a consistent manner, has in multiple cases encouraged the NRAs to work in close cooperation with the European Regulators Group in order to arrive at a coherent EU approach, as well as to revisit the NRAs' analysis in the light of a common approach as soon as this has been established. In this respect, relevant aspects of the work of the ERG on a common position on the regulation of both fixed and mobile call termination — as reported to-date — are also presented here.

3.2. Some practical experience to-date as reported by the ERG

The ERG Common Position on symmetry of fixed call termination rates and symmetry of mobile call termination rates adopted on 28 February 2008 (ERG Common Position on symmetry) helps to illustrate some inconsistencies observed in the NRAs' implementation of remedies in fixed and mobile termination markets to date.

A number of inconsistencies in the regulation of mobile call termination rates have been identified. According to ERG data, 21 out of 28 countries that provided information in response to an ERG questionnaire²⁷ indicated that they imposed a cost orientation obligation on at least the first mobile operator having entered the market. For later entrants, the price control obligation could sometimes take the form of a “non-excessive” or “fair and reasonable” price rule. A wholesale price cap was imposed in some countries, although not necessarily on all mobile operators.

In addition, significant variety was noted in respect of the cost models already in place. According to the ERG Common Position on symmetry:

- top-down accounting data was used by eleven NRAs as the main tool and by two NRAs as a complementary tool;

²⁵ Cases DE/2006/0421, AT/2006/0544, LV/2007/0574, FR/2007/0596, EE/2007/0598, BE/2006/0433, FR/2006/0461, FR/2007/0669.

²⁶ Case FR/2007/0669.

²⁷ The ERG questionnaire was also sent to non-EU Member States.

- a bottom–up model was used by two NRAs as the main tool while one NRA was developing it;
- a hybrid model (bottom–up model calibrated with data provided by Mobile Network Operators (MNOs)) was used by seven NRAs as the main tool and by one NRA as a complementary tool, while three NRAs were developing it; and
- international benchmarking was used by eight NRAs as the main tool and by five NRAs as a complementary tool²⁸.

Furthermore, even where NRAs chose the same costing tool, the ERG noted differing practices in implementing those models. For example, in relation to top–down models, the ERG observed large disparities in the way top–down accounting data are first produced and then how they are checked/verified. With regard to bottom–up modelling, the ERG also noted a large disparity with regard to the way depreciation is implemented in the model.

Finally, with regard to the definition of an “efficient” operator (whose charges are used as a reference target for the model, especially those models whose remit spans a number of years), the ERG acknowledged a large variety of definitions chosen by the NRAs (including the lowest cost of all the MNOs, the highest costs of the MNOs, an average or a weighted average of the costs of all the MNOs, the cost reference of an efficient operator, the actual costs of each operator as well as a benchmark).

As regards fixed call termination, ERG noted that a different, more stringent set of remedies is usually imposed on the incumbent operators as compared with the remedies imposed on alternative operators.

The NRAs have imposed the full scope of remedies set out in the Access Directive on the fixed incumbent operators²⁹. However, differences between Member States in implementing cost orientation are observable³⁰: although in most cases the termination rates are regulated on the basis of a LRIC model, a Fully Allocated Cost (FAC) model or other means of regulation are also applied. Moreover, Current Cost Accounting (CCA) is most commonly, but not exclusively, used for calculating FTRs. As a result, the different application of the same regulatory tool produces diverse results.

The diversity of methods is also apparent in the regulation of termination rates for fixed alternative operators. One of the following regulatory approaches is usually applied:

- requiring reasonable prices or forbidding excessive prices;
- adding a mark-up to the incumbent’s fixed termination rates;

²⁸ Two NRAs, Hungary and Poland, have two main tools.

²⁹ However, the following exceptions were noted by the ERG: one NRA has not imposed an obligation of transparency, but transparency followed, however, from the obligation to publish a reference offer; two NRAs have not imposed an obligation of accounting separation, but in one case it is stipulated by national law in the event an *ex ante* price control obligation is imposed.

³⁰ See, for example, ERG Report — Regulatory Accounting in Practice, 2007 (ERG (07)22).

- benchmarking the termination rates of alternative operators against the charges of the incumbent operator (higher rates may be approved on the basis of cost calculation);
- imposing symmetry gradually, after a “glide path” — i.e. the difference (asymmetry) between the termination rates of the incumbent and of an alternative operator is progressively decreased, so that both become equal (symmetric) at a given point in time;
- imposing delayed reciprocity where alternative operators’ termination rates are set equal to the incumbent’s termination rates but lagged by a specified number of years.

Theoretically, symmetry may also be achieved in the latter case if the incumbent’s termination rates do not change over several years.

Finally, in some cases no *ex ante* price control was imposed on alternative operators³¹.

In conclusion, as a consequence of the diverse approaches taken on regulating both mobile and fixed termination rates, these rates differ more between Member States and between operators than may be justified by different national circumstances or by exogenous cost factors.

4. COMMON PRINCIPLES FOR REGULATING TERMINATION MARKETS

4.1. Common principles in relation to cost determination

Article 8(2) of the Framework Directive requires NRAs to promote competition by *inter alia* ensuring that all users derive maximum benefit in terms of choice, price and quality, and that there is no distortion or restriction of competition. Recital 20 of the Access Directive states further that the method of cost recovery should be appropriate to the circumstances taking account of the need to promote efficiency and sustainable competition and maximise consumer benefits.

In relation to these obligations and taking account of the particular characteristics of call termination markets (as further outlined below), the Commission has previously emphasised that termination rates should be brought down to the costs of an efficient operator as soon as possible. As outlined in section 3.1 above, the Commission has also encouraged NRAs to develop cost models which take into account the necessity for alternative operators to become efficient over time and which take into account the costs of an efficient operator. In addition, the Commission has encouraged NRAs to assess whether a forward-looking LRIC model would not be the most appropriate model for calculating termination rates, notably in terms of potentially excessive tariffs and inefficiencies of operators.

A key regulatory decision relates to the appropriate cost base for calculating an efficient operator’s costs, and the question arises as to which cost base is more in line

³¹ For example Poland, Denmark.

with the above-stated regulatory objectives. Today regulators may use either the costs actually incurred by the regulated company (historic costs) or the costs that would be incurred if a notional network would be built today (current costs). While both approaches can, in principle, be used to satisfy the efficiency objective, the current-costs approach is more compatible with the competitive standard of efficiency, since in a competitive market prices would be set on the basis of the prevailing technology. In a competitive environment, operators would compete on the basis of current costs and would not be compensated for costs incurred through inefficiency; neither should high-cost operators be allowed through regulation to pass on their inefficiencies to final consumers. Operators that are compensated for actual costs incurred have few incentives to increase efficiency. In these circumstances, the operator that was able to terminate calls more cheaply would not be the operator to benefit from the efficiency gains. On the contrary, it would be the less efficient (competing) operator that would pay the lower termination charge and thereby gain an undue competitive advantage.

Final consumers also stand to gain from the use of current costs. Termination charges are expected to be lower using a current-cost base due to the impact of technological improvements in relation to the core network, where most of the termination costs are incurred. This gain in consumer surplus is unlikely to be outweighed by the fact that assets already depreciated in the past may under a current-cost methodology be included again. These costs primarily concern the access network which is less relevant for the calculation of termination charges.

The choice of the appropriate cost base is also related to the choice of cost model, i.e. whether a top-down (TD), bottom-up (BU) or hybrid model is used. In a TD model the starting source of information is the cost actually incurred by the operator. Consequently TD models are said to avoid disincentives to invest, since incurred costs are usually allowed to be recovered, even if this does not necessarily promote efficiency.

BU models use demand data as a starting point and determine an efficient network capable of serving that demand by using economic, engineering and accounting principles. BU models give more flexibility regarding network efficiency considerations and reduce the dependence on the regulated operator for data. A BU model is synonymous with the theoretical concept of developing the network of an efficient operator because it reflects the equipment quantity needed rather than actually provided and the model ignores legacy costs. A BU model does not ensure that all actually incurred costs are eventually recovered from the regulated service.

Also, BU models may understate the costs where technologies are rapidly changing and operators cannot instantaneously change their technologies.

Although BU models are generally developed by NRAs, operators can contribute to the model inputs and assumptions. This will increase the transparency and objectivity of BU models, although it carries the risk that ‘negotiated’ figures, as opposed to more accurate figures, will be used in the model.

Given the fact that a bottom-up model is based largely on derived data, e.g. network costs are computed using information from equipment vendors, regulators may wish to reconcile the results of a BU model with the results of a TD model in order to

produce as robust results as possible and to avoid large discrepancies in operating cost, capital cost and cost allocation between a hypothetical and a real operator. The purpose of the reconciliation is to show and to quantify the sources of differences between both models and to make appropriate adjustments accordingly, thus assisting in the verification of the BU model. This may be appropriate, for example, where there is an information asymmetry or a risk of certain cost categories being erroneously omitted. However, any modification of the BU model must take into account the necessity of showing the costs of an efficient operator; it should not be done merely to bring the results of both models closer.

Concerning cost standards, the Commission has stated³² that the long-run incremental cost (LRIC)³³ methodology is consistent with cost orientation. LRIC is normally based on forward-looking cost (FL-LRIC). “Forward-looking” is a term which is used interchangeably with current cost.

Standard economic theory determines that prices be set equal to marginal costs. This sends appropriate cost signals and ensures that consumers are informed about the costs of producing the product in question. However, it is often argued that should this pricing principle be applied in the telecommunications sector, a sector which faces substantial fixed costs (i.e. costs that do not vary with the volume of output), operators would not be in a position to fully recover all of their costs.

LRIC addresses the recovery of fixed costs in telecommunications markets as it is conceptually between marginal cost and stand-alone cost. This is achieved by considering the long run (as opposed to the short run for marginal costing) and rendering all assets variable, i.e. assuming that they can vary in response to demand. Additionally, instead of taking into account an additional unit of output, LRIC considers an additional increment. The increment can be defined narrowly, as a small change in the volume of a particular service, or broadly, as the addition of a whole group of services, with many possible increments of different size. By considering the long run, LRIC facilitates efficient recovery of costs relevant to the defined increment which in the short run are regarded as fixed.

Depending on the size of the increment, only costs associated with the services included in the increment would be allocated to that increment. If, for example, there was only one increment including all services provided by an operator, then LRIC would cover all costs and, in fact, be equivalent to Fully Allocated Cost (FAC). If smaller increments are chosen (such as a particular service), a LRIC model facilitates the recovery of costs proportionate to the size of the increment in question and requires a decision on an appropriate cost-allocation mechanism for joint costs (costs that can be directly attributed to more than one specific service) and common costs (costs which are not directly attributable to specific services) with regulators often applying a mark-up to account for these costs.

In this respect, it is important to note that LRIC facilitates efficient cost recovery and also provides scope for discretion as to how certain regulatory objectives are most

³² Recommendation of 8 January 1998 on interconnection in a liberalised telecommunications market (Part 1 — Interconnection pricing), (98/195/EC), OJ L 73, 12.3.1998, p. 42.

³³ The forward-looking long-run incremental cost provides an analytical framework which can be used to obtain an estimate of the cost that would be found in a competitive market.

effectively met. Under the current regulatory framework, the primary mechanism for ensuring that users derive maximum benefit in terms of choice, price and quality is competition. Furthermore, Recital 20 of the Access Directive underlines the importance of taking account of particular circumstances when determining the appropriate method of cost recovery. In view of the particular characteristics of call termination markets and their competitive influence, the Commission has recognised in its responses to several regulatory proposals under Article 7 of the Framework Directive that setting termination rates based on the costs of an efficient operator would promote efficiency and sustainable competition and maximise consumer benefits.

The main advantage of an incremental-cost approach which allocates only efficiently incurred costs is that it promotes efficient production and consumption decisions. It sends correct signals to originating operators as to the costs generated by their activities and they can therefore adjust their behaviour in the most efficient manner. For example, allowing network costs to be recovered from the wholesale termination rate which do not result directly from the provision of that service can lead to distorted signals and higher prices for the originating operators buying termination services and, consequently, for their consumers. In effect, this results in them cross-subsidising the investment costs of other operators' networks and may also result in a sub-optimal number of calls being made.

It is also important to note that termination markets are a situation of two-way access³⁴ where both interconnecting operators are presumed to benefit from the arrangement but, as these operators are also in competition with each other for subscribers, termination rates can have important strategic and competitive implications.

Termination rates which are set above efficient cost can create substantial transfers of wholesale termination revenues from:

- *Fixed network operators to mobile network operators, creating an effective cross-subsidy between fixed and mobile markets and consumers.*

While mobile termination rates are on a downward trend as a result of regulatory intervention in the EU, regulators have tended to implement glide paths with a more gradual rate of reduction and in 2007 mobile termination rates were still on average almost nine times the equivalent fixed rate³⁵. This results in substantial transfers and an indirect subsidy from fixed operators and their customers to mobile networks and services. This may in turn be contributing to inefficiently low usage of fixed networks in some Member States and could prove to be a barrier to important

³⁴ This is distinct from a situation of one-way access such as in local loop unbundling markets.

³⁵ According to the European Commission's 13th Report on the Implementation of the Telecommunications Regulatory Package (13th Progress Report), in 2007 the average mobile termination rate dropped for the first time below 10 cents, to 9.67 cents - a decrease of 12% compared to October 2006. However, the average mobile termination rate was still 8.7 times higher than the average fixed termination rate. According to the Commission's recently published 14th Progress Report, termination charges have continued to decrease and at October 2008 the average EU mobile termination charge was (at 8.55 cents) 11.58% lower than one year before. The report notes further that despite the continuing decline, termination charges remain on average more than 10 times higher than the fixed interconnection charges (single transit).

innovations and investments in the fixed sector such as fibre roll-out and delivery of next generation networks and bundled/convergent services.

- *Net senders to net receivers of voice traffic, which can reinforce network effects and increase barriers to smaller operators expanding within markets.*

Above-cost termination rates can give rise to competitive distortions between operators with asymmetric market shares and traffic flows. Termination rates that are set above an efficient level of cost result in higher off-net wholesale and retail prices. As smaller networks typically have a large proportion of off-net calls, this leads to significant payments to their larger competitors and hampers their ability to compete with on-net/off-net retail offers of larger incumbents. This can reinforce the network effects of larger networks and increase barriers to smaller operators entering and expanding within markets.

The further termination rates move away from incremental cost, the greater the competitive distortions become in each of the above cases.

In an environment of increasing convergence between fixed and mobile networks and with a view to promoting sustainable competition and investment within and across all telecoms markets, it is important that regulation is, as far as is practicable, technology neutral and ensures that there is no distortion or restriction of competition and that efficient investment and innovation is encouraged. These principles are enshrined in Article 8 of the Framework Directive and include the development of the internal market through consistent regulatory practice and consistent application of the regulatory framework. The above considerations imply that in similar circumstances and where similar market failures have been identified, similar costing principles should be applied.

Furthermore, it may be claimed that high termination rates charged on a per-minute price basis create pressure on operators to adopt per-minute retail tariffs, thereby limiting the possible emergence of more innovative offers such as those based on flat-rate tariff structures which could in turn promote greater retail consumption.

Basing the regulated wholesale termination charge on the incremental cost of providing this service alleviates the above-mentioned distortions and provides a more consistent and balanced regulatory framework. This is facilitated, for example, by reducing the magnitude of cross-subsidies between groups of customers (e.g. fixed and mobile) and by reducing the impact of any financial disadvantages arising from traffic imbalances between smaller and larger operators (e.g. in mobile markets). Thus, termination rates which approximate the long-run incremental cost of providing the service can be expected to lead to enhanced competition and lower retail tariffs across the range of consumers, while still facilitating efficient cost recovery and appropriate investment incentives.

When deciding on the correct level of the regulated wholesale termination rate, it is essential to ensure that the methodology adopted promotes efficient production and consumption decisions and minimises any artificial transfers and distortions between competitors and consumers. Therefore, regulators should construct models which set wholesale termination charges as close to incremental cost as possible. The closer the

termination price of all operators is to the incremental cost, the more likely it is that this will lead to the most efficient and least distortionary use of call termination services, and minimise the risk of problems such as cross-subsidisation between operators and customers and inefficient pricing and investment behaviour. Therefore, it is justified to apply a pure LRIC approach where the relevant increment is the wholesale call termination service and which includes only those costs that would not be incurred if that service were no longer produced (i.e. avoidable costs). A pure LRIC approach, while recognising the essential objective of short-run marginal cost pricing, also recognises that cost structures in network industries tend to be characterised by substantial fixed costs and (by assuming that all costs become variable over the long run) provides for the recovery of service-specific fixed costs and variable costs which are incremental to providing the service over the longer term.

A pure LRIC approach implies the exclusion of costs which would not be avoidable if the wholesale termination service were discontinued. It is frequently argued, however, that as a significant proportion of joint and common costs in telecommunications markets would not be avoidable in the absence of a wholesale termination service, provision should be made for their inclusion in the LRIC model either via a mark-up or by defining the increment more broadly. It is also argued that, in the case of multi-product firms, allocating joint and common costs by way of Ramsey pricing would yield the most socially optimal result. This implies a form of pricing whereby mark-ups are allocated according to the elasticities of the individual services. However, there are significant informational requirements associated with accurately identifying such elasticities. In addition, even if Ramsey pricing principles were applied to termination rates, there is a significant risk of corresponding (unregulated) retail prices not being set at Ramsey levels and overall welfare being reduced. Furthermore, as noted above, there are distributional and competitive problems (e.g. between fixed and mobile operators and smaller- and larger-scale operators respectively) associated with allowing mark-ups above incremental costs for call termination markets.

It should also be noted that the existing system of cost allocation used for cost orientation of wholesale termination rates in the EU, i.e. Calling Party Network Pays, assumes that the calling party is the only party causing costs to arise. However, it is important to recognise that both calling and called parties jointly cause a call to be made and jointly benefit from that call. If the receiver did not receive a benefit, they would not accept the call³⁶. In that respect, call termination differs from other markets where the creation of costs and attribution of benefits can be ascribed to one side only. The use of traditional cost-causation principles in setting cost-oriented prices suggests that the creator of the costs should bear those costs. Given the two-sided nature of call termination, not all related termination costs must necessarily be recovered from the wholesale charge levied on the originating operator. Even if wholesale termination rates were set at zero, terminating operators would still have the ability to recover their costs from non-regulated retail services. Rather it is a

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This is also known as a call externality which refers to the fact that it is not only the calling party but also the called party which obtains a benefit from receiving a call. The externality arises in this instance because under the calling party pays principle (CPP) such benefits accruing to the called party are not taken into account, but only the calling party is charged for the call.

question of how these financial transfers are distributed across operators in a way that best promotes economic efficiency to the benefit of consumers.

It has been further indicated in recent economic literature³⁷ that in the presence of call externalities mobile networks have strong incentives to implement on-net/off-net price differentials due to: (i) high mobile-to-mobile termination charges which exceed marginal costs; and (ii) their strategic incentives to reduce the number of calls that subscribers on rival networks receive, reducing the attractiveness of rival networks and hence their ability to compete. This theory suggests that mobile call termination charges above marginal costs can lead to permanent net payments by smaller networks and, since off-net prices are set above costs, also implies that smaller networks receive relatively fewer calls. According to some of this literature, termination charges which are above the marginal costs of termination result in strategically-induced network effects which may be detrimental to smaller networks.

However, for the purposes of this Recommendation, it should be noted that all of the incremental (avoidable) service-specific fixed and variable costs (as the fixed costs are assumed to become variable over the long run) of providing the wholesale termination service to third parties may be recovered via the regulated wholesale termination charge. Even if the Recommendation does not propose to set termination rates at the level of marginal cost or below (as suggested by some recent economic literature), applying a pure LRIC approach should in any case facilitate a more efficient distribution of these financial transfers between operators and thereby contribute to a level playing field between all fixed and mobile operators.

4.2. Common principles for symmetry/asymmetry of termination rates

As the relevant cost standard for setting termination rates should be BU LRIC which reflects the cost of an efficient operator, there should in principle be no asymmetries between the rate of the established operator(s) and the rates of later entrants to the market. This is broadly consistent with the ERG Common Position on symmetry which states that termination rates should normally be symmetric and that asymmetry requires adequate justification. As noted in section 3.1.3 above, the Commission has previously noted in its Article 7 decisions that termination rates should normally be symmetric and that asymmetry requires an adequate justification based on objective cost differences outside the control of the operators concerned. A key argument frequently used in support of the authorisation of temporary asymmetric rates in favour of later entrants, and in the absence of any verifiable objective cost differences, is that it forms part of an overall *entry assistance policy* which is aimed at promoting new entry and longer-term competition in fixed and mobile markets. The rationale is that allowing higher post-entry profits will encourage entry and investment and lead to more intense competition in the long run. However, it is generally accepted that such a policy may also attract inefficient entry. It may also be expected that consumers will end up paying higher retail prices than would otherwise be the case in a situation of cost-based symmetric termination rates. In addition, providing a mark-up for new entrants while regulating incumbents at cost effectively creates a cross-subsidy and can simultaneously reduce the incumbents' investment incentives.

³⁷ Armstrong and Wright (2007), Hoernig (2007), Calzada and Valletti (2007), Harbord and Pagnozzi (2008).

In the light of the above, it is questionable whether asymmetric termination rates should be used as a form of entry assistance. On the contrary, it may be argued that symmetric price control based on an efficient-cost benchmark, rather than on the costs actually incurred by an operator, gives efficient investment incentives to firms. These considerations apply to both fixed and mobile markets.

Arguments relating to *economies of scale* and the higher unit costs initially incurred by new entrants have in particular been raised as possible justification for transitory asymmetry in termination rates. The Commission has previously noted in that respect that objective cost differences due to substantial differences in the date of market entry could represent a possible justification for asymmetry. At the same time, it should be borne in mind that rewarding an operator for its smaller size can give inappropriate investment signals and risks promoting inefficient entry. Such a policy may, for example, act as a disincentive to smaller operators to innovate and expand. In that respect, the Commission has previously stated that the fact an operator entered the market later and that it therefore has a smaller market share can only justify higher termination rates for a limited transitory period. The persistence of a higher termination rate would not be justified after a period long enough for an operator to adapt to market conditions and become efficient and could even discourage smaller operators from seeking to expand their market share.

As regards the extent to which new entrants might be expected to have higher unit costs than incumbents, it has been argued that this consideration is more relevant for mobile than for fixed operators. Fixed operators have the opportunity to build their networks in a particular geographic area and focus on higher-density routes. Furthermore, they can lease relevant network services from the incumbent to reduce the fixed costs of network build and thereby reduce the impact of economies of scale. It has been argued, however, that scale economies play a bigger role in mobile networks: due to coverage requirements new entrants initially incur higher per-unit costs arising from their smaller customer base, although there is some debate regarding the magnitude of the costs involved.

Following the above considerations, it is important, after having identified impediments on the retail market to market entry and expansion, to limit any asymmetries allowing new mobile entrants to recoup their higher incremental costs compared to those of a modelled efficient operator for a transitional period before a minimum efficient scale³⁸ can be expected to be reached. Drawing upon the ERG Common Position on symmetry, it is reasonable to envisage a timeframe of four years (from the date of entry of the operator concerned) for phasing out asymmetries in mobile markets, based on the estimation that in the mobile market it can be expected to take three to four years to reach a market share of between 15 and 20%³⁹.

A further (albeit related) argument cited in support of temporary asymmetry is the existence of *traffic imbalances* between larger incumbent operators and smaller new entrants. Where a new market entrant initially has lower traffic volumes than the more established incumbents, this can result in net payments to the incumbents which are typically net receivers of traffic. It is further argued that the financial disadvantages which new entrants face as a result of their lower traffic volumes can

³⁸ See section 5.2.3 for the determination of the minimum efficient scale in mobile markets.

³⁹ ERG (07) 83 final 080312, p. 94.

be exacerbated by *differential on-net/off-net pricing* policies pursued by the incumbent operators.

It is difficult to see how arguments regarding financial imbalances resulting from differences in traffic volumes and differential on-net/off-net pricing would justify setting asymmetric termination rates. This is because asymmetric wholesale pricing is likely to reinforce the asymmetric pricing observed at retail level. That is, the off-net retail prices of the incumbents will likely rise to compensate for the increased cost of off-net wholesale termination to the new entrants. As long as traffic imbalances persist, asymmetric pricing will likely only contribute to perpetuating any resulting financial imbalances.

Moreover, it has been argued that on mobile markets there may be exogenous cost factors associated with *uneven spectrum assignments* which result in per-unit cost differences between mobile operators. In that regard, the Commission has previously recognised that objective cost differences may relate to uneven spectrum assignments between operators, even in situations where the minimum efficient scale can be expected to have been reached. Exogenous cost differences may arise where spectrum assignments have not taken place using market-based mechanisms but on the basis of a sequential licensing process where, for example, later entrants mainly receive 1800 MHz frequencies, thus facing higher unit costs in certain areas than operators with a 900 MHz allocation. Due to the better propagation characteristics of the 900 MHz spectrum, it is argued, for example, that in urban areas fewer base stations are needed to ensure indoor coverage than is the case with the 1800 MHz spectrum.

The extent of this cost disadvantage depends on a number of factors, including the regulatory situation, the nature of the demand for coverage and the geography and topology of the country. It appears that this relative cost disadvantage decreases as the market shares of the later entrants grow, increasing their capacity needs. In addition, where the spectrum assignment takes place through a market-based mechanism such as an auction or where there is a secondary market in place, any frequency-induced cost differences become more endogenously determined and are likely to be significantly reduced or eliminated. Moreover, with further spectrum liberalisation taking place, it needs to be examined whether on a forward-looking basis additional spectrum is likely to be made available through market-based assignment processes which might erode any cost differences arising from existing assignments. For example, the digital dividend is leading to the release of spectrum that is being freed up as a result of the switchover from analogue to all-digital television. The spectrum that will be released by the digital switchover is in the prime Ultra High Frequency (UHF) band. Since these bands are located in the lower spectrum range they can cover large geographical areas with relatively few base stations, offering nationwide network rollout at lower costs when compared to services delivered at higher frequencies, offering greater capacity but at shorter range.

An important argument for symmetric termination rates at the level of efficient cost is that asymmetric pricing can foster inefficient behaviour and generate productive inefficiencies. Productive efficiency takes place when a good is produced at the lowest cost possible. Rewarding an operator with a price above an efficient or cost-based level can reduce its incentives to innovate and minimise costs. For example,

asymmetries based on differences in dates of market entry and scale may discourage innovation and cost efficiency on the part of the later entrant/smaller operator, and may give rise to inappropriate investment incentives and inefficient entry.

Consequently, consumers may end up paying higher prices than would otherwise be the case in a situation of cost-based symmetric termination rates. This is because the higher termination rates have to be recovered by the originating operators and will presumably be passed onto consumers in the form of higher retail prices. This effectively creates a cross-subsidy from lower-cost operators and their consumers to their less efficient rivals, thereby generating allocative-efficiency concerns. Meanwhile, the less efficient operator benefits from the lower termination rates of its rivals, thus enabling it to lower its retail prices and win customers. As the subsidised operators expand, the negative impact on retail prices and consumer welfare is even greater. Given that the stated purpose of the regulation of wholesale termination charges is to prevent excessive pricing and its negative impact on consumer welfare, it is arguably counter-intuitive to apply a remedy that also generates allocative and productive inefficiencies.

5. THE APPLICATION OF COST-BASED REMEDIES

Following the choice of the appropriate cost base, cost model and cost standard (i.e. a BU LRIC model based on current costs), this section deals with the implementation of the chosen model in practice. The first question deals with the choice of technology, from that follows the definition of the increment. Since both fixed and mobile termination rates are generally subject to regulation, and since fixed and mobile networks are to an increasing extent in competition with each other, attention must be paid to consistent treatment of both network types.

5.1. Fixed networks

5.1.1. Choice of technology

From a forward-looking perspective, a new operator would choose a packet-switched network with all services delivered over an IP core network. Given that regulating termination rates at the level of efficient costs aims at reflecting a situation which would prevail under competitive circumstances, this implies the selection of the most efficient technologies subject to the availability of such technologies in the timeframe considered by the model. In a competitive market, a new entrant would opt for the most efficient available technology, i.e. one based on NGN, for the purposes of building a core network. Hence, a BU model built today could assume that the *core* network is NGN-based, to the extent that the costs of such a network can be reliably identified. Specifically, this implies that all existing PSTN switches would be assumed to be replaced with NGN equivalents and that Synchronous Digital Hierarchy/Asynchronous Transfer Mode (SDH/ATM) transmission equipment becomes redundant. It also implies that voice traffic needs to be converted to/from IP packets at the edges of the network. Whilst connecting operators still interconnect via Time Division Multiplexing (TDM) technologies, there will be a need to include Media Gateways in the BU model in order to interconnect with operators using PSTN-based equipment.

Technology developments in the *access* network may focus around the shortening of the local loop by partial replacement with fibre to the kerb or street cabinet (using Very-High-Rate Digital Subscriber Line (VDSL) technology), the replacement of the copper local loop with Fibre-To-The-Building (FTTB), or the replacement of the copper local loop with Fixed Wireless Access (FWA) equipment.

In principle, the concept of forward-looking costs would value all assets at the cost of a modern equivalent asset (MEA), which is the lowest cost asset with the latest available and proven technology. While it can be argued that an operator constructing a brand-new, nationwide access network today would install fibre directly to the home, the level of investment necessary to replace the existing copper-based access network with fibre on a nationwide basis precludes it from being a MEA for the twisted copper pair. Furthermore, FWA technologies are not likely to form a long-term replacement for the twisted copper pair since they appear to be deployed only in specialist cases. The question of how the cost of deploying fibre to the street cabinet should be treated in the LRIC model will largely depend on the increment chosen and is addressed in the next section.

5.1.2. *Definition of the increment*

As stated in section 4.1., LRIC models include only those fixed and variable costs (as the fixed costs are assumed to become variable over the long run) which are caused by the provision of a defined increment. This increment can contain single or multiple services or network components. Incremental costs can also be considered as the costs that would be saved if those services were no longer produced. Costs that span more than one increment are either joint or common costs. The smaller the increment, the larger the proportion of costs which are joint or common and *vice versa*.

The relevant incremental cost (i.e. avoidable costs) of the wholesale call termination increment is the difference between the total long-run costs of an operator providing its full range of services and the total long-run costs of that operator not providing a wholesale call termination service to third parties.

In this context a distinction needs to be made between traffic- and non-traffic-related costs to ensure the appropriate attribution of those costs. Traffic-related costs are all those fixed and variable costs which rise with increased levels of traffic. The relevant costs for the calculation of the regulated wholesale termination charges are the traffic-related costs which are only attributable to wholesale voice call termination services. Other costs, i.e. those traffic-related costs attributed to other services (e.g. call origination, data services, IPTV, etc.) and non-traffic-related costs are not to be taken into account.

The default demarcation point between traffic- and non-traffic-related costs is typically where the first point of traffic concentration occurs. In a PSTN network this is normally deemed to be the upstream side of the line card in the (remote) concentrator. The broadband NGN equivalent is the line card in the Digital Subscriber Line Access Multiplexer/Multi-Service Access Node (DSLAM/MSAN). The deployment of fibre to the street cabinets and the installation of active devices (DSLAM or MSAN) at that network level might be seen as an extension of the traffic-sensitive part of the network. The logic behind this is that under current

technology the loop is customer-specific and not traffic-dependent. In a Next Generation Access (NGA) network the former loop between the cabinet and the exchange/Main Distribution Frame (MDF) becomes a shared medium and might not be treated as being subscriber-driven, but rather as being traffic-sensitive.

The demarcation point between traffic- and non-traffic-sensitive costs in an NGA context is subject to considerable uncertainty. Certain regulators have decided that traffic is *amalgamated* at the cabinet and not concentrated, and that the fibre capacity between the cabinet and MDF is dedicated to each subscriber for the purposes of voice traffic. The existing demarcation point (i.e. at the line card) also remains unchanged if operators dedicate sufficient capacity for voice traffic to ensure there is never congestion. However, if operators would opt to prioritise traffic rather than dedicate capacity, then in a fibre-to-the-building scenario the traffic-sensitive part of the network could move closer to the final consumer.

For the time being it can be assumed that an efficient forward-looking network will allocate dedicated capacity to the voice channel irrespective of the technology deployed. Hence, the existing demarcation remains unchanged, unless there are significant NGA developments inducing an observable general trend towards using shared capacity, which would be reflected in the regulated access regime.

To facilitate accurate identification of avoidable costs that should be attributed to the wholesale call termination service, it may be appropriate to allocate operators' costs in the first instance to business segments/services other than wholesale voice call termination, with only the residual cost being allocated to the wholesale call termination increment. Given that wholesale call termination is a traffic-related service, non-traffic-related costs should not be taken into account when calculating wholesale termination rates. Then, it may be appropriate to first identify among the traffic-related costs (discussed above) those that are related to other services, such as data traffic (e.g. broadband, leased lines, IPTV, etc.) and other relevant voice services (e.g. call origination), and to develop cost-volume relationships according to which costs can be allocated to those services. When the costs for all other services have been calculated and attributed, only then should the remaining costs be allocated to the voice call termination service. As a consequence, the incremental costs of call termination are only those costs that can be avoided if the call termination service were no longer provided (avoidable costs).

Following this approach, examples of costs which would be part of the termination service increment would include additional network capacity needed to transport additional wholesale termination traffic (e.g. additional network infrastructure to the extent that it is driven by the need to increase capacity for the purposes of carrying the additional wholesale traffic) as well as additional wholesale commercial costs directly related to the provision of the wholesale termination service to third parties.

5.1.3. *Efficient scale of operators*

It is particularly difficult to determine minimum efficient scale for fixed networks due to a number of factors. Firstly, in fixed networks operators have the ability to rent infrastructure and to purchase interconnection. Secondly, fixed operators have the opportunity to build their networks in a particular geographic area and focus on

higher-density routes. Consequently, fixed operators can potentially achieve low unit costs at low levels of output and thereby reduce the impact of economies of scale.

When deciding on the appropriate single efficient scale of the modelled operator, NRAs should take into account the need to promote efficient entry, while also recognising that under certain conditions smaller operators can produce at low unit costs by operating in smaller geographic areas. Furthermore, smaller operators which cannot match the largest operators' scale advantages over broader geographic areas can be assumed to purchase wholesale inputs rather than self-provide termination services.

5.2. Mobile networks

5.2.1. Choice of technology

Just as in fixed networks, a forward-looking perspective would imply that all services will be delivered over an IP core network. A BU model built today could assume that the core network is NGN-based, to the extent that the costs of such a network can be reliably identified. Similar issues arise in relation to the mobile access network as compared to the fixed access network. In the same way as fibre to the node or to the home is replacing copper, so too are 3G- or UMTS-based technologies gradually replacing 2G. Some very important differences remain. In mobile networks economic conditions driven by demand concentration and geographic characteristics influence the selection of a range of spectrum-based technologies to match those conditions. It can be expected that 2G and 3G networks are likely to co-exist for a number of years. Hence, the model should be based on both 2G and 3G employed in the access part of the network to reflect the actually anticipated situation facing operators, while the core part could be assumed to be NGN-based.

5.2.2. Definition of the increment

As in fixed networks, for the purposes of calculating the incremental costs of wholesale call termination in mobile networks, it is necessary to identify only those fixed and variable costs that would not be incurred if the wholesale termination services were no longer provided to third-party operators (i.e. the avoidable costs only). The avoidable costs of the wholesale call termination increment may be calculated by identifying the total long-run cost of an operator providing its full range of services and then identifying the long-run costs of this same operator in the absence of the wholesale call termination service being provided to third parties. This may then be subtracted from the total long-run costs of the business to derive the defined increment.

Furthermore, as for the fixed network, a broad distinction will need to be made between traffic- and non-traffic-related costs to ensure the appropriate attribution of those costs.

The costs of the handset and the SIM card are not traffic-related and should be excluded from any costing model for wholesale voice call termination services.

Although there is no equivalent to the local loop or the line card as in the fixed access model, there is a requirement to provide coverage to subscribers, and this will cause certain unavoidable costs to be incurred to meet that requirement. Those costs

should consequently be treated as non-traffic-sensitive costs and should not be attributed to the wholesale call termination increment as they would not be avoided if that service were discontinued. Coverage can be best described as the capability or option to make a single call from any point of the network at a point in time. Coverage costs would, for example, include site preparation costs, the base station cost and the first transceiver cost of coverage sites. Investments in mature mobile markets are largely driven by capacity increases. Capacity represents the additional network costs which are necessary to carry increasing levels of traffic (above the network coverage necessary to offer a retail service to subscribers). These capacity costs can be regarded as traffic-related and may fall within the wholesale call termination service increment to the extent that those capacity requirements are driven by the provision of a wholesale call termination service and would be avoidable if that service were discontinued. The incremental cost of wholesale voice call termination services should therefore exclude coverage costs, but should include additional capacity costs to the extent that they are caused by the provision of wholesale voice call termination services.

As for the fixed network, an appropriate way of accurately identifying only those residual costs which may be attributed to the wholesale call termination service may be to first allocate costs to services other than wholesale voice call termination, with only the residual being allocated to the wholesale call termination increment. Given that wholesale call termination is a traffic-related service, it may be appropriate to identify from the traffic-related cost category those other services (e.g. data, SMS, MMS, call origination, etc.) which also fall within that broader cost category, and to develop cost-volume relationships according to which costs can be allocated to those services. When the costs for all other services have been calculated and attributed, only then should the remaining costs be allocated to voice call termination services. As a consequence, the incremental costs of call termination are only those costs that can be avoided if the call termination service were no longer provided (avoidable costs).

The costs of spectrum usage (the authorisation to retain and use spectrum frequencies) incurred in providing retail services to network subscribers are initially driven by the number of subscribers, and thus are not traffic-driven and should not be calculated as part of the wholesale call termination service increment. The costs of acquiring additional spectrum to increase capacity (above the initial spectrum necessary to provide retail services to subscribers) for the purposes of carrying additional traffic resulting from the provision of a wholesale voice call termination service should be included on the basis of forward-looking opportunity costs, where possible.

Following the approach outlined above, examples of costs which would be included in the termination service increment would include additional network capacity needed to transport additional wholesale traffic deriving from the provision of the wholesale call termination service to third-party operators (e.g. additional network infrastructure to the extent that it is driven by the need to increase capacity for the purposes of carrying the additional wholesale traffic). Such network-related costs could include additional Mobile Switching Centres (MSCs) or backbone infrastructure directly required to carry the terminating traffic for third parties. Furthermore, where certain network elements are shared for the purposes of supplying origination and termination services, such as cell sites or Base Transceiver

Stations (BTS), these network elements will be included in the termination cost model to the extent that they are needed because of the additional capacity necessary to carry terminating traffic by third parties. In addition, the additional spectrum costs and wholesale commercial costs directly related to the provision of the wholesale termination service to third parties would also be taken into account. This implies that coverage costs, unavoidable business overhead costs and retail commercial costs which would all still be incurred in the absence of a wholesale termination service being provided are not included.

5.2.3. *Efficient scale of operators*

To determine the minimum efficient scale for the purposes of the cost model, and taking account of market share developments in a number of EU Member States, the recommended approach is to set that scale at 20% market share.

When setting the appropriate efficient scale, it is important to mimic a competitive outcome and provide appropriate incentives for efficiency. The Competition Commission in the UK in the context of its 2003 review of the UK market concluded that once a mobile network operator has captured 20%–25% of the market volume, there are only very limited remaining economies of scale⁴⁰. In a number of European markets, however, there is still an observable spread of market shares between early and late entrants⁴¹. The Recommendation thus takes account of these market share developments and considers that the model should lead to results which also allow a mobile operator with a market share lower than the average market share of an efficient operator (as represented by an average market share of $1/\text{Number of Mobile Network Operators}$ ⁴²) to be able to recover the long-run incremental costs of providing termination services. As indicated by the Competition Commission, a mobile operator with a lower than average market share has the opportunity to capture at least an average share of the market over time⁴³. It may similarly be expected that mobile operators, having entered the market, would strive to maximise efficiency and revenues and thus be in a position to achieve at least a minimum market share of 20%. In case an NRA can prove that the market conditions in the territory of that Member State would imply a higher minimum efficient scale, e.g. due to the maturity of the market operators may be expected to achieve the average market share, it could deviate from the recommended approach.

⁴⁰ UK Competition Commission, “Vodafone, O2, Orange and T-Mobile: Reports on references under section 13 of the Telecommunications Act 1984 on the charges made by Vodafone, O2, Orange and T-Mobile for terminating calls from fixed and mobile networks”, (Competition Commission Report), 2003.

⁴¹ The 13th Progress Report showed, for example, that, as of October 2007, the leading operators still had between 40 and 50% market share in 15 Member States, while in two Member States the leading operators had market shares in excess of 60%.

⁴² On the basis that no Member State has licensed more than five mobile network operators to date, this average market share would comprise at least 20% of the relevant national market. In the case of mobile virtual network operators, the opportunity to lease relevant network inputs from the mobile network operators may reduce the impact of economies of scale implying that low unit costs could potentially be achieved at low levels of output.

⁴³ Competition Commission Report (2003), p. 69. In its decision, the Competition Commission envisaged a time period of two to three years for an MNO with a lower than average market share to be in a position to capture at least an average share of the market.

As regards the basis for estimating this efficient scale (e.g. whether that is expressed in terms of volume of terminated minutes, total volume of traffic, numbers of subscribers, etc.) this may be determined in a national context. It may be useful to note some precedence in that regard. In its 2003 inquiry of the UK mobile market, the Competition Commission appears to have estimated the efficient scale based on the cost of a network that could support a 25% market share of total call traffic but which was actually only handling 20%. In its 2007 report for the Australian Competition and Consumer Commission, WIK appears to have estimated different scenarios for the efficient scale (at 25% and 31% respectively) based on the number of mobile users⁴⁴. Furthermore, the ERG's assessment, that in a mature mobile market it can be expected to take three to four years for a new entrant to reach a market share of between 15 and 20%, involves a market share reference relating to the number of subscribers⁴⁵.

5.2.4. *Externalities*

It is argued that in the presence of *network externalities*, the addition of a marginal subscriber to a mobile network may also be of value to other subscribers. For example, other fixed and mobile subscribers derive a benefit from being able to contact and be contacted by this additional subscriber. The externality arises because the benefit to other subscribers is not taken into account when the decision of whether or not to join a network is made. Thus a sub-optimal number of customers may choose to become network subscribers. Consequently, it is argued that it may be appropriate for wholesale termination charges to include an externality mark-up above cost which may then be used by the operators to subsidise the addition or maintenance of marginal subscribers on their networks with associated benefits for all consumers calling those networks. However, this argument relies on a number of assumptions.

The first is that customer penetration levels are not yet near saturation levels, as otherwise network externalities would be largely exhausted, or that, in the absence of a mark-up above cost, network operators would not act to attract or maintain marginal subscribers on their networks and are thus not in a position to internalise this externality. However, it should be noted that network operators have incentives to have as many subscribers on their networks as possible because subscribers benefit from being able to call other subscribers located on the same networks as themselves (i.e. network or club effects are generated). Furthermore, under the recommended approach the regulated termination rates would continue to cover the incremental costs of servicing these subscribers and there is evidence that where network externality mark-ups have not been applied, network operators have still acted to bring and maintain marginal subscribers onto the network.

It also assumes that there is a direct pass-through of the wholesale termination profits to marginal subscribers at retail level rather than being retained by the relevant operator as excess profits, i.e. that there is a waterbed effect. However, this relies on an assumption that operators are already operating close to the efficient cost level. Further, there is insufficient evidence as regards the magnitude of this effect.

⁴⁴ WIK-Consult, Mobile Termination Cost Model for Australia, Report for the Australian Competition and Consumer Commission, January 2007.

⁴⁵ See footnote 39 above.

Additionally, it ignores the competitive and distributional consequences of setting termination rates above efficient costs which must then be subsidised by other networks, such as by fixed networks and their consumers or by subscribers of smaller mobile networks

It further represents a static viewpoint of competition and consumer behaviour. While it is possible that the pricing structure at the retail level may be adjusted to reflect changes at the wholesale level⁴⁶, a stronger competitive dynamic resulting from the elimination of competitive distortions associated with above-cost termination rates should serve to constrain the costs of mobile phone ownership for end users and thus preserve high mobile penetration levels in the EU. More affordable calls for end users should also encourage increased usage (depending on the demand elasticity), the revenues from which may in turn be used to finance inducements for more marginal customer segments.

Therefore, in view of the current stage of mobile market development, the scope for operators to internalise network externalities, and the allocative efficiency concerns associated with above-cost termination rates, a network externality does not seem sufficient justification to allow for an increase in termination rates.

5.2.5. *Implication of recommended approach for mobile termination rates*

The recommended approach for setting termination rates sets out a consistent methodology for regulating termination rates based on the costs of an efficient operator. While any further reductions in termination rates in the EU will depend on the extent to which estimated termination rates might currently exceed the level of efficient cost, regulators have tended to implement glide paths with a more gradual rate of reduction for mobile termination rates and in 2007 they were still on average almost nine times the equivalent fixed rate. Thus it may be expected that a more consistent and effective interpretation of this cost concept will have an impact on the level of termination rates, in particular in mobile networks.

When examining the cost structure of mobile operations, it can be noted that on average around 75% of the costs of mobile call termination are currently network-related, slightly more than half of which are generated by the radio access network. According to the recommended approach, only those costs which are capacity-driven and incremental to the provision of a wholesale call termination service would be taken into account. Furthermore, the remaining 25% of the total cost of mobile call termination is typically accounted for by spectrum costs, business overheads and wholesale commercial costs. Cost models currently applied by NRAs treat a large proportion of the radio access network as traffic-driven and therefore a sizeable proportion of the radio access network costs are taken into account in calculating the costs of providing termination services. Under the recommended approach only that proportion of the radio access network costs which would be avoidable if a wholesale termination service were no longer provided would be allocated to the overall mobile termination cost. Further, that portion of spectrum costs driven by the need to increase capacity, above the spectrum necessary to provide retail services to

⁴⁶ In that respect, it may also be noted that handset subsidies are not a necessary inducement for marginal customers to join mobile networks. For example, penetration levels in Italy and Finland are high despite handset subsidies having been restricted in both countries in the past.

subscribers, for the purposes of carrying wholesale voice call termination traffic for third parties would be included. General business overheads would also only be included to the extent that they are driven by the provision of the wholesale termination service. Unavoidable business overhead costs would be excluded. Furthermore, wholesale commercial costs which are directly related to the provision of a wholesale call termination service (such as billing costs which result directly from providing a wholesale termination service) would be included; however of the latter cost categories, wholesale commercial costs are typically the smallest in magnitude.

6. FORWARD-LOOKING CONSIDERATIONS

6.1. Possible alternative approaches

6.1.1. Introduction

As noted above, call termination services are two-sided, with the network(s) being the platform and the caller and receiver being on either side of that platform. The demand elasticities on either side of the platform mean that the *structure* of prices impacts on the levels of consumption; therefore, it often plays a crucial role in bringing the two sides of the market together⁴⁷.

It has also been noted that in a call there are benefits to both the calling and to the called party, which in turn suggests that both parties have a part in the creation of costs. Currently, the benefit of the called party is largely ignored when regulating termination rates⁴⁸. The consideration of call externalities raises issues about how costs ought to be recovered in a forward-looking context.

In addition, there are non-trivial costs associated with developing cost models for the setting of wholesale termination rates. These costs need to be considered in the context of possible alternative mechanisms for remunerating termination services. A number of alternative arrangements for the exchange of termination traffic are considered below.

6.1.2. Bill and Keep

A few countries⁴⁹ use alternative arrangements, under which network operators negotiate termination fees, subject to an obligation to interconnect and usually subject to the requirement that rates received by both networks that are parties to the same agreement are reciprocal. These operators often choose to set termination rates at zero. That system, where traffic is exchanged without financial settlements, is known as *Bill and Keep*. Bill and Keep may be related to Receiving Party Pays (see 6.1.4.), as it allows operators to directly charge their customers for received calls without resorting to wholesale charges from other operators, although this is not a necessary consequence.

⁴⁷ See Rochet/Tirole (2004).

⁴⁸ Unlike in the regulation of international roaming calls, Regulation (EC) No 717/2007.

⁴⁹ For example, the USA, Canada and Singapore.

There is no record of Bill and Keep being imposed by a regulatory authority. It generally results from voluntary agreement between interested parties, which in certain circumstances choose to set these fees at zero, particularly where the net financial settlements are equal to or close to zero.

It is argued that Bill and Keep obviates the need for regulatory intervention and resolves the termination bottleneck. Moreover, it is further argued that Bill and Keep leads to lower retail prices for call origination and appears to increase usage due to the price elasticity of demand. Furthermore, proponents of Bill and Keep consider that it facilitates development of innovative offers, e.g. flat-rate offers promoting increased usage. It also brings immediate benefits by decreasing transaction and measurement costs. Finally, Bill and Keep takes account of the call externality.

Nevertheless, one should note that setting the price of any service at zero may cause distortionary behaviour, bring arbitrage opportunities, lead to inefficient traffic routing and inefficient network utilisation. For instance, a potentially problematic issue might be inefficient routing of traffic from operators not participating in the Bill and Keep scheme.

When assessing the possible introduction of the Bill and Keep system, potential merits and drawbacks of such an approach would have to be carefully considered. Given the high current level of termination rates under the prevailing CPP system in the EU, the full effects of switching to a Bill and Keep system may not be reliably foreseen.

However, a significant reduction of termination rates from current levels might create appropriate incentives for voluntary inter-operator agreements⁵⁰ and consequently Bill and Keep type arrangements could evolve naturally.

6.1.3. *Reciprocity*

One of the possible regulatory approaches is to require that interconnecting operators negotiate termination rates among themselves, subject only to the requirement that these rates are reciprocal. Bill and Keep is a particular example of a reciprocal arrangement, where the termination rates are set at zero. However, other levels of reciprocal termination rates may be applied.

Potentially, this could require limited regulation, assuming that prices are negotiated at an efficient level. Nevertheless, reciprocity may lead to collusion between operators aimed at maintaining high wholesale and retail prices. Moreover, it may be expected that the outcome of reciprocal arrangements would depend on the level of traffic flows between two interconnecting networks. A net recipient of traffic would likely prefer a higher termination rate and *vice versa*. Thus, efficient termination rates do not necessarily have to result from the imposition of reciprocity. Consequently, additional regulatory intervention may be needed.

⁵⁰ Voluntary agreements are always subject to competition law.

6.1.4. *Receiving Party Pays*

Some countries (e.g. Canada, Singapore, Hong Kong, the United States) use Receiving Party Pays (RPP) as an alternative arrangement to the CPP system at retail level. Under RPP the receiving network terminates calls without charging the originating operator the full cost of that termination service, leading the operator to potentially recover part of the termination costs from their own retail customers. Since this charge is now noticeable to the consumer, there is an incentive for the consumer to respond to that charge where more competitive alternatives exist. Thus, both incoming and outgoing call charges are subject to competition. Such a settlement system is consistent with an argument that while the calling party causes a cost originating the call, the called party causes a cost by accepting it and thus it recognises the existence of a positive call externality to the receiving party.

RPP avoids the deficiencies of the CPP system, e.g. high termination rates resulting from the monopoly on termination markets and which thus produce negative competitive consequences both at the wholesale and retail level. If subscribers are charged for incoming calls, they can be expected to be more sensitive to the price charged for them. Thus, competition between operators for mobile subscribers could be expected to exert a constraint on the setting of wholesale termination charges with associated implications for retail prices.

Nevertheless, it could possibly meet resistance from customers unwilling to meet the termination charge. RPP might not be efficient if the calling party values the call highly but the called party does not and, as a result, an efficient call might not be completed⁵¹. The reverse issue may arise in the CPP system, where an efficient call may not be initiated even if the called party values it highly but the calling party does not. In addition, if the originating operator continues to cover part of the termination cost, RPP would still require a degree of regulatory oversight, as otherwise RPP would likely revert to a CPP arrangement.

As noted above, there are potential merits in an RPP system given that it recognises that both calling and receiving parties benefit from a call and contribute towards its cost. However, it is difficult to envisage such a situation at present given the current high level of termination rates in the EU. Nevertheless, it may not be excluded that RPP will emerge if operators decide to recover part of the termination charge directly from the called party, in particular RPP may evolve after a reduction of the regulated termination charge or as a response to a Bill and Keep system.

6.1.5. *Conclusion*

Further to the above, a number of possible alternative approaches may be implemented over the longer term to the extent that they may promote efficiency and decrease the need for regulation. However, in view of the current high level of termination rates, particularly in the mobile sector, it is difficult to see how these alternative systems may be introduced in the short to medium term. Reducing termination rates to an efficient level is an appropriate first step before other potential approaches may be introduced.

⁵¹ However, operators may employ certain measures aimed at counteracting possible sub-optimal usage, e.g. flat rate offers with free incoming calls.

6.2. Migration to IP Interconnection

Another issue which needs to be considered with respect to forward-looking termination rates is the effect that termination arrangements are likely to have on investment and network evolution in the context of IP developments.

Currently, the most noteworthy driver of change in networks is the convergence of the network, with a single integrated IP-based network delivering a combination of data, voice and video services. This evolution makes it possible for different underlying platforms (for example, fixed telecommunications and cable television) to offer equivalent services, potentially benefiting competition. This same evolution enables bundled offers of multiple services to the end-user, thus changing the character of competition.

Although migration to an IP network enables a direct decrease of network costs, in addition to increasing the economies of scope resulting from an ability to offer a wider range of services, in the transition to IP certain inefficiencies may occur. Such short-term inefficiencies, resulting from the operators' own policy, should not serve as a justification for higher termination rates even for a limited period. For some operators, high termination rates represent an important source of revenue. They may therefore perceive this evolution as a threat, and possibly resist the emergence of these new forms of interconnection since they may undermine the current charging mechanisms.

Generally, IP-based interconnection (data traffic) is currently implemented by a mixture of peering and transit⁵². With *peering*, two Internet Service Providers (ISPs) agree to exchange traffic solely among their respective customers, sometimes without payment; with *transit*, one ISP agrees to carry the traffic of a customer (possibly also an ISP) to third parties for a fee. These freely negotiated arrangements result in a globally interconnected Internet, and do not (in most cases) depend on any regulatory obligations.

If call termination fees remain at current levels, it might be that many mobile operators and some fixed operators might choose not to evolve their networks to IP-based interconnection. They might perceive the migration as a risk of losing termination revenues. This suggests that waiting for the migration to IP-based NGNs to be implemented by operators in the presence of high termination charges might be a self-defeating strategy.

Furthermore, even in the event of a move to IP-based interconnection of voice calls, the inevitable question remains as to whether interconnection of future NGNs should or could be based on the Internet economic model, on the switched network model, or some third model (possibly a blend of the two). In the presence of high termination rates, any spontaneous move from the existing charging mechanisms for voice traffic exchange seems unlikely. The conclusion must be that given the current level of termination rates, the evolution of IP interconnection is likely to be slower and that any transition to alternative charging mechanisms is likely to be significantly impeded.

⁵² Other IP interconnection arrangements exist, such as mutual transit, but they are less frequently used.

7. IMPLEMENTATION OF THE RECOMMENDATION

7.1. Transition Period

The transition to the Recommendation raises issues for all stakeholders. Article 16(1) of the Framework Directive states that NRAs shall carry out an analysis of the relevant markets as soon as possible after adoption of the Recommendation or any updating thereof. That implies that “as soon as possible” in Article 16(1) is interpreted as respecting regulatory measures that have already been notified and agreed.

A period of transition can therefore be anticipated to ease the transition from the NRAs' latest market reviews. Such a time period should, on the one hand, be long enough to allow regulators to put the cost model in place and for operators to adapt their business plans accordingly while, on the other hand, ensuring that consumers derive maximum benefits in terms of efficient cost-based termination rates. Such a period should be limited to 31 December 2012, as of which date the NRAs should ensure that the termination rates are implemented in accordance with this Recommendation.

7.2. Possible exceptions

It is essential to ensure that the key objectives of the Recommendation, i.e. providing greater consistency in the regulation of termination rates across the EU and setting termination rates at the level of efficient costs, are met. However, it is recognised that the requirement to develop a bottom-up LRIC model by 31 December 2012 may be viewed as challenging for certain regulatory authorities with fewer resources.

Therefore, in exceptional circumstances where an NRA is not in a position, in particular due to limited resources, to finalise the recommended cost model in a timely manner, an NRA might implement a methodology other than the recommended methodology (provided that this would result in outcomes consistent with the Recommendation and generate efficient outcomes consistent with a competitive market) for an additional interim period after the recommended methodology for setting termination rates has become applicable.

In view of the experience that will be accumulated by those NRAs implementing the recommended approach from 31 December 2012, an additional period up to 01 July 2014 is deemed sufficiently long for those less well-resourced NRAs to establish cost models in line with the recommended approach. It can be expected that NRAs will work together over this time period, within the body established for cooperation among the NRAs and in the context of its related working groups, with the larger NRAs sharing the benefits of their resources and expertise with the smaller, less well-resourced NRAs and assisting them in building a cost model which may be implemented after the conclusion of this interim phase. Where, however, it would be objectively disproportionate for those NRAs with limited resources to apply the recommended cost methodology after 01 July 2014 and it is not possible for the body established for cooperation among the NRAs and the Commission to provide sufficient practical support and guidance to overcome this limitation of resources and, in particular, the cost of implementing the recommended cost methodology,

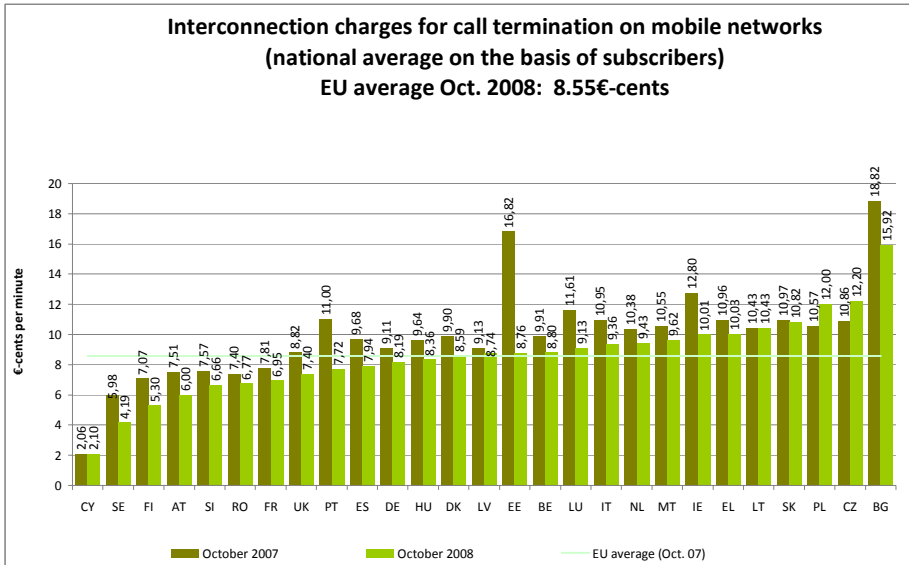
such NRAs may continue to apply an alternative methodology up to the date for review of the Recommendation.

As to alternative methodologies, benchmarking may, for example, be viewed as one possible mechanism for determining termination rates in the additional interim period. The most obvious benefit of benchmarking is its ease of implementation. Benchmarking can also have certain advantages in terms of promoting yardstick competition, e.g. frequently published international price comparisons can encourage countries to seek to improve their performance relative to their international peers. A potential disadvantage of this approach is that if inappropriate benchmarks are chosen that do not represent efficient cost-based estimates, distortions resulting from inconsistent and above-cost termination rates will persist. Furthermore, even where increased consistency is achieved via this approach, this may well be at an inefficient level.

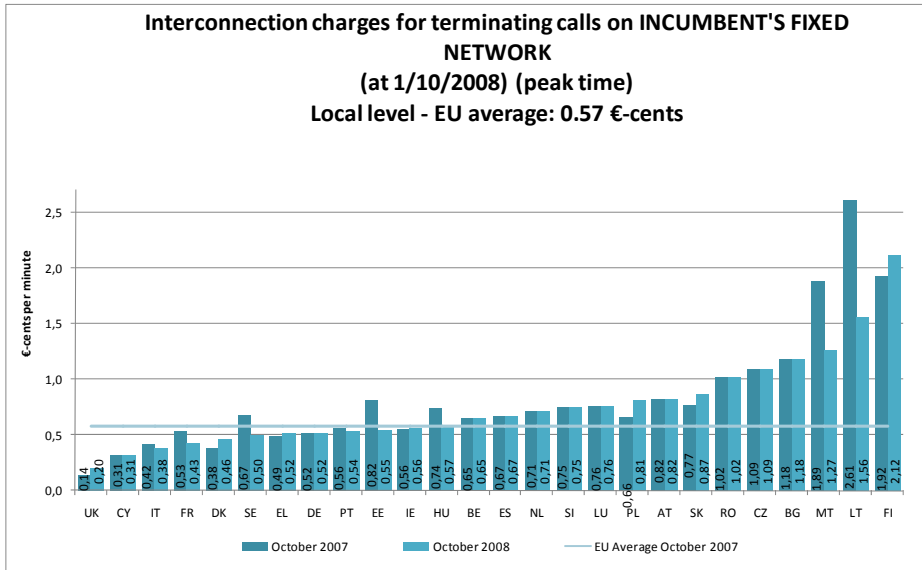
Against this background, it is essential that any benchmarking process has a strong efficiency underpinning. It is considered that this could be best achieved by limiting the circumstances under which benchmarking may be applied to only those situations where the costs of implementing the recommended cost methodology would clearly outweigh the benefits for the particular Member State and where the relevant benchmarks chosen are confined to those countries which have implemented the recommended costing approach. Such a guiding principle should help limit regulatory inconsistencies and ensure the selection of efficient benchmarks only.

To this end, NRAs should be able to demonstrate that any alternative methodology results in outcomes consistent with the Recommendation and generates efficient outcomes consistent with those in a competitive market. An outcome which is consistent with the Recommendation is one which does not exceed the average of the termination rates set by NRAs implementing the recommended cost methodology. During this additional interim period, this requirement would provide a sufficiently robust standard against which to test the results of any such alternative approaches.

ANNEX



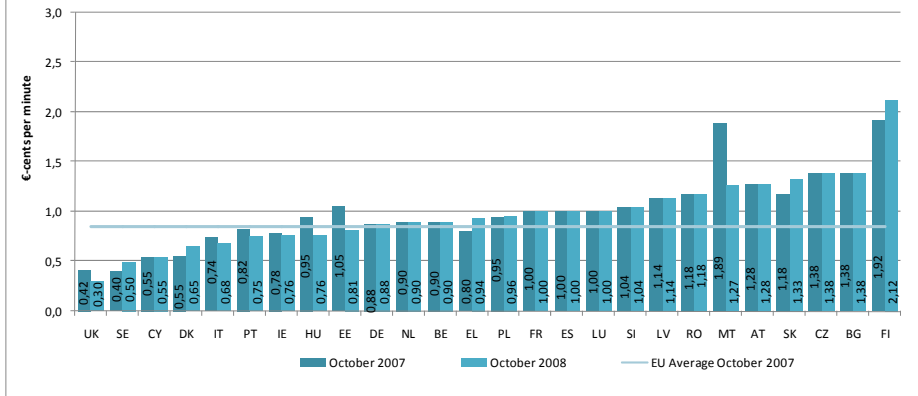
Source: European Electronic Communications Regulation and Markets, 14th Progress Report



Source: European Electronic Communications Regulation and Markets, 14th Progress Report

**Interconnection charges for terminating calls on INCUMBENT'S FIXED NETWORK
(at 1/10/2008)**

Single transit - EU average: 0.86 €-cents



Source: European Electronic Communications Regulation and Markets, 14th Progress Report

Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services

(2002/C 165/03)

(Text with EEA relevance)

1. INTRODUCTION

1.1. Scope and purpose of the guidelines

1. These guidelines set out the principles for use by national regulatory authorities (NRAs) in the analysis of markets and effective competition under the new regulatory framework for electronic communications networks and services.
2. This new regulatory framework comprises five Directives: Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ⁽¹⁾, hereinafter the framework Directive; Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services ⁽²⁾, hereinafter the authorisation Directive; Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities ⁽³⁾, hereinafter the access Directive; Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services ⁽⁴⁾, hereinafter the universal service Directive; a Directive of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector ⁽⁵⁾. However, until this last Directive is formally adopted, Directive 97/66/EC of the European Parliament and the Council concerning the processing of personal data and protection of privacy in the telecommunications sector ⁽⁶⁾, hereinafter the data protection Directive, remains the relevant Directive.
3. Under the 1998 regulatory framework, the market areas of the telecommunications sector that were subject to *ex-ante* regulation were laid down in the relevant directives, but were not markets defined in accordance with the principles of competition law. In these areas defined under the 1998 regulatory framework, NRAs had the power to designate undertakings as having significant market power when they possessed 25 % market share, with the possibility to deviate from this threshold taking into account the undertaking's ability to influence the market, its turnover relative to the size of the market, its control of the means of access to end-users, its access to financial resources and its experience in providing products and services in the market.
4. Under the new regulatory framework, the markets to be regulated are defined in accordance with the principles of European competition law. They are identified by the

Commission in its recommendation on relevant product and service markets pursuant to Article 15(1) of the framework Directive (hereinafter 'the Recommendation'). When justified by national circumstances, other markets can also be identified by the NRAs, in accordance with the procedures set out in Articles 6 and 7 of the framework Directive. In case of transnational markets which are susceptible to *ex-ante* regulation, they will where appropriate be identified by the Commission in a decision on relevant transnational markets pursuant to Article 15(4) of the framework Directive (hereinafter 'the Decision on transnational markets').

5. On all of these markets, NRAs will intervene to impose obligations on undertakings only where the markets are considered not to be effectively competitive ⁽⁷⁾ as a result of such undertakings being in a position equivalent to dominance within the meaning of Article 82 of the EC Treaty ⁽⁸⁾. The notion of dominance has been defined in the case-law of the Court of Justice as a position of economic strength affording an undertaking the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers. Therefore, under the new regulatory framework, in contrast with the 1998 framework, the Commission and the NRAs will rely on competition law principles and methodologies to define the markets to be regulated *ex-ante* and to assess whether undertakings have significant market power ('SMP') on those markets.
6. These guidelines are intended to guide NRAs in the exercise of their new responsibilities for defining markets and assessing SMP. They have been adopted by the Commission in accordance with Article 15(2) of the framework Directive, after consultation of the relevant national authorities and following a public consultation, the results of which have been duly taken into account.
7. Under Article 15(3) of the framework Directive, NRAs should take the utmost account of these guidelines. This will be an important factor in any assessment by the Commission of the proportionality and legality of proposed decisions by NRAs, taking into account the policy objectives laid down in Article 8 of the framework Directive.
8. These guidelines specifically address the following subjects: (a) market definition; (b) assessment of SMP; (c) SMP designation; and (d) procedural issues related to all of these subjects.

9. The guidelines have been designed for NRAs to use as follows:

- to define the geographical dimension of those product and service markets identified in the Recommendation. NRAs will not define the geographic scope of any transnational markets, as any Decision on transnational markets will define their geographic dimension,
- to carry out, using the methodology set out in Section 3 of the guidelines, a market analysis of the conditions of competition prevailing in the markets identified in the Recommendation and Decision and by NRAs,
- to identify relevant national or sub-national product and service markets which are not listed in the Recommendation when this is justified by national circumstances and following the procedures set out in Articles 6 and 7 of the framework Directive,
- to designate, following the market analysis, undertakings with SMP in the relevant market and to impose proportionate *ex-ante* measures consistent with the terms of the regulatory framework as described in Sections 3 and 4 of the guidelines,
- to assist Member States and NRAs in applying Article 11(1f) of the authorisation Directive, and Article 5(1) of the framework Directive, and thus ensure that undertakings comply with the obligation to provide information necessary for NRAs to determine relevant markets and assess significant market power thereon,
- to guide NRAs when dealing with confidential information, which is likely to be provided by:
 - undertakings under Article 11(1f) of the authorisation Directive and Article 5(1) of the framework Directive,
 - national competition authorities (NCAs) as part of the cooperation foreseen in Article 3(5) of the framework Directive, and
 - the Commission and a NRA in another Member State as part of the cooperation foreseen in Article 5(2) of the framework Directive.

10. The guidelines are structured in the following way:

Section 1 provides an introduction and overview of the background, purpose, scope and content of the guidelines. **Section 2** describes the methodology to be used by NRAs to define the geographic scope of the markets identified in the market Recommendation as

well as to define relevant markets outside this Recommendation. **Section 3** describes the criteria for assessing SMP in a relevant market. **Section 4** outlines the possible conclusions that NRAs may reach in their market analyses and describes the possible actions that may result. **Section 5** describes the powers of investigation of NRAs, suggests procedures for coordination between NRAs and between NRAs and NCAs, and describes coordination and cooperation procedures between NRAs and the Commission. Finally, **Section 6** describes procedures for public consultation and publication of NRAs' proposed decisions.

11. The major objective of these guidelines is to ensure that NRAs use a consistent approach in applying the new regulatory framework, and especially when designating undertakings with SMP in application of the provisions of the regulatory framework.
12. By issuing these guidelines, the Commission also intends to explain to interested parties and undertakings operating in the electronic communications sector how NRAs should undertake their assessments of SMP under the framework Directive, thereby maximising the transparency and legal certainty of the application of the sector specific legislation.
13. The Commission will amend these guidelines, whenever appropriate, taking into account experience with the application of the regulatory framework and future developments in the jurisprudence of the Court of First Instance and the European Court of Justice.
14. These guidelines do not in any way restrict the rights conferred by Community law on individuals or undertakings. They are entirely without prejudice to the application of Community law, and in particular of the competition rules, by the Commission and the relevant national authorities, and to its interpretation by the European Court of Justice and the Court of First Instance. These guidelines do not prejudice any action the Commission may take or any guidelines the Commission may issue in the future with regard to the application of European competition law.

1.2. Principles and policy objectives behind sector specific measures

15. NRAs must seek to achieve the policy objectives identified in Article 8(2), (3) and (4) of the framework Directive. These fall into three categories:
 - promotion of an open and competitive market for electronic communications networks, services and associated facilities,
 - development of the internal market, and
 - promotion of the interests of European citizens.

16. The purpose of imposing *ex-ante* obligations on undertakings designated as having SMP is to ensure that undertakings cannot use their market power either to restrict or distort competition on the relevant market, or to leverage such market power onto adjacent markets.
 17. These regulatory obligations should only be imposed on those electronic communications markets whose characteristics may be such as to justify sector-specific regulation and in which the relevant NRA has determined that one or more operators have SMP.
 18. The product and service markets whose characteristics may be such as to justify sector-specific regulation are identified by the Commission in its Recommendation and, when the definition of different relevant markets is justified by national circumstances, by the NRAs following the procedures set out in Articles 6 and 7 of the framework Directive⁽⁹⁾. In addition, certain other markets are specifically identified in Article 6 of the access Directive and Articles 18 and 19 of the universal service Directive.
 19. In respect of each of these relevant markets, NRAs will assess whether the competition is effective. A finding that effective competition exists on a relevant market is equivalent to a finding that no operator enjoys a single or joint dominant position on that market. Therefore, for the purposes of applying the new regulatory framework, effective competition means that there is no undertaking in the relevant market which holds alone or together with other undertakings a single or collective dominant position. When NRAs conclude that a relevant market is not effectively competitive, they will designate undertakings with SMP on that market, and will either impose appropriate specific obligations, or maintain or amend such obligations where they already exist, in accordance with Article 16(4) of the framework Directive.
 20. In carrying out the market analysis under the terms of Article 16 of the framework Directive, NRAs will conduct a forward looking, structural evaluation of the relevant market, based on existing market conditions. NRAs should determine whether the market is prospectively competitive, and thus whether any lack of effective competition is durable⁽¹⁰⁾, by taking into account expected or foreseeable market developments over the course of a reasonable period. The actual period used should reflect the specific characteristics of the market and the expected timing for the next review of the relevant market by the NRA. NRAs should take past data into account in their analysis when such data are relevant to the developments in that market in the foreseeable future.
 21. If NRAs designate undertakings as having SMP, they must impose on them one or more regulatory obligations, in accordance with the relevant Directives and taking into account the principle of proportionality. Exceptionally, NRAs may impose obligations for access and interconnection that go beyond those specified in the access Directive, provided this is done with the prior agreement of the Commission, as provided by Article 8(3) of that Directive.
 22. In the exercise of their regulatory tasks under Article 15 and 16 of the framework Directive, NRAs enjoy discretionary powers which reflect the complexity of all the relevant factors that must be assessed (economic, factual and legal) when identifying the relevant market and determining the existence of undertakings with SMP. These discretionary powers remain subject, however, to the procedures provided for in Article 6 and 7 of the framework Directive.
 23. Regulatory decisions adopted by NRAs pursuant to the Directives will have an impact on the development of the internal market. In order to prevent any adverse effects on the functioning of the internal market, NRAs must ensure that they implement the provisions to which these guidelines apply in a consistent manner. Such consistency can only be achieved by close coordination and cooperation with other NRAs, with NCAs and with the Commission, as provided in the framework Directive and as recommended in Section 5.3 of these guidelines.
- ### 1.3. Relationship with competition law
24. Under the regulatory framework, markets will be defined and SMP will be assessed using the same methodologies as under competition law. Therefore the definition of the geographic scope of markets identified in the Recommendation, the definition where necessary of relevant product/services markets outside the Recommendation, and the assessment of effective competition by NRAs should be consistent with competition case-law and practice. To ensure such consistency, these guidelines are based on (1) existing case-law of the Court of First Instance and the European Court of Justice concerning market definition and the notion of dominant position within the meaning of Article 82 of the EC Treaty and Article 2 of the merger control Regulation⁽¹¹⁾; (2) the 'Guidelines on the application of EEC competition rules in the telecommunications sector'⁽¹²⁾; (3) the 'Commission notice on the definition of relevant markets for the purposes of Community competition law'⁽¹³⁾, hereinafter the 'Notice on market definition'; and (4) the 'Notice on the application of competition rules to access agreements in the telecommunications sector'⁽¹⁴⁾, hereinafter the 'Access notice'.

25. The use of the same methodologies ensures that the relevant market defined for the purpose of sector-specific regulation will in most cases correspond to the market definitions that would apply under competition law. In some cases, and for the reasons set out in Section 2 of these guidelines, markets defined by the Commission and competition authorities in competition cases may differ from those identified in the Recommendation and Decision, and/or from markets defined by NRAs under Article 15(3) of the framework Directive. Article 15(1) of the framework Directive makes clear that the markets to be defined by NRAs for the purpose of *ex-ante* regulation are without prejudice to those defined by NCAs and by the Commission in the exercise of their respective powers under competition law in specific cases.
26. For the purposes of the application of Community competition law, the Commission's Notice on market definition explains that the concept of the relevant market is closely linked to the objectives pursued under Community policies. Markets defined under Articles 81 and 82 EC Treaty are generally defined on an *ex-post* basis. In these cases, the analysis will consider events that have already taken place in the market and will not be influenced by possible future developments. Conversely, under the merger control provisions of EC competition law, markets are generally defined on a forward-looking basis.
27. On the other hand, relevant markets defined for the purposes of sector-specific regulation will always be assessed on a forward looking basis, as the NRA will include in its assessment an appreciation of the future development of the market. However, NRAs' market analyses should not ignore, where relevant, past evidence when assessing the future prospects of the relevant market (see also Section 2, below). The starting point for carrying out a market analysis for the purpose of Article 15 of the framework Directive is not the existence of an agreement or concerted practice within the scope of Article 81 EC Treaty, nor a concentration within the scope of the Merger Regulation, nor an alleged abuse of dominance within the scope of Article 82 EC Treaty, but is based on an overall forward-looking assessment of the structure and the functioning of the market under examination. Although NRAs and competition authorities, when examining the same issues in the same circumstances and with the same objectives, should in principle reach the same conclusions, it cannot be excluded that, given the differences outlined above, and in particular the broader focus of the NRAs' assessment, markets defined for the purposes of competition law and markets defined for the purpose of sector-specific regulation may not always be identical.
28. Although merger analysis is also applied *ex ante*, it is not carried out periodically as is the case with the analysis of the NRAs under the new regulatory framework. A competition authority does not, in principle, have the opportunity to conduct a periodic review of its decision in the light of market developments, whereas NRAs are bound to review their decisions periodically under Article 16(1) of the framework Directive. This factor can influence the scope and breadth of the market analysis and the competitive assessment carried out by NRAs, and for this reason, market definitions under the new regulatory framework, even in similar areas, may in some cases, be different from those markets defined by competition authorities.
29. It is considered that markets which are not identified in the Recommendation will not warrant *ex-ante* sector specific regulation, except where the NRA is able to justify such regulation of an additional or different relevant market in accordance with the procedure in Article 7 of the framework Directive.
30. The designation of an undertaking as having SMP in a market identified for the purpose of *ex-ante* regulation does not automatically imply that this undertaking is also dominant for the purpose of Article 82 EC Treaty or similar national provisions. Moreover, the SMP designation has no bearing on whether that undertaking has committed an abuse of a dominant position within the meaning of Article 82 of the EC Treaty or national competition laws. It merely implies that, from a structural perspective, and in the short to medium term, the operator has and will have, on the relevant market identified, sufficient market power to behave to an appreciable extent independently of competitors, customers, and ultimately consumers, and this, solely for purposes of Article 14 of the framework Directive.
31. In practice, it cannot be excluded that parallel procedures under *ex-ante* regulation and competition law may arise with respect to different kinds of problems in relevant markets⁽¹³⁾. Competition authorities may therefore carry out their own market analysis and impose appropriate competition law remedies alongside any sector specific measures applied by NRAs. However, it must be noted that such simultaneous application of remedies by different regulators would address different problems in such markets. *Ex-ante* obligations imposed by NRAs on undertakings with SMP aim to fulfil the specific objectives set out in the relevant directives, whereas competition law remedies aim to sanction agreements or abusive behaviour which restrict or distort competition in the relevant market.

32. As far as emerging markets are concerned, recital 27 of the framework Directive notes that emerging markets, where *de facto* the market leader is likely to have a substantial market share, should not be subject to inappropriate *ex-ante* regulation. This is because premature imposition of *ex-ante* regulation may unduly influence the competitive conditions taking shape within a new and emerging market. At the same time, foreclosure of such emerging markets by the leading undertaking should be prevented. Without prejudice to the appropriateness of intervention by the competition authorities in individual cases, NRAs should ensure that they can fully justify any form of early, *ex-ante* intervention in an emerging market, in particular since they retain the ability to intervene at a later stage, in the context of the periodic re-assessment of the relevant markets.

2. MARKET DEFINITION

2.1. Introduction

33. In the Competition guidelines issued in 1991⁽¹⁶⁾, the Commission recognised the difficulties inherent in defining the relevant market in an area of rapid technological change, such as the telecommunications sector. Whilst this statement still holds true today as far as the electronic communications sector is concerned, the Commission since the publication of those guidelines has gained considerable experience in applying the competition rules in a dynamic sector shaped by constant technological changes and innovation, as a result of its role in managing the transition from monopoly to competition in this sector. It should however be recalled that the present guidelines do not purport to explain how the competition rules apply, generally, in the electronic communications sector, but focus only on issues related to (i) market definition; and (ii) the assessment of significant market power within the meaning of Article 14 of the framework Directive (hereafter SMP).
34. In assessing whether an undertaking has SMP, that is whether it 'enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately consumers'⁽¹⁷⁾, the definition of the relevant market is of fundamental importance since effective competition can only be assessed by reference to the market thus defined⁽¹⁸⁾. The use of the term 'relevant market' implies the description of the products or services that make up the market and the assessment of the geographical scope of that market (the terms 'products' and 'services' are used interchangeably throughout this text). In that regard, it should be recalled that relevant markets defined under the 1998 regulatory framework were distinct from those identified for competition-law purposes, since they were based on certain specific aspects of end-to-end communications rather than on the demand and supply criteria used in a competition law analysis⁽¹⁹⁾.
35. Market definition is not a mechanical or abstract process but requires an analysis of any available evidence of past market behaviour and an overall understanding of the mechanics of a given sector. In particular, a dynamic rather than a static approach is required when carrying out a prospective, or forward-looking, market analysis⁽²⁰⁾. In this respect, any experience gained by NRAs, NCAs and the Commission through the application of competition rules to the telecommunication sector clearly will be of particular relevance in applying Article 15 of the framework Directive. Thus, any information gathered, any findings made and any studies or reports commissioned or relied upon by NRAs (or NCAs) in the exercise of their tasks, in relation to the conditions of competition in the telecommunications markets (provided of course that market conditions have since remained unchanged), should serve as a starting point for the purposes of applying Article 15 of the framework Directive and carrying out a prospective market analysis⁽²¹⁾.
36. The main product and service markets whose characteristics may be such as to justify the imposition of *ex-ante* regulatory obligations are identified in the Recommendation which the Commission is required to adopt pursuant to Article 15(1) of the framework Directive, as well as any Decision on transnational markets which the Commission decides to adopt pursuant to Article 15(4) of the framework Directive. Therefore, in practice the task of NRAs will normally be to define the geographical scope of the relevant market, although NRAs have the possibility under Article 15(3) of the framework Directive to define markets other than those listed in the Recommendation in accordance with Article 7 of the framework Directive (see below, Section 6).
37. Whilst a prospective analysis of market conditions may in some cases lead to a market definition different from that resulting from a market analysis based on past behaviour⁽²²⁾, NRAs should nonetheless seek to preserve, where possible, consistency in the methodology adopted between, on the one hand, market definitions developed for the purposes of *ex-ante* regulation, and on the other hand, market definitions developed for the purposes of the application of the competition rules. Nevertheless, as stated in Article 15(1) of the framework Directive and Section 1 of the guidelines, markets defined under sector-specific regulation are defined without prejudice to markets that may be defined in specific cases under competition law.

2.2. Main criteria for defining the relevant market

38. The extent to which the supply of a product or the provision of a service in a given geographical area constitutes the relevant market depends on the existence of competitive constraints on the price-setting behaviour of the producer(s) or service provider(s)

concerned. There are two main competitive constraints to consider in assessing the behaviour of undertakings on the market, (i) demand-side; and (ii) supply-side substitution. A third source of competitive constraint on an operator's behaviour exists, namely potential competition. The difference between potential competition and supply-substitution lies in the fact that supply-side substitution responds promptly to a price increase whereas potential entrants may need more time before starting to supply the market. Supply substitution involves no additional significant costs whereas potential entry occurs at significant sunk costs⁽²³⁾. The existence of potential competition should thus be examined for the purpose of assessing whether a market is effectively competitive within the meaning of the framework Directive, that is whether there exist undertakings with SMP⁽²⁴⁾.

39. Demand-side substitutability is used to measure the extent to which consumers are prepared to substitute other services or products for the service or product in question⁽²⁵⁾, whereas supply-side substitutability indicates whether suppliers other than those offering the product or services in question would switch in the immediate to short term their line of production or offer the relevant products or services without incurring significant additional costs.

40. One possible way of assessing the existence of any demand and supply-side substitution is to apply the so-called 'hypothetical monopolist test'⁽²⁶⁾. Under this test, an NRA should ask what would happen if there were a small but significant, lasting increase in the price of a given product or service, assuming that the prices of all other products or services remain constant (hereafter, 'relative price increase'). While the significance of a price increase will depend on each individual case, in practice, NRAs should normally consider customers' (consumers or undertakings) reactions to a permanent price increase of between 5 to 10 %⁽²⁷⁾. The responses by consumers or undertakings concerned will aid in determining whether substitutable products do exist and, if so, where the boundaries of the relevant product market should be delineated⁽²⁸⁾.

41. As a starting point, an NRA should apply this test firstly to an electronic communications service or product offered in a given geographical area, the characteristics of which may be such as to justify the imposition of regulatory obligations, and having done so, add additional products or areas depending on whether competition from those products or areas constrains the price of the main product or service in question. Since a relative price increase of a set of products⁽²⁹⁾ is likely to lead to some sales being lost, the key issue is to determine whether the loss of sales would be sufficient to offset the increased profits which would otherwise be made from sales made following the price increase. Assessing the demand-side and supply-side substitution

provides a way of measuring the quantity of the sales likely to be lost and consequently of determining the scope of the relevant market.

42. In principle, the 'hypothetical monopolist test' is relevant only with regard to products or services, the price of which is freely determined and not subject to regulation. Thus, the working assumption will be that current prevailing prices are set at competitive levels. If, however, a service or product is offered at a regulated, cost-based price, then such price is presumed, in the absence of indications to the contrary, to be set at what would otherwise be a competitive level and should therefore be taken as the starting point for applying the 'hypothetical monopolist test'⁽³⁰⁾. In theory, if the demand elasticity of a given product or service is significant, even at relative competitive prices, the firm in question lacks market power. If, however, elasticity is high even at current prices, that may mean only that the firm in question has already exercised market power to the point that further price increases will not increase its profits. In this case, the application of the hypothetical monopoly test may lead to a different market definition from that which would be produced if the prices were set at a competitive level⁽³¹⁾. Any assessment of market definition must therefore take into account this potential difficulty. However, NRAs should proceed on the basis that the prevailing price levels provide a reasonable basis from which to start the relevant analysis unless there is evidence that this is not in fact the case.

43. If an NRA chooses to have recourse to the hypothetical monopolist test, it should then apply this test up to the point where it can be established that a relative price increase within the geographic and product markets defined will not lead consumers to switch to readily available substitutes or to suppliers located in other areas.

2.2.1. The relevant product/service market

44. According to settled case-law, the relevant product/service market comprises all those products or services that are sufficiently interchangeable or substitutable, not only in terms of their objective characteristics, by virtue of which they are particularly suitable for satisfying the constant needs of consumers, their prices or their intended use, but also in terms of the conditions of competition and/or the structure of supply and demand on the market in question⁽³²⁾. Products or services which are only to a small, or relative degree interchangeable with each other do not form part of the same market⁽³³⁾. NRAs should thus commence the exercise of defining the relevant product or service market by grouping together products or services that are used by consumers for the same purposes (end use).

45. Although the aspect of the end use of a product or service is closely related to its physical characteristics, different kind of products or services may be used for the same end. For instance, consumers may use dissimilar services such as cable and satellite connections for the same purpose, namely to access the Internet. In such a case, both services (cable and satellite access services) may be included in the same product market. Conversely, paging services and mobile telephony services, which may appear to be capable of offering the same service, that is, dispatching of two-way short messages, may be found to belong to distinct product markets in view of their different perceptions by consumers as regards their functionality and end use.
46. Differences in pricing models and offerings for a given product or service may also imply different groups of consumers. Thus, by looking into prices, NRAs may define separate markets for business and residential customers for essentially the same service. For instance, the ability of operators engaged in providing international retail electronic communications services to discriminate between residential and business customers, by applying different sets of prices and discounts, has led the Commission to decide that these two groups form separate markets as far as such services are concerned (see below). However, in order for products to be viewed as demand-side substitutes it is not necessary that they are offered at the same price. A low quality product or service sold at a low price could well be an effective substitute to a higher quality product sold at higher prices. What matters in this case is the likely responses of consumers following a relative price increase⁽³⁴⁾.
47. Furthermore, product substitutability between different electronic communications services will arise increasingly through the convergence of various technologies. Use of digital systems leads to an increasing similarity in the performance and characteristics of network services using distinct technologies. A packet-switched network, for instance, such as Internet, may be used to transmit digitised voice signals in competition with traditional voice telephony services⁽³⁵⁾.
48. In order, therefore, to complete the market-definition analysis, an NRA, in addition to considering products or services whose objective characteristics, prices and intended use make them sufficiently interchangeable, should also examine, where necessary, the prevailing conditions of demand and supply substitution by applying the hypothetical monopolist test.

2.2.1.1. Demand-side substitution

49. Demand-side substitution enables NRAs to determine the substitutable products or range of products to which consumers could easily switch in case of a relative price increase. In determining the existence of demand

substitutability, NRAs should make use of any previous evidence of consumers' behaviour. Where available, an NRA should examine historical price fluctuations in potentially competing products, any records of price movements, and relevant tariff information. In such circumstances evidence showing that consumers have in the past promptly shifted to other products or services, in response to past price changes, should be given appropriate consideration. In the absence of such records, and where necessary, NRAs will have to seek and assess the likely response of consumers and suppliers to a relative price increase of the service in question.

50. The possibility for consumers to substitute a product or a service for another because of a small, but significant lasting price increase may, however, be hindered by considerable switching costs. Consumers who have invested in technology or made any other necessary investments in order to receive a service or use a product may be unwilling to incur any additional costs involved in switching to an otherwise substitutable service or product. In the same vein, customers of existing providers may also be 'locked in' by long-term contracts or by the prohibitively high cost of switching terminals. Accordingly, in a situation where end users face significant switching costs in order to substitute product A for product B, these two products should not be included in the same relevant market⁽³⁶⁾.
51. Demand substitutability focuses on the interchangeable character of products or services from the buyer's point of view. Proper delineation of the product market may, however, require further consideration of potential substitutability from the supply side.

2.2.1.2. Supply-side substitution

52. In assessing the scope for supply substitution, NRAs may also take into account the likelihood that undertakings not currently active on the relevant product market may decide to enter the market, within a reasonable time frame⁽³⁷⁾, following a relative price increase, that is, a small but significant, lasting price increase. In circumstances where the overall costs of switching production to the product in question are relatively negligible, then that product may be incorporated into the product market definition. The fact that a rival firm possesses some of the assets required to provide a given service is immaterial if significant additional investment is needed to market and offer profitably the services in question⁽³⁸⁾. Furthermore, NRAs will need to ascertain whether a given supplier would actually use or switch its productive assets to produce the relevant product or offer the relevant service (for instance, whether their capacity is committed under long-term supply agreements, etc.). Mere hypothetical supply-side substitution is not sufficient for the purposes of market definition.

53. Account should also be taken of any existing legal, statutory or other regulatory requirements which could defeat a time-efficient entry into the relevant market and as a result discourage supply-side substitution. For instance, delays and obstacles in concluding interconnection or co-location agreements, negotiating any other form of network access, or obtaining rights of ways for network expansion⁽³⁹⁾, may render unlikely in the short term the provision of new services and the deployment of new networks by potential competitors.

54. As can be seen from the above considerations, supply substitution may serve not only for defining the relevant market but also for identifying the number of market participants.

2.2.2. Geographic market

55. Once the relevant product market is identified, the next step to be undertaken is the definition of the geographical dimension of the market. It is only when the geographical dimension of the product or service market has been defined that a NRA may properly assess the conditions of effective competition therein.

56. According to established case-law, the relevant geographic market comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which area the conditions of competition are similar or sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different⁽⁴⁰⁾. The definition of the geographic market does not require the conditions of competition between traders or providers of services to be perfectly homogeneous. It is sufficient that they are similar or sufficiently homogeneous, and accordingly, only those areas in which the conditions of competition are 'heterogeneous' may not be considered to constitute a uniform market⁽⁴¹⁾.

57. The process of defining the limits of the geographic market proceeds along the same lines as those discussed above in relation to the assessment of the demand and supply-side substitution in response to a relative price increase.

58. Accordingly, with regard to demand-side substitution, NRAs should assess mainly consumers' preferences as well as their current geographic patterns of purchase. In particular, linguistic reasons may explain why certain services are not available or marketed in different language areas. As far as supply-side substitution is concerned, where it can be established that operators which are not currently engaged or present on the relevant market, will, however, decide to enter that market in the short term in the event of a relative

price increase, then the market definition should be expanded to incorporate those 'outside' operators.

59. In the electronic communications sector, the geographical scope of the relevant market has traditionally been determined by reference to two main criteria⁽⁴²⁾:

(a) the area covered by a network⁽⁴³⁾; and

(b) the existence of legal and other regulatory instruments⁽⁴⁴⁾.

60. On the basis of these two main criteria⁽⁴⁵⁾, geographic markets can be considered to be local, regional, national or covering territories of two or more countries (for instance, pan-European, EEA-wide or global markets).

2.2.3. Other issues of market definition

61. For the purposes of *ex-ante* regulation, in certain exceptional cases, the relevant market may be defined on a route-by-route basis. In particular, when considering the dimension of markets for international retail or wholesale electronic communications services, it may be appropriate to treat paired countries or paired cities as separate markets⁽⁴⁶⁾. Clearly, from the demand side, the delivery of a call to one country is not a substitute for the delivery of the same to another country. On the other hand, the question of whether indirect transmission services, that is, re-routing or transit of the same call via a third country, represent effective supply-side substitutes depends on the specificities of the market and should be decided on a case-by-case basis⁽⁴⁷⁾. However, a market for the provision of services on a bilateral route would be national in scope since supply and demand patterns in both ends of the route would most likely correspond to different market structures⁽⁴⁸⁾.

62. In its Notice on market definition, the Commission drew attention to certain cases where the boundaries of the relevant market may be expanded to take into consideration products or geographical areas which, although not directly substitutable, should be included in the market definition because of so-called 'chain substitutability'⁽⁴⁹⁾. In essence, chain substitutability occurs where it can be demonstrated that although products A and C are not directly substitutable, product B is a substitute for both product A and product C and therefore products A and C may be in the same product market since their pricing might be constrained by the substitutability of product B. The same reasoning also applies for defining the geographic market. Given the inherent risk of unduly widening the scope of the relevant market, findings of chain substitutability should be adequately substantiated⁽⁵⁰⁾.

2.3. The Commission's own practice

63. The Commission has adopted a number of decisions under Regulation No 17 and the merger control Regulation relating to the electronic communications sector. These decisions may be of particular relevance for NRAs with regard to the methodology applied by the Commission in defining the relevant market⁽⁵¹⁾. As stated above, however, in a sector characterised by constant innovation and rapid technological convergence, it is clear that any current market definition runs the risk of becoming inaccurate or irrelevant in the near future⁽⁵²⁾. Furthermore, markets defined under competition law are without prejudice to markets defined under the new regulatory framework as the context and the timeframe within which a market analysis is conducted may be different⁽⁵³⁾.
64. As stated in the Access notice, there are in the electronic communications sector at least two main types of relevant markets to consider, that of services provided to end users (services market) and that of access to facilities necessary to provide such services (access market)⁽⁵⁴⁾. Within these two broad market definitions further market distinctions may be made depending on demand and supply side patterns.
65. In particular, in its decision-making practice, the Commission will normally make a distinction between the provision of services and the provision of underlying network infrastructure. For instance, as regards the provision of infrastructure, the Commission has identified separate markets for the provision of local loop, long distance and international infrastructure⁽⁵⁵⁾. As regards fixed services, the Commission has distinguished between subscriber (retail) access to switched voice telephony services (local, long distance and international), operator (wholesale) access to networks (local, long distance and international) and business data communications services⁽⁵⁶⁾. In the market for fixed telephony retail services, the Commission has also distinguished between the initial connection and the monthly rental⁽⁵⁷⁾. Retail services are offered to two distinct classes of consumers, namely, residential and business users, the latter possibly being broken down further into a market for professional, small and medium sized business customers and another for large businesses⁽⁵⁸⁾. With regard to fixed telephony retail services offered to residential users, demand and supply patterns seem to indicate that two main types of services are currently being offered, traditional fixed telephony services (voice and narrowband data transmissions) on the one hand, and high speed communications services (currently in the form of xDSL services) on the other hand⁽⁵⁹⁾.
66. As regards the provision of mobile communications services, the Commission has found that, from a demand-side point of view, mobile telephony services and fixed telephony services constitute separate markets⁽⁶⁰⁾. Within the mobile market, evidence gathered from the Commission has indicated that the market for mobile communications services encompasses both GSM 900 and GSM 1800 and possibly analogue platforms⁽⁶¹⁾.
67. The Commission has found that with regard to the 'access' market, the latter comprises all types of infrastructure that can be used for the provision of a given service⁽⁶²⁾. Whether the market for network infrastructures should be divided into as many separate submarkets as there are existing categories of network infrastructure, depends clearly on the degree of substitutability among such (alternative) networks⁽⁶³⁾. This exercise should be carried out in relation to the class of users to which access to the network is provided. A distinction should, therefore, be made between provision of infrastructure to other operators (wholesale level) and provision to end users (retail level)⁽⁶⁴⁾. At the retail level, a further segmentation may take place between business and residential customers⁽⁶⁵⁾.
68. When the service to be provided concerns only end users subscribed to a particular network, access to the termination points of that network may well constitute the relevant product market. This will not be the case if it can be established that the same services may be offered to the same class of consumers by means of alternative, easily accessible competing networks. For example, in its Communication on unbundling the local loop⁽⁶⁶⁾, the Commission stated that although alternatives to the PSTN for providing high speed communications services to residential consumers exist (fibre optic networks, wireless local loops or upgradable TV networks), none of these alternatives may be considered as a substitute to the fixed local loop infrastructure⁽⁶⁷⁾. Future innovative and technological changes may, however, justify different conclusions⁽⁶⁸⁾.
69. Access to mobile networks may also be defined by reference to two potentially separate markets, one for call origination and another for call termination. In this respect, the question whether the access market to mobile infrastructure relates to access to an individual mobile network or to all mobile networks, in general, should be decided on the basis of an analysis of the structure and functioning of the market⁽⁶⁹⁾.

3. ASSESSING SIGNIFICANT MARKET POWER (DOMINANCE)

70. According to Article 14 of the framework Directive 'an undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the

power to behave to an appreciable extent independently of competitors customers and ultimately consumers'. This is the definition that the Court of Justice case-law ascribes to the concept of dominant position in Article 82 of the Treaty ⁽⁷⁰⁾. The new framework has aligned the definition of SMP with the Court's definition of dominance within the meaning of Article 82 of the Treaty ⁽⁷¹⁾. Consequently, in applying the new definition of SMP, NRAs will have to ensure that their decisions are in accordance with the Commission's practice and the relevant jurisprudence of the Court of Justice and the Court of First Instance on dominance ⁽⁷²⁾. However, the application of the new definition of SMP, *ex-ante*, calls for certain methodological adjustments to be made regarding the way market power is assessed. In particular, when assessing *ex-ante* whether one or more undertakings are in a dominant position in the relevant market, NRAs are, in principle, relying on different sets of assumptions and expectations than those relied upon by a competition authority applying Article 82, *ex post*, within a context of an alleged committed abuse ⁽⁷³⁾. Often, the lack of evidence or of records of past behaviour or conduct will mean that the market analysis will have to be based mainly on a prospective assessment. The accuracy of the market analysis carried out by NRAs will thus be conditioned by information and data existing at the time of the adoption of the relevant decision.

71. The fact that an NRA's initial market predictions do not finally materialise in a given case does not necessarily mean that its decision at the time of its adoption was inconsistent with the Directive. In applying *ex ante* the concept of dominance, NRAs must be accorded discretionary powers correlative to the complex character of the economic, factual and legal situations that will need to be assessed. In accordance with the framework Directive, market assessments by NRAs will have to be undertaken on a regular basis. In this context, therefore, NRAs will have the possibility to react at regular intervals to any market developments and to take any measure deemed necessary.

3.1. Criteria for assessing SMP

72. As the Court has stressed, a finding of a dominant position does not preclude some competition in the market. It only enables the undertaking that enjoys such a position, if not to determine, at least to have an appreciable effect on the conditions under which that competition will develop, and in any case to act in disregard of any such competitive constraint so long as such conduct does not operate to its detriment ⁽⁷⁴⁾.
73. In an *ex-post* analysis, a competition authority may be faced with a number of different examples of market behaviour each indicative of market power within the meaning of Article 82. However, in an *ex-ante* environment, market power is essentially measured by reference of the power of the undertaking concerned to raise prices by restricting output without incurring a significant loss of sales or revenues.
74. The market power of an undertaking can be constrained by the existence of potential competitors ⁽⁷⁵⁾. An NRA should thus take into account the likelihood that undertakings not currently active on the relevant product market may in the medium term decide to enter the market following a small but significant non-transitory price increase. Undertakings which, in case of such a price increase, are in a position to switch or extend their line of production/services and enter the market should be treated by NRAs as potential market participants even if they do not currently produce the relevant product or offer the relevant service.
75. As explained in the paragraphs below, a dominant position is found by reference to a number of criteria and its assessment is based, as stated above, on a forward-looking market analysis based on existing market conditions. Market shares are often used as a proxy for market power. Although a high market share alone is not sufficient to establish the possession of significant market power (dominance), it is unlikely that a firm without a significant share of the relevant market would be in a dominant position. Thus, undertakings with market shares of no more than 25 % are not likely to enjoy a (single) dominant position on the market concerned ⁽⁷⁶⁾. In the Commission's decision-making practice, single dominance concerns normally arise in the case of undertakings with market shares of over 40 %, although the Commission may in some cases have concerns about dominance even with lower market shares ⁽⁷⁷⁾, as dominance may occur without the existence of a large market share. According to established case-law, very large market shares — in excess of 50 % — are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position ⁽⁷⁸⁾. An undertaking with a large market share may be presumed to have SMP, that is, to be in a dominant position, if its market share has remained stable over time ⁽⁷⁹⁾. The fact that an undertaking with a significant position on the market is gradually losing market share may well indicate that the market is becoming more competitive, but it does not preclude a finding of significant market power. On the other hand, fluctuating market shares over time may be indicative of a lack of market power in the relevant market.
76. As regards the methods used for measuring market size and market shares, both volume sales and value sales provide useful information for market measurement ⁽⁸⁰⁾. In the case of bulk products preference is given to volume whereas in the case of differentiated products (i.e. branded products) sales in value and their associated market share will often be considered to reflect better the relative position and strength of each provider. In bidding markets the number of bids won and lost may also be used as approximation of market shares ⁽⁸¹⁾.

77. The criteria to be used to measure the market share of the undertaking(s) concerned will depend on the characteristics of the relevant market. It is for NRAs to decide which are the criteria most appropriate for measuring market presence. For instance, leased lines revenues, leased capacity or numbers of leased line termination points are possible criteria for measuring an undertaking's relative strength on leased lines markets. As the Commission has indicated, the mere number of leased line termination points does not take into account the different types of leased lines that are available on the market — ranging from analogue voice quality to high-speed digital leased lines, short distance to long distance international leased lines. Of the two criteria, leased lines revenues may be more transparent and less complicated to measure. Likewise, retail revenues, call minutes or numbers of fixed telephone lines or subscribers of public telephone network operators are possible criteria for measuring the market shares of undertakings operating in these markets⁽⁸²⁾. Where the market defined is that of interconnection, a more realistic measurement parameter would be the revenues accrued for terminating calls to customers on fixed or mobile networks. This is so because the use of revenues, rather than for example call minutes, takes account of the fact that call minutes can have different values (i.e. local, long distance and international) and provides a measure of market presence that reflects both the number of customers and network coverage⁽⁸³⁾. For the same reasons, the use of revenues for terminating calls to customers of mobile networks may be the most appropriate means to measure the market presence of mobile network operators⁽⁸⁴⁾.
78. It is important to stress that the existence of a dominant position cannot be established on the sole basis of large market shares. As mentioned above, the existence of high market shares simply means that the operator concerned might be in a dominant position. Therefore, NRAs should undertake a thorough and overall analysis of the economic characteristics of the relevant market before coming to a conclusion as to the existence of significant market power. In that regard, the following criteria can also be used to measure the power of an undertaking to behave to an appreciable extent independently of its competitors, customers and consumers. These criteria include amongst others:
- overall size of the undertaking,
 - control of infrastructure not easily duplicated,
 - technological advantages or superiority,
 - absence of or low countervailing buying power,
 - easy or privileged access to capital markets/financial resources,
 - product/services diversification (e.g. bundled products or services),
 - economies of scale,
 - economies of scope,
 - vertical integration,
 - a highly developed distribution and sales network,
 - absence of potential competition,
 - barriers to expansion.
79. A dominant position can derive from a combination of the above criteria, which taken separately may not necessarily be determinative.
80. A finding of dominance depends on an assessment of ease of market entry. In fact, the absence of barriers to entry deters, in principle, independent anti-competitive behaviour by an undertaking with a significant market share. In the electronic communications sector, barriers to entry are often high because of existing legislative and other regulatory requirements which may limit the number of available licences or the provision of certain services (i.e. GSM/DCS or 3G mobile services). Furthermore, barriers to entry exist where entry into the relevant market requires large investments and the programming of capacities over a long time in order to be profitable⁽⁸⁵⁾. However, high barriers to entry may become less relevant with regard to markets characterised by on-going technological progress. In electronic communications markets, competitive constraints may come from innovative threats from potential competitors that are not currently in the market. In such markets, the competitive assessment should be based on a prospective, forward-looking approach.
81. As regards the relevance of the notion of 'essential facilities' for the purposes of applying the new definition of SMP, there is for the moment no jurisprudence in relation to the electronic communications sector. However, this notion, which is mainly relevant with regard to the existence of an abuse of a dominant position under Article 82 of the EC Treaty, is less relevant with regard to the *ex-ante* assessment of SMP within the meaning of Article 14 of the framework Directive. In particular, the doctrine of 'essential facilities' is complementary to existing general obligations imposed on dominant undertaking, such as the obligation not to discriminate among customers and has been applied in cases under Article 82 in exceptional circumstances, such as where the refusal to supply or to grant access to third parties would limit or prevent the emergence of new markets, or new products, contrary to Article 82(b) of the Treaty. It has thus primarily been associated with

access issues or cases involving a refusal to supply or to deal under Article 82 of the Treaty, without the presence of any discriminatory treatment. Under existing case-law, a product or service cannot be considered 'necessary' or 'essential' unless there is no real or potential substitute. Whilst it is true that an undertaking which is in possession of an 'essential facility' is by definition in a dominant position on any market for that facility, the contrary is not always true. The fact that a given facility is not 'essential' or 'indispensable' for an economic activity on some distinct market, within the meaning of the existing case-law⁽⁸⁶⁾ does not mean that the owner of this facility might not be in a dominant position. For instance, a network operator can be in a dominant position despite the existence of alternative competing networks if the size or importance of its network affords him the possibility to behave independently from other network operators⁽⁸⁷⁾. In other words, what matters is to establish whether a given facility affords its owner significant market power in the market without thus being necessary to further establish that the said facility can also be considered 'essential' or 'indispensable' within the meaning of existing case-law.

82. It follows from the foregoing that the doctrine of the 'essential facilities' is less relevant for the purposes of applying *ex ante* Article 14 of the framework Directive than applying *ex-post* Article 82 of the EC Treaty.

3.1.1. Leverage of market power

83. According to Article 14(3) of the framework Directive, 'where an undertaking has significant market power on a specific market, it may also be deemed to have significant market power on a closely related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the undertaking'.

84. This provision is intended to address a market situation comparable to the one that gave rise to the Court's judgment in *Tetra Pak II*⁽⁸⁸⁾. In that case, the Court decided that an undertaking that had a dominant position in one market, and enjoyed a leading position on a distinct but closely associated market, was placed as a result in a situation comparable to that of holding a dominant position on the markets in question taken as a whole. Thanks to its dominant position on the first market, and its market presence on the associated, secondary market, an undertaking may thus leverage the market power which it enjoys in the first market and behave independently of its customers on the latter market⁽⁸⁹⁾. Although in *Tetra Pak* the markets taken as a

whole in which *Tetra Pak* was found to be dominant were horizontal, close associative links, within the meaning of the Court's case-law, will most often be found in vertically integrated markets. This is often the case in the telecommunications sector, where an operator often has a dominant position on the infrastructure market and a significant presence on the downstream, services market⁽⁹⁰⁾. Under such circumstances, an NRA may consider it appropriate to find that such operator has SMP on both markets taken together. However, in practice, if an undertaking has been designated as having SMP on an upstream wholesale or access market, NRAs will normally be in a position to prevent any likely spill-over or leverage effects downstream into the retail or services markets by imposing on that undertaking any of the obligations provided for in the access Directive which may be appropriate to avoid such effects. Therefore, it is only where the imposition of *ex-ante* obligations on an undertaking which is dominant in the (access) upstream market would not result in effective competition on the (retail) downstream market that NRAs should examine whether Article 14(3) may apply.

85. The foregoing considerations are also relevant in relation to horizontal markets⁽⁹¹⁾. Moreover, irrespective of whether the markets under consideration are vertical or horizontal, both markets should be electronic communications markets within the meaning of Article 2 of the framework Directive and both should display such characteristics as to justify the imposition of *ex-ante* regulatory obligations⁽⁹²⁾.

3.1.2. Collective dominance

86. Under Article 82 of the EC Treaty, a dominant position can be held by one or more undertakings ('collective dominance'). Article 14(2) of the framework Directive also provides that an undertaking may enjoy significant market power, that is, it may be in a dominant position, either individually or jointly with others.

87. In the Access notice, the Commission had stated that, although at the time both its own practice and the case-law of the Court were still developing, it would consider two or more undertakings to be in a collective dominant position when they had substantially the same position *vis-à-vis* their customers and competitors as a single company has if it is in a dominant position, provided that no effective competition existed between them. The lack of competition could be due, in practice, to the existence of certain links between those companies. The Commission had also stated, however, that the existence of such links was not a prerequisite for a finding of joint dominance⁽⁹³⁾.

88. Since the publication of the Access notice, the concept of collective dominance has been tested in a number of decisions taken by the Commission under Regulation No 17 and under the merger control Regulation. In addition, both the Court of First Instance (CFI) and the Court of Justice of the European Communities (ECJ) have given judgments which have contributed to further clarifying the exact scope of this concept.
- 3.1.2.1. The jurisprudence of the CFI/ECJ
89. The expression 'one or more undertakings' in Article 82 of the EC Treaty implies that a dominant position may be held by two or more economic entities which are legally and economically independent of each other⁽⁹⁴⁾.
90. Until the ruling of the ECJ in *Compagnie maritime belge*⁽⁹⁵⁾ and the ruling of the CFI in *Gencor*⁽⁹⁶⁾ (see below), it might have been argued that a finding of collective dominance was based on the existence of economic links, in the sense of structural links, or other factors which could give rise to a connection between the undertakings concerned⁽⁹⁷⁾. The question of whether collective dominance could also apply to an oligopolistic market, that is a market comprised of few sellers, in the absence of any kind of links among the undertakings present in such a market, was first raised in *Gencor*. The case concerned the legality of a decision adopted by the Commission under the merger control Regulation prohibiting the notified transaction on the grounds that it would lead to the creation of a duopoly market conducive to a situation of oligopolistic dominance⁽⁹⁸⁾. Before the CFI, the parties argued that the Commission had failed to prove the existence of 'links' between the members of the duopoly within the meaning of the existing case-law.
91. The CFI dismissed the application by stating, *inter alia*, that there was no legal precedent suggesting that the notion of 'economic links' was restricted to the notion of structural links between the undertakings concerned: According to the CFI, 'there is no reason whatsoever in legal or economic terms to exclude from the notion of economic links the relationship of interdependence existing between the parties to a tight oligopoly within which, in a market with the appropriate characteristics, in particular in terms of market concentration, transparency and product homogeneity, those parties are in a position to anticipate one another's behaviour and are therefore strongly encouraged to align their conduct in the market, in particular in such a way as to maximise their joint profits by restricting production with a view to increasing prices. In such a context, each trader is aware that highly competitive action on its part designed to increase its market share (for example a price cut) would provoke identical action by the others, so that it would derive no benefit from its initiative. All the traders would thus be affected by the reduction in price levels'⁽⁹⁹⁾. As the Court pointed out, market conditions may be such that 'each undertaking may become aware of common interests and, in particular, cause prices to increase without having to enter into an agreement or resort to concerted practice'⁽¹⁰⁰⁾.
92. The CFI's ruling in *Gencor* was later endorsed by the ECJ in *Compagnie maritime belge*, where the Court gave further guidance as to how the term of collective dominance should be understood and as to which conditions must be fulfilled before such finding can be made. According to the Court, in order to show that two or more undertakings hold a joint dominant position, it is necessary to consider whether the undertakings concerned together constitute a collective entity vis-à-vis their competitors, their trading partners and their consumers on a particular market⁽¹⁰¹⁾. This will be the case when (i) there is no effective competition among the undertakings in question; and (ii) the said undertakings adopt a uniform conduct or common policy in the relevant market⁽¹⁰²⁾. Only when that question is answered in the affirmative, is it appropriate to consider whether the collective entity actually holds a dominant position⁽¹⁰³⁾. In particular, it is necessary to ascertain whether economic links exist between the undertakings concerned which enable them to act independently of their competitors, customers and consumers. The Court recognised that an implemented agreement, decision or concerted practice (whether or not covered by an exemption under Article 81(3) of the Treaty) may undoubtedly result in the undertakings concerned being linked in a such way that their conduct on a particular market on which they are active results in them being perceived as a collective entity vis-à-vis their competitors, their trading partners and consumers⁽¹⁰⁴⁾.
93. The mere fact, however, that two or more undertakings are linked by an agreement, a decision of associations of undertakings or a concerted practice within the meaning of Article 81(1) of the Treaty does not, of itself, constitute a necessary basis for such a finding. As the Court stated, 'a finding of a collective dominant position may also be based on other connecting factors and would depend on an economic assessment and, in particular, on an assessment of the structure of the market in question'⁽¹⁰⁵⁾.
94. It follows from the *Gencor* and *Compagnie maritime belge* judgments that, although the existence of structural links can be relied upon to support a finding of a collective dominant position, such a finding can also be made in relation to an oligopolistic or highly concentrated market whose structure alone in particular, is conducive to coordinated effects on the relevant market⁽¹⁰⁶⁾.

3.1.2.2. The Commission's decision-making practice and Annex II of the framework Directive

95. In a number of decisions adopted under the merger control Regulation, the Commission considered the concept of collective dominance. It sought in those cases to ascertain whether the structure of the oligopolistic markets in question was conducive to coordinated effects on those markets ⁽¹⁰⁷⁾.
96. When assessing *ex-ante* the likely existence or emergence of a market which is or could become conducive to collective dominance in the form of tacit coordination, NRAs, should analyse:
- (a) whether the characteristics of the market makes it conducive to tacit coordination; and
- (b) whether such form of coordination is sustainable that is, (i) whether any of the oligopolists have the ability and incentive to deviate from the coordinated outcome, considering the ability and incentives of the non-deviators to retaliate; and (ii) whether buyers/fringe competitors/potential entrants have the ability and incentive to challenge any anti-competitive coordinated outcome ⁽¹⁰⁸⁾.
97. This analysis is facilitated by looking at a certain number of criteria which are summarised in Annex II of the framework Directive, which have also been used by the Commission in applying the notion of collective dominance under the merger control Regulation. According to this Annex, two or more undertakings can be found to be in a joint dominant position within the meaning of Article 14 if, even in the absence of structural or other links between them, they operate in a market, the structure of which is considered to be conducive to coordinated effects ⁽¹⁰⁹⁾. Without prejudice to the case-law of the Court of Justice on joint dominance, this is likely to be the case where the market satisfies a number of appropriate characteristics, in particular in terms of market concentration, transparency and other characteristics mentioned below:
- mature market,
 - stagnant or moderate growth on the demand side,
 - low elasticity of demand,
 - homogeneous product,
 - similar cost structures,
 - similar market shares,
 - lack of technical innovation, mature technology,
 - absence of excess capacity,
 - high barriers to entry,
 - lack of countervailing buying power,
 - lack of potential competition,
 - various kind of informal or other links between the undertakings concerned,
 - retaliatory mechanisms,
 - lack or reduced scope for price competition'.
98. Annex II of the framework Directive expressly states that the above is not an exhaustive list, nor are the criteria cumulative. Rather, the list is intended to illustrate the sorts of evidence that could be used to support assertions concerning the existence of a collective (oligopolistic) dominance in the form of tacit coordination ⁽¹¹⁰⁾. As stated above, the list also shows that the existence of structural links among the undertakings concerned is not a prerequisite for finding a collective dominant position. It is however clear that where such links exist, they can be relied upon to explain, together with any of the other abovementioned criteria, why in a given oligopolistic market coordinated effects are likely to arise. In the absence of such links, in order to establish whether a market is conducive to collective dominance in the form of tacit coordination, it is necessary to consider a number of characteristics of the market. While these characteristics are often presented in the form of the abovementioned list, it is necessary to examine all of them and to make an overall assessment rather than mechanically applying a 'check list'. Depending on the circumstances of the case, the fact that one or another of the structural elements usually associated with collective dominance may not be clearly established is not in itself decisive to exclude the likelihood of a coordinated outcome ⁽¹¹¹⁾.
99. In an oligopolistic market where most, if not all, of the abovementioned criteria are met, it should be examined whether, in particular, the market operators have a strong incentive to converge to a coordinated market outcome and refrain from reliance on competitive conduct. This will be the case where the long-term benefits of an anti-competitive conduct outweigh any short-term gains resulting from a resort to a competitive behaviour.
100. It must be stressed that a mere finding that a market is concentrated does not necessarily warrant a finding that its structure is conducive to collective dominance in the form of tacit coordination ⁽¹¹²⁾.

101. Ultimately, in applying the notion of collective dominance in the form of tacit coordination, the criteria which will carry the most sway will be those which are critical to a coordinated outcome in the specific market under consideration. For instance, in Case COMP/M.2499 — Norske Skog/Parenco/Walsum, the Commission came to the conclusion that even if the markets for newsprint and wood-containing magazine paper were concentrated, the products were homogeneous, demand was highly inelastic, buyer power was limited and barriers to entry were high, nonetheless the limited stability of market shares, the lack of symmetry in costs structures and namely, the lack of transparency of investments decisions and the absence of a credible retaliation mechanism rendered unlikely and unsustainable any possibility of tacit coordination among the oligopolists⁽¹¹³⁾.
- 3.1.2.3. Collective dominance and the telecommunications sector
102. In applying the notion of collective dominance, NRAs may also take into consideration decisions adopted under the merger control Regulation in the electronic communications sector, in which the Commission has examined whether any of the notified transactions could give rise to a finding of collective dominance.
103. In *MCI WorldCom/Sprint*, the Commission examined whether the merged entity together with Concert Alliance could be found to enjoy a collective dominant position on the market for global telecommunications services (GTS). Given that operators on that market competed on a bid basis where providers were selected essentially in the first instances of the bidding process on the basis of their ability to offer high quality, tailor-made sophisticated services, and not on the basis of prices, the Commission's investigation was focused on the incentives for market participants to engage in parallel behaviour as to who wins what bid (and who had won what bids)⁽¹¹⁴⁾. After having examined in depth the structure of the market (homogenous product, high barriers of entry, customers countervailing power, etc.) the Commission concluded that it was not able to show absence of competitive constraints from actual competitors, a key factor in examining whether parallel behaviour can be sustained, and thus decided not to pursue further its objections in relation to that market⁽¹¹⁵⁾.
104. In *BT/Esat*⁽¹¹⁶⁾, one of the issues examined by the Commission was whether market conditions in the Irish market for dial-up Internet access lent themselves to the emergence of a duopoly consisting of the incumbent operator, Eircom, and the merged entity. The Commission concluded that this was not the case for the following reasons. First, market shares were not stable; second, demand was doubling every six months; third, internet access products were not considered homogeneous; and finally, technological developments were one of the main characteristics of the market⁽¹¹⁷⁾.
105. In *Vodafone/Airtouch*⁽¹¹⁸⁾, the Commission found that the merged entity would have joint control of two of the four mobile operators present on the German mobile market (namely D2 and E-Plus, the other two being T-Mobil and VIAG Interkom). Given that entry into the market was highly regulated, in the sense that licences were limited by reference to the amount of available radio frequencies, and that market conditions were transparent, it could not be ruled out that such factors could lead to the emergence of a duopoly conducive to coordinated effects⁽¹¹⁹⁾.
106. In *France Telecom/Orange* the Commission found that, prior to the entry of Orange into the Belgian mobile market, the two existing players, Proximus and Mobistar, were in a position to exercise joint dominance. As the Commission noted, for the four years preceding Orange's entry, both operators had almost similar and transparent pricing, their prices following exactly the same trends⁽¹²⁰⁾. In the same decision the Commission further dismissed claims by third parties as to the risk of a collective dominant position of Vodafone and France Telecom in the market for the provision of pan-European mobile services to internationally mobile customers. Other than significant asymmetries between the market shares of the two operators, the market was considered to be emerging, characterised by an increasing demand and many types of different services on offer and on price⁽¹²¹⁾.
- 4. IMPOSITION, MAINTENANCE, AMENDMENT OR WITHDRAWAL OF OBLIGATIONS UNDER THE REGULATORY FRAMEWORK**
107. Section 3 of these guidelines dealt with the analysis of relevant markets that NRAs must carry out under Article 16 of the framework Directive to determine whether a market is effectively competitive, i.e. whether there are undertakings in that market who are in a dominant position. This section aims to provide guidance for NRAs on the action they should take following that analysis, i.e. the imposition, maintenance, amendment or withdrawal, as appropriate, of specific regulatory obligations on undertakings designated as having SMP. This section also describes the circumstances in which similar obligations than those that can be imposed on SMP operators may, exceptionally, be imposed on undertakings who have not been designated as having SMP.
108. The specific regulatory obligations which may be imposed on SMP undertakings can apply both to wholesale and retail markets. In principle, the obligations related to wholesale markets are set out in Articles 9 to 13 of the access Directive. The obligations related to retail markets are set out in Articles 17 to 19 of the universal service Directive.

109. The obligations set out in the access Directive are: transparency (Article 9); non-discrimination (Article 10); accounting separation (Article 11), obligations for access to and use of specific network facilities (Article 12), and price control and cost accounting obligations (Article 13). In addition, Article 8 of the access Directive provides that NRAs may impose obligations outside this list. In order to do so, they must submit a request to the Commission, which will take a decision, after seeking the advice of the Communications Committee, as to whether the NRA concerned is permitted to impose such obligations.
110. The obligations set out in the universal service Directive are: regulatory controls on retail services (Article 17), availability of the minimum set of leased lines (Article 18 and Annex VII) and carrier selection and preselection (Article 19).
111. Under the regulatory framework, these obligations should only be imposed on undertakings which have been designated as having SMP in a relevant market, except in certain defined cases, listed in Section 4.3.
- 4.1. Imposition, maintenance, amendment or withdrawal of obligations on SMP operators**
112. As explained in Section 1, the notion of effective competition means that there is no undertaking with dominance on the relevant market. In other words, a finding that a relevant market is effectively competitive is, in effect, a determination that there is neither single nor joint dominance on that market. Conversely, a finding that a relevant market is not effectively competitive is a determination that there is single or joint dominance on that market.
113. If an NRA finds that a relevant market is subject to effective competition, it is not allowed to impose obligations on any operator on that relevant market under Article 16. If the NRA has previously imposed regulatory obligations on undertaking(s) in that market, the NRA must withdraw such obligations and may not impose any new obligation on that undertaking(s). As stipulated in Article 16(3) of the framework Directive, where the NRA proposes to remove existing regulatory obligations, it must give parties affected a reasonable period of notice.
114. If an NRA finds that competition in the relevant market is not effective because of the existence of an undertaking or undertakings in a dominant position, it must designate in accordance with Article 16(4) of the framework Directive the undertaking or undertakings concerned as having SMP and impose appropriate regulatory obligations on the undertaking(s) concerned. However, merely designating an undertaking as having SMP on a given market, without imposing any appropriate regulatory obligations, is inconsistent with the provisions of the new regulatory framework, notably Article 16(4) of the framework Directive. In other words, NRAs must impose at least one regulatory obligation on an undertaking that has been designated as having SMP. Where an NRA determines the existence of more than one undertaking with dominance, i.e. that a joint dominant position exists, it should also determine the most appropriate regulatory obligations to be imposed, based on the principle of proportionality.
115. If an undertaking was previously subject to obligations under the 1998 regulatory framework, the NRA must consider whether similar obligations continue to be appropriate under the new regulatory framework, based on a new market analysis carried out in accordance with these guidelines. If the undertaking is found to have SMP in a relevant market under the new framework, regulatory obligations similar to those imposed under the 1998 regulatory framework may therefore be maintained. Alternatively, such obligations could be amended, or new obligations provided in the new framework might also be imposed, as the NRA considers appropriate.
116. Except where the Community's international commitments under international treaties prescribe the choice of regulatory obligation (see Section 4.4) or when the Directives prescribe particular remedies as under Article 18 and 19 of the universal service Directive, NRAs will have to choose between the range of regulatory obligations set out in the Directives in order to remedy a particular problem in a market found not to be effectively competitive. Where NRAs intend to impose other obligations for access and interconnection than those listed in the access Directive, they must submit a request for Commission approval of their proposed course of action. The Commission must seek the advice of the Communications Committee before taking its decision.
117. Community law, and in particular Article 8 of the framework Directive, requires NRAs to ensure that the measures they impose on SMP operators under Article 16 of the framework Directive are justified in relation to the objectives set out in Article 8 and are proportionate to the achievement of those objectives. Thus any obligation imposed by NRAs must be proportionate to the problem to be remedied. Article 7 of the framework Directive requires NRAs to set out the reasoning on which any proposed measure is based when they communicate that measure to other NRAs and to the Commission. Thus, in addition to the market analysis supporting the finding of SMP, NRAs need to include in their decisions a justification of the proposed measure in relation to the objectives of Article 8, as well as an explanation of why their decision should be considered proportionate.

118. Respect for the principle of proportionality will be a key criterion used by the Commission to assess measures proposed by NRAs under the procedure of Article 7 of framework Directive. The principle of proportionality is well-established in Community law. In essence, the principle of proportionality requires that the means used to attain a given end should be no more than what is appropriate and necessary to attain that end. In order to establish that a proposed measure is compatible with the principle of proportionality, the action to be taken must pursue a legitimate aim, and the means employed to achieve the aim must be both necessary and the least burdensome, i.e. it must be the minimum necessary to achieve the aim.
119. However, particularly in the early stages of implementation of the new framework, the Commission would not expect NRAs to withdraw existing regulatory obligations on SMP operators which have been designed to address legitimate regulatory needs which remain relevant, without presenting clear evidence that those obligations have achieved their purpose and are therefore no longer required since competition is deemed to be effective on the relevant market. Different remedies are available in the new regulatory framework to address different identified problems and remedies should be tailored to these specified problems.
120. The Commission, when consulted as provided for in Article 7(3) of the framework Directive, will also check that any proposed measure taken by the NRAs is in conformity with the regulatory framework as a whole, and will assess the impact of the proposed measure on the single market.
121. The Commission will assist NRAs to ensure that as far as possible they adopt consistent approaches in their choice of remedies where similar situations exist in different Member States. Moreover, as noted in Article 7(2) of the framework Directive, NRAs shall seek to agree on the types of remedies best suited to address particular situations in the marketplace.
- 4.2. Transnational markets: joint analysis by NRAs**
122. Article 15(4) of the framework Directive gives the Commission the power to issue a Decision identifying product and service markets that are transnational, covering the whole of the Community or a substantial part thereof. Under the terms of Article 16(5) of the framework Directive, the NRAs concerned must jointly conduct the market analysis and decide whether obligations need to be imposed. In practice, the European Regulators Group is expected to provide a suitable forum for such a joint analysis.
123. In general, joint analysis by NRAs would follow similar procedures (e.g. for public consultation) to those required when a single national regulatory authority is conducting a market analysis. Precise arrangements for collective analysis and decision-making will need to be drawn up.
- 4.3. Imposition of certain specific regulatory obligations on non-SMP operators**
124. The preceding parts of this section set out the procedures whereby certain specific obligations may be imposed on SMP undertakings, under Articles 7 and 8 of the access Directive and Article 16-19 of the universal service Directive. Exceptionally, similar obligations may be imposed on operators other than those that have been designated as having SMP, in the following cases, listed in Article 8(3) of the access Directive:
- obligations covering *inter alia* access to conditional access systems, obligations to interconnect to ensure end-to-end interoperability, and access to application program interfaces and electronic programme guides to ensure accessibility to specified digital TV and radio broadcasting services (Article 5(1), 5(2) and 6 of the access Directive),
 - obligations that NRAs may impose for co-location where rules relating to environmental protection, health, security or town and country planning deprive other undertakings of viable alternatives to co-location (Article 12 of the framework Directive),
 - obligations for accounting separation on undertakings providing electronic communications services who enjoy special or exclusive rights in other sectors (Article 13 of the framework Directive),
 - obligations relating to commitments made by an undertaking in the course of a competitive or comparative selection procedure for a right of use of radio frequency (Condition B7 of the Annex to the authorisation Directive, applied via Article 6(1) of that Directive),
 - obligations to handle calls to subscribers using specific numbering resources and obligations necessary for the implementation of number portability (Articles 27, 28 and 30 of the universal service Directive),
 - obligations based on the relevant provisions of the data protection Directive, and
 - obligations to be imposed on non-SMP operators in order to comply with the Community's international commitments.

4.4. Relationship to WTO commitments

125. The EC and its Member States have given commitments in the WTO in relation to undertakings that are 'major suppliers' of basic telecommunications services⁽¹²²⁾. Such undertakings are subject to all of the obligations set out in the EC's and its Member States' commitments in the WTO for basic telecommunications services. The provisions of the new regulatory framework, in particular relating to access and interconnection, ensure that NRAs continue to apply the relevant obligations to undertakings that are major suppliers in accordance with the WTO commitments of the EC and its Member States.

5. POWERS OF INVESTIGATION AND COOPERATION PROCEDURES FOR THE PURPOSE OF MARKET ANALYSIS

5.1. Overview

126. This section of the guidelines covers procedures in respect of an NRA's powers to obtain the information necessary to conduct a market analysis.

127. The regulatory framework contains provisions to enable NRAs to require undertakings that provide electronic communications networks and services to supply all the information, including confidential information, necessary for NRAs to assess the state of competition in the relevant markets and impose appropriate *ex-ante* obligations and thus to ensure compliance with the regulatory framework.

128. This section of the guidelines also includes guidance as to measures to ensure effective cooperation between NRAs and NCAs at national level, and among NRAs and between NRAs and the Commission at Community level. In particular this section deals with the exchange of information between those authorities.

129. Many electronic communication markets are fast-moving and their structures are changing rapidly. NRAs should ensure that the assessment of effective competition, the public consultation, and the designation of operators having SMP are all carried out within a reasonable period. Any unnecessary delay in the decision could have harmful effects on incentives for investment by undertakings in the relevant market and therefore on the interests of consumers.

5.2. Market analysis and powers of investigation

130. Under Article 16(1) of the framework Directive, NRAs must carry out an analysis of the relevant markets identified in the Recommendation and any Decision as soon as possible after their adoption or subsequent revision. The conclusions of the analysis of each of the relevant markets, together with the proposed regulatory action, must be published and a public consultation must be conducted, as described in Section 6.

131. In order to carry out their market analysis, NRAs will first need to collect all the information they consider necessary to assess market power in a given market. To the extent that such information needs to be obtained directly from undertakings, Article 11 of the authorisation Directive provides that undertakings are required by the terms of their general authorisation to supply the information necessary for NRAs to conduct a market analysis within the meaning of Article 16(2) of the framework Directive. This is reinforced by the more general obligation in Article 5(1) of the framework Directive which provides that Member States shall ensure that undertakings providing electronic communications networks and services provide all the information necessary for NRAs to ensure conformity with Community law.

132. When NRAs request information from an undertaking, they should state the reasons justifying the request and the time limit within which the information is to be provided. As provided for in Article 10(4) of the authorisation Directive, NRAs may be empowered to impose financial penalties on undertakings for failure to provide information.

133. In accordance with Article 5(4) of the framework Directive, NRAs must publish all information that would contribute to an open and competitive market, acting in accordance with national rules on public access to information and subject to Community and national rules on commercial confidentiality.

134. However, as regards information that is confidential in nature, the provisions of Article 5(3) of the framework Directive, require NRAs to ensure the confidentiality of such information in accordance with Community and national rules on business confidentiality. This confidentiality obligation applies equally to information that has been received in confidence from another public authority.

5.3. Cooperation procedures

Between NRAs and NCAs

135. Article 16(1) of the framework Directive requires NRAs to associate NCAs with the market analyses as appropriate. Member States should put in place the necessary procedures to guarantee that the analysis under Article 16 of the framework Directive is carried out effectively. As the NRAs conduct their market analyses in accordance with the methodologies of competition law, the views of NCAs in respect of the assessment of competition are highly relevant. Cooperation between NRAs and NCAs will be essential, but NRAs remain legally responsible for conducting the relevant analysis. Where under national law the tasks assigned under Article 16 of the framework Directive are carried out by two or more separate regulatory bodies, Member States should ensure clear division of tasks and set up procedures for consultation and cooperation between regulators in order to assure coherent analysis of the relevant markets.

136. Article 3(5) of the framework Directive requires NRAs and NCAs to provide each other with the information necessary for the application of the regulatory framework, and the receiving authority must ensure the same level of confidentiality as the originating authority. NCAs should therefore provide NRAs with all relevant information obtained using the former's investigatory and enforcement powers, including confidential information.

137. Information that is considered confidential by an NCA, in accordance with Community and national rules on business confidentiality, should only be exchanged with NRAs where such exchange is necessary for the application of the provisions of the regulatory framework. The information exchanged should be limited to that which is relevant and proportionate to the purpose of such exchange.

Between the Commission and NRAs

138. For the regulatory framework to operate efficiently and effectively, it is vital that there is a high level of cooperation between the Commission and the NRAs. It is particularly important that effective informal cooperation takes place. The European Regulators Group will be of great importance in providing a framework for such cooperation, as part of its task of assisting and advising the Commission. Cooperation is likely to be of mutual benefit, by minimising the likelihood of divergences in approach between different NRAs, in particular divergent remedies to deal with the same problem⁽¹²³⁾.

139. In accordance with Article 5(2) of the framework Directive, NRAs must supply the Commission with information necessary for it to carry out its tasks under the Treaty. This covers information relating to the regulatory framework (to be used in verifying compatibility of NRA action with the legislation), but also information that the Commission might require, for example, in considering compliance with WTO commitments.

140. NRAs must ensure that, where they submit information to the Commission which they have requested undertakings to provide, they inform those undertakings that they have submitted it to the Commission.

141. The Commission can also make such information available to another NRA, unless the original NRA has made an explicit and reasoned request to the contrary. Although there is no legal requirement to do so, the Commission will normally inform the undertaking which originally provided the information that it has been passed on to another NRA.

Between NRAs

142. It is of the utmost importance that NRAs develop a common regulatory approach across Member States that will contribute to the development of a true single market for electronic communications. To this end, NRAs are required under Article 7(2) of the framework Directive to cooperate with each other and with the Commission in a transparent manner to ensure the consistent application, in all Member States, of the new regulatory framework. The European Regulators' Group is expected to serve as an important forum for cooperation.

143. Article 5(2) of the framework Directive also foresees that NRAs will exchange information directly between each other, as long as there is a substantiated request. This will be particularly necessary where a transnational market needs to be analysed, but it will also be required within the framework of cooperation in the European Regulators' Group. In all exchanges of information, the NRAs are required to maintain the confidentiality of information received.

6. PROCEDURES FOR CONSULTATION AND PUBLICATION OF PROPOSED NRA DECISIONS

6.1. Public consultation mechanism

144. Except in the urgent cases as explained below, an NRA that intends to take a measure which would have a significant impact on the relevant market should give the interested parties the opportunity to comment on the draft measure. To this effect, the NRA must hold a public consultation on its proposed measure. Where the draft measure concerns a decision relating to an SMP designation or non-designation it should include the following:

- the market definition used and reasons therefor, with the exception of information that is confidential in accordance with European and national law on business confidentiality,
- evidence relating to the finding of dominance, with the exception of information that is confidential in accordance with European and national law on business confidentiality together with the identification of any undertakings proposed to be designated as having SMP,
- full details of the sector-specific obligations that the NRA proposes to impose, maintain, modify or withdraw on the abovementioned undertakings together with an assessment of the proportionality of that proposed measure.

145. The period of the consultation should be reasonable. However, NRAs' decisions should not be delayed excessively as this can impede the development of the market. For decisions related to the existence and designation of undertakings with SMP, the Commission considers that a period of two months would be reasonable for the public consultation. Different periods could be used in some cases if justified. Conversely, where a draft SMP decision is proposed on the basis of the results of an earlier consultation, the length of consultation period for these decisions may well be shorter than two months.

6.2. Mechanisms to consolidate the internal market for electronic communications

146. Where an NRA intends to take a measure which falls within the scope of the market definition or market analysis procedures of Articles 15 and 16 of the framework Directive, as well as when NRAs apply certain other specific Articles in the regulatory framework⁽¹²⁴⁾ and where the measures have an effect on trade between Member States, the NRAs must communicate the measures, together with their reasoning, to NRAs in other Member States and to the Commission in accordance with Article 7(3) of the framework Directive. It should do this at the same time as it begins its public consultation. The NRA must then give other NRAs and the Commission the chance to comment on the NRA's proposed measures, before adopting any final decision. The time available for other NRAs and the Commission to comment should be the same time period as that set by the NRA for its national public consultation, unless the latter is shorter than the minimum period of one month provided for in Article 7(3). The Commission may decide in justified circumstances to publish its comments.

147. With regard to measures that could affect trade between Member States, this should be understood as meaning measures that may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in a manner which might create a barrier to the single European market⁽¹²⁵⁾. Therefore, the notion of an effect on trade between Member States is likely to cover a broad range of measures.

148. NRAs must make public the results of the public consultation, except in the case of information that is confidential in accordance with Community and national law on business confidentiality.

149. With the exception of two specific cases, explained in the following paragraph, the NRA concerned may adopt the final measure after having taken account of views expressed during its mandatory consultation. The final measure must then be communicated to the Commission without delay.

6.3. Commission power to require the withdrawal of NRAs' draft measures

150. Under the terms of Article 7(4) of the framework Directive, there are two specific situations where the Commission has the possibility to require an NRA to withdraw a draft measure which falls within the scope of Article 7(3):

- the draft measure concerns the definition of a relevant market which differs from that identified in the Recommendation, or

- the draft measure concerns a decision as to whether to designate, or not to designate, an undertaking as having SMP, either individually or jointly with others.

151. In respect of the above two situations, where the Commission has indicated to the NRA in the course of the consultation process that it considers that the draft measure would create a barrier to the single European market or where the Commission has serious doubts as to the compatibility of the draft measure with Community law, the adoption of the measure must be delayed by a maximum of an additional two months.

152. During this two-month period, the Commission may, after consulting the Communications Committee following the advisory procedure⁽¹²⁶⁾, take a decision requiring the NRA to withdraw the draft measure. The Commission's decision will be accompanied by a detailed and objective analysis of why it considers that the draft measure should not be adopted together with specific proposals for amending the draft measure. If the Commission does not take a decision within that period, the draft measure may be adopted by the NRA.

6.4. Urgent cases

153. In exceptional circumstances, NRAs may act urgently in order to safeguard competition and protect the interest of users. An NRA may therefore, exceptionally, adopt proportionate and provisional measures without consulting either interested parties, the NRAs in other Member States, or the Commission. Where an NRA has taken such urgent action, it must, without delay, communicate these measures, with full reasons, to the Commission, and to the other NRAs. The Commission will verify the compatibility of those measures with Community law and in particular will assess their proportionality in relation to the policy objectives of Article 8 of the framework Directive.

154. If the NRA wishes to make the provisional measures permanent, or extends the time for which it is applicable, the NRA must go through the normal consultation procedure set out above. It is difficult to foresee any circumstances that would justify urgent action to define a market or designate an SMP operator, as such measure are not those that can be carried out immediately. The Commission therefore does not expect NRAs to use the exceptional procedures in such cases.

6.5. Adoption of the final decision

155. Once an NRA's decision has become final, NRAs should notify the Commission of the names of the undertakings that have been designated as having SMP and the obligations imposed on them, in accordance with the requirements of Article 36(2) of the universal service Directive and Articles 15(2) and 16(2) of the access Directive. The Commission will thereafter make this information available in a readily accessible form, and

will transmit the information to the Communications Committee as appropriate.

156. Likewise, NRAs should publish the names of undertakings that they have designated as having SMP and the obligations imposed on them. They should ensure that up-to-date information is made publicly available in a manner that guarantees all interested parties easy access to that information.

⁽¹⁾ OJ L 108, 24.4.2002, p. 33.

⁽²⁾ OJ L 108, 24.4.2002, p. 21.

⁽³⁾ OJ L 108, 24.4.2002, p. 7.

⁽⁴⁾ OJ L 108, 24.4.2002, p. 51.

⁽⁵⁾ To be adopted.

⁽⁶⁾ OJ L 24, 30.1.1998, p. 1.

⁽⁷⁾ Except where the new regulatory framework expressly permits obligations to be imposed independently of the competitive state of the market.

⁽⁸⁾ Article 14 of the framework Directive.

⁽⁹⁾ In addition, transnational markets whose characteristics may be such as to justify sector-specific regulation may be identified by the Commission in a Decision on transnational markets.

⁽¹⁰⁾ Recital 27 of the framework Directive.

⁽¹¹⁾ Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ L 395, 30.12.1989, p. 1), as last amended by Regulation (EC) No 1310/97 of 30 June 1997 (OJ L 180, 9.7.1997, p. 1) (hereafter the merger control Regulation).

⁽¹²⁾ Guidelines on the application of EEC competition rules in the telecommunications sector (OJ C 233, 6.9.1991, p. 2).

⁽¹³⁾ Commission notice on the definition of relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).

⁽¹⁴⁾ Notice on the application of the competition rules to access agreements in the telecommunications sector (OJ C 265, 22.8.1998, p. 2).

⁽¹⁵⁾ It is expected that effective cooperation between NRAs and NCAs would prevent the duplication of procedures concerning identical market issues.

⁽¹⁶⁾ Guidelines on the application of EEC competition rules in the telecommunications sector (OJ C 233, 6.9.1991, p. 2).

⁽¹⁷⁾ Article 14(2) of the framework Directive.

⁽¹⁸⁾ Case C-209/98, *Entreprenørforeningens Affalds* [2000] ECR I-3743, paragraph 57, and Case C-242/95 *GT-Link* [1997] ECR I-4449, paragraph 36. It should be recognised that the objective of market definition is not an end in itself, but part of a process, namely assessing the degree of a firm's market power.

⁽¹⁹⁾ See Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of open network provision (ONP) (OJ L 199, 26.7.1997, p. 32) (the interconnection Directive); Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (OJ L 192, 24.7.1990, p. 1) (the ONP framework Directive); Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines (OJ L 165, 19.6.1992, p. 27) (the leased lines Directive); Directive 95/62/EC of the European Parliament and of the Council of 13 December 1995 on the application of open network provision (ONP) to voice telephony (OJ L 321, 30.12.1995, p. 6), replaced by Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment (OJ L 101, 1.4.1998, p. 24) (the ONP voice telephony Directive).

⁽²⁰⁾ Joined Cases C-68/94 and C-30/95, *France and Others v Commission* [1998] ECR I-1375. See, also, Notice on market definition, at paragraph 12.

⁽²¹⁾ To the extent that the electronic communications sector is technology and innovation-driven, any previous market definition may not necessarily be relevant at a later point in time.

⁽²²⁾ Notice on market definition, paragraph 12.

⁽²³⁾ See, also, Notice on market definition, paragraphs 20-23, Case IV/M.1225 — *Enso/Stora*, (OJ L 254, 29.9.1999), paragraph 40.

⁽²⁴⁾ See Notice on market definition, paragraph 24. Distinguishing between supply-side substitution and potential competition in electronic communications markets may be more complicated than in other markets given the dynamic character of the former. What matters, however, is that potential entry from other suppliers is taken into consideration at some stage of the relevant market analysis, that is, either at the initial market definition stage or at the subsequent stage of the assessment of market power (SMP).

⁽²⁵⁾ It is not necessary that all consumers switch to a competing product; it suffices that enough or sufficient switching takes place so that a relative price increase is not profitable. This requirement corresponds to the principle of 'sufficient interchangeability' laid down in the case-law of the Court of Justice; see below, footnote 32.

- ⁽²⁶⁾ See, also, Access notice, paragraph 46, and Case T-83/91, *Tetra Pak v Commission*, [1994] ECR II-755, paragraph 68. This test is also known as 'SSNIP' (small but significant non transitory increase in price). Although the SSNIP test is but one example of methods used for defining the relevant market and notwithstanding its formal econometric nature, or its margins for errors (the so-called 'cellophane fallacy', see below), its importance lies primarily in its use as a conceptual tool for assessing evidence of competition between different products or services.
- ⁽²⁷⁾ See Notice on market definition, paragraphs 17-18.
- ⁽²⁸⁾ In other words, where the cross-price elasticity of demand between two products is high, one may conclude that consumers view these products as close substitutes. Where consumer choice is influenced by considerations other than price increases, the SSNIP test may not be an adequate measurement of product substitutability; see Case T-25/99, *Colin Arthur Roberts and Valerie Ann Roberts v Commission*, [2001] ECR II-1881.
- ⁽²⁹⁾ Within the context of market definition under Article 82 of the EC Treaty, a competition authority or a court would estimate the 'starting price' for applying the SSNIP on the basis of the price charged by the alleged monopolist. Likewise, under the prospective assessment of the effects which a merger may have on competition, the starting price would be based on the prevailing prices of the merging parties. However, where an NRA carries out a market analysis for the purposes of applying Article 14 of the framework Directive the service or product in question may be offered by several firms. In such a case, the starting price should be the industry 'average price'.
- ⁽³⁰⁾ It is worth noting that prices which result from price regulation which does not aim at ensuring that prices are cost-based, but rather at ensuring an affordable offer within the context of the provision of universal services, may not be presumed to be set at a competitive level, nor should they serve as a starting point for applying the SSNIP test.
- ⁽³¹⁾ Indeed, one of the drawbacks of the application of the SSNIP test is that in some cases, a high-demand cross-price elasticity may mean that a firm has already exercised market power, a situation known in competition law and practice as the 'cellophane fallacy'. In such cases, the prevailing price does not correspond to a competitive price. Determining whether the prevailing price is set above the competitive level is admittedly one of the most difficult aspects of the SSNIP test. NRAs faced with such difficulties could rely on other criteria for assessing demand and supply substitution such as functionality of services, technical characteristics, etc. Clearly, if evidence exist to show that in the past a firm has engaged in anti-competitive behaviour (price-fixing) or has enjoyed market power, then this may serve as an indication that its prices are not under competitive constraint and accordingly are set above the competitive level.
- ⁽³²⁾ Case C-333/94 P, *Tetra Pak v Commission* [1996] ECR I-5951, paragraph 13, Case 31/80 *L'Oréal* [1980] ECR 3775, paragraph 25, Case 322/81, *Michelin v Commission* [1983] ECR 3461, paragraph 37, Case C-62/86, *AkzoChemie v Commission* [1991] ECR I-3359, Case T-504/93, *Tiercé Ladbroke v Commission* [1997] ECR II-923, paragraph 81, T-65/96, *Kish Glass v Commission* [2000] ECR II-1885, paragraph 62, Case C-475/99, *Ambulanz Glöckner and Landkreis Südwestpfalz*, [2001] ECR I-0000, paragraph 33. The test of sufficient substitutability or interchangeability was first laid down by the Court of Justice in Case 6/72, *Europemballage and Continental Can v Commission*, [1973] ECR 215, paragraph 32 and Case 85/76, *Hoffmann La-Roche v Commission* [1979] ECR 461, paragraph 23.
- ⁽³³⁾ Case C-333/94 P, *Tetra Pak v Commission* [1996] ECR I-5951, paragraph 13, Case 66/86, *Ahmed Saeed* [1989] ECR 803, paragraphs 39 and 40, Case *United Brands v Commission* [1978] ECR 207, paragraphs 22 and 29, and 12; Case T-229/94, *Deutsche Bahn v Commission* [1997] ECR II-1689, paragraph 54. In *Tetra Pak*, the Court confirmed that the fact that demand for aseptic and non-aseptic cartons used for packaging fruit juice was marginal and stable over time relative to the demand for cartons used for packaging milk was evidence of a very little interchangeability between the milk and the non-milk packaging sector, *idem*, paragraphs 13 and 15.
- ⁽³⁴⁾ For example, in the case of a relative price increase, consumers of a lower quality/price service may switch to a higher quality/price service if the cost of doing so (the premium paid) is offset by the price increase. Conversely, consumers of a higher quality product may no longer accept a higher premium and switch to a lower quality service. In such cases, low and high quality products would appear to be effective substitutes.
- ⁽³⁵⁾ Communication from the Commission — Status of voice on the Internet under Community law, and in particular, under Directive 90/388/EEC — Supplement to the Communication by the Commission to the European Parliament and the Council on the status and implementation of Directive 90/388/EEC on competition in the markets for telecommunications services (OJ C 369, 22.12.2000, p. 3). Likewise, it cannot be excluded that in the future, xDSL technology and multipoint video distribution services based on wireless local loops may be used for the transmission of TV materials in direct competition with other existing TV delivery systems based on cable systems, direct-to-home satellite transmission and terrestrial analogue or digital transmission platforms.
- ⁽³⁶⁾ Switching costs which stem from strategic choices by undertakings rather than from exogenous factors should be considered, together with some other form of entry barriers, at the subsequent stage of SMP assessment. Where a market is still growing, total switching costs for already 'captured' consumers may not be significant and may not thus deter demand or supply-side substitution.
- ⁽³⁷⁾ The time frame to be used to assess the likely responses of other suppliers in case of a relative price increase will inevitably depend on the characteristics of each market and should be decided on a case-by-case basis.
- ⁽³⁸⁾ See, also, Case C-333/94, *Tetra Pak v Commission*, *op. cit.*, paragraph 19. As mentioned above, the required investments should also be undertaken within a reasonable time frame.
- ⁽³⁹⁾ See, also, Case COMP/M.2574 — *Pirelli/Edizione/Olivetti/Telecom Italia*, paragraph 58.
- ⁽⁴⁰⁾ *United Brands*, *op. cit.*, paragraph 44, *Michelin*, *op. cit.*, paragraph 26, Case 247/86 *Alsatel v Novasam* [1988] ECR 5987, paragraph 15; *Tiercé Ladbroke v Commission*, *op. cit.*, paragraph 102.
- ⁽⁴¹⁾ *Deutsche Bahn v Commission*, *op. cit.*, paragraph 92, Case T-139/98 *AAMS v Commission*, [2001] ECR 0000-II, paragraph 39.
- ⁽⁴²⁾ See, for instance, Case IV/M.1025 — *Mannesmann/Olivetti/Infostrada*, paragraph 17, and Case COMP/JV.23 — *Telefónica Portugal Telecom/Médi Telecom*.
- ⁽⁴³⁾ In practice, this area will correspond to the limits of the area in which an operator is authorised to operate. In Case COMP/M.1650 — *ACEA/Telefónica*, the Commission pointed out that since the notified joint venture would have a licence limited to the area of Rome, the geographical market could be defined as local; at paragraph 16.

- (44) The fact that mobile operators can provide services only in the areas where they have been authorised to and the fact that a network architecture reflects the geographical dimension of the mobile licences explains why mobile markets are considered to be national in scope. The extra connection and communications costs that consumers face when roaming abroad, coupled with the loss of certain additional service functionalities (i.e. lack of voice mail abroad) further supports this definition; see Case IV/M.1439 — Telia/Telenor, paragraph 124, Case IV/M.1430 — Vodafone/Airtouch, paragraphs 13-17, Case COMP/JV.17 — Mannesmann/Bell Atlantic/Omnitel, paragraph 15.
- (45) Physical interconnection agreements may also be taken into consideration for defining the geographical scope of the market, Case IV/M.570 — TBT/TeleDanmark/Telenor, paragraph 35.
- (46) Case IV/M.856 — British Telecom/MCI (II), paragraph 19s., Case IV/JV.15 — BT/AT & T, paragraph 84 and 92, Case COMP/M.2257 — France Telecom/Equant, paragraph 32, It is highly unlikely that the provision of electronic communications services could be segmented on the basis of national (or local) bilateral routes.
- (47) Reference may be made, for instance, to the market for backhaul capacity in international routes (i.e. cable station serving country A to country E) where a potential for substitution between cable stations serving different countries (i.e., cable stations connecting Country A to B, A to C and A to D) may exist where a supplier of backhaul capacity in relation to the route A to E is or would be constrained by the ability of consumers to switch to any of the other 'routes', also able to deal with traffic from or to country E.
- (48) Where a market is defined on the basis of a bilateral route, its geographical scope could be wider than national if suppliers are present in both ends of the market and can satisfy demand coming from both ends of the relevant route.
- (49) See Notice on market definition, paragraphs 57 and 58. For instance, chain substitutability could occur where an undertaking providing services at national level constrains the prices charged by undertakings providing services in separate geographical markets. This may be the case where the prices charged by undertakings providing cable networks in particular areas are constrained by a dominant undertaking operating nationally; see also, Case COMP/M.1628 — TotalFina/Elf (OJ L 143, 29.5.2001, p. 1), paragraph 188.
- (50) Evidence should show clear price interdependence at the extremes of the chain and the degree of substitutability between the relevant products or geographical areas should be sufficiently strong.
- (51) The Commission has, *inter alia*, made references in its decisions to the existence of the following markets: international voice-telephony services (Case IV/M.856 — British Telecommunications/MCI (II), OJ L 336, 8.12.1997), advanced telecommunications services to corporate users (Case IV/35.337, Atlas, OJ L 239, 19.9.1996, paragraphs 5-7, Case IV/35617, Phoenix/Global/One, OJ L 239, 19.9.1996, paragraph 6, Case IV/34.857, BT-MCI (I), OJ L 223, 27.8.1994), standardised low-level packet-switched data-communications services, resale of international transmission capacity (Case IV/M.975 — Albacom/BT/ENI, paragraph 24) audioconferencing (Albacom/BT/ENI, paragraph 17), satellite services (Case IV/350518 — Iridium, OJ L 16, 18.1.1997), (enhanced) global telecommunications services (Case IV/JV.15 — BT/AT & T, Case COMP/M.1741 — MCI WorldCom/Sprint, paragraph 84, Case COMP/M.2257 — France Telecom/Equant, paragraph 18), directory-assistance services (Case IV/M.2468 — SEAT Pagine Gialle/ENIRO, paragraph 19, Case COMP/M.1957 — VIAG Interkom/Telenor Media, paragraph 8), Internet-access services to end users (Case IV/M.1439 — Telia/Telenor, Case COMP/JV.46 — Blackstone/CDPQ/Kabel Nordrhein/Westfalen, paragraph 26, Case COMP/M.1838 — BT/Esat, paragraph 7), top-level or universal Internet connectivity (Case COMP/M.1741 — MCI WorldCom/Sprint, paragraph 52), seamless pan-European mobile telecommunications services to internationally mobile customers (Case COMP/M.1975 — Vodafone Airtouch/Mannesmann, Case COMP/M.2016 — France Telecom/Orange, paragraph 15), wholesale roaming services (Case COMP/M.1863 — Vodafone/Airtel, paragraph 17), and market for connectivity to the international signalling network (Case COMP/2598 — TDC/CMG/Migway JV, paragraphs 17-18).
- (52) See, also, Joined Cases T-125/97 and T-127/97, *The Coca-Cola Company and Others v Commission* [2000] ECR II-1733, at paragraphs 81 and 82.
- (53) See, also, Article 15 of the framework Directive.
- (54) Access notice, paragraph 45.
- (55) See Case COMP/M.1439 — Telia/Telenor.
- (56) See Telia/Telenor, BT/AT & T, France Télécom/Equant, *op. cit.* See also Commission Decision of 20 May 1999, *Cégétel + 4* (OJ L 218, 18.8.1999), paragraph 22. With regard to the emerging market for 'Global broadband data communications services — GBDS', the Commission has found that such services can be supported by three main network architectures: (i) terrestrial wireline systems; (ii) terrestrial wireless systems; and (iii) satellite-based systems, and that from a demand side, satellite-based GBDS can be considered as a separate market, Case COMP/M.1564 — Astrolink, paragraphs 20-23.
- (57) Directive 96/19/EC, recital 20 (OJ L 74, 22.3.1996, p. 13). See, also, communication from the Commission, 'Unbundled access to the local loop: enabling the competitive provision of a full range of electronic communication services, including broadband multimedia and high speed Internet' (OJ C 272, 23.9.2000, p. 55). Pursuant to point 3.2, 'While categories of services have to be monitored closely, particularly given the speed of technological change, and regularly reassessed on a case-by-case basis, these services are presently normally not substitutable for one another, and would therefore be considered as forming different relevant markets'.
- (58) The Commission has identified separate markets for services to large multinational corporations (MNCs) given the significant differences in the demand (and supply) of services to this group of customers compared to other retail (business) customers, see Case IV/JV.15 — BT/AT & T, Case COMP/M.1741 — MCI WorldCom/Sprint, Case COMP/M.2257 — France Télécom/Equant.
- (59) See communication on 'Unbundled access to the local loop', *op. cit.*, point 3.2. The market for 'high-speed' communications services could possibly be further divided into distinct segments depending on the nature of the services offered (i.e. Internet services, video-on-demand, etc.).
- (60) Case COMP/M.2574 — Pirelli/Edizione/Olivetti/Telecom Italia, paragraph 33. It could also be argued that dial-up access to the Internet via existing 2G mobile telephones is a separate market from dial-up access via the public switched telecommunications network. According to the Commission, accessing the Internet via a mobile phone is unlikely to be a substitute for existing methods of accessing the Internet via a PC due to difference in sizes of the screen and the format of the material that can be obtained through the different platforms; see Case COMP/M.1982 — Telia/Oracle/Drutt, paragraph 15, and Case COMP/JV.48 Vodafone/Vivendi/Canal+.

- ⁽⁶¹⁾ Case COMP/M.2469 — Vodafone/Airtel, paragraph 7, Case IV/M.1430 — Vodafone/Airtouch, Case IV/M.1669, Deutsche Telecom/One2One, paragraph 7. Whether this market can be further segmented into a carrier (network operator) market and a downstream service market should be decided on a case-by-case basis; see Case IV/M.1760 — Mannesmann/Orange, paragraphs 8-10, and Case COMP/M.2053 — Telenor/BellSouth/Sonofon, paragraphs 9-10.
- ⁽⁶²⁾ For instance, in British Interactive Broadcasting/Open, the Commission noted that for the provision of basic voice services to consumers, the relevant infrastructure market included not only the traditional copper network of BT but also the cable networks of the cable operators, which were capable of providing basic telephony services, and possibly wireless fixed networks, Case IV/36.359, (OJ L 312, 6.12.1999, paragraphs 33-38). In Case IV/M.1113 — Nortel/Norweb, the Commission recognised that electricity networks using 'digital power line' technology could provide an alternative to existing traditional local telecommunications access loop, paragraphs 28-29.
- ⁽⁶³⁾ In assessing the conditions of network competition in the Irish market that would ensue following full liberalisation, the Commission also relied on the existence of what, at that period of time, were perceived as potential alternative infrastructure providers, namely, cable TV and electricity networks, Telecom Eireann, cit., paragraph 30. The Commission left open the question whether the provision of transmission capacity by an undersea network infrastructure constitutes a distinct market from terrestrial or satellite transmissions networks, Case COMP/M.1926 — Telefonica/Tyco/JV, at paragraph 8.
- ⁽⁶⁴⁾ Case COMP/M.1439, Telia/Telenor, paragraph 79. For instance, an emerging pan-European market for wholesale access (SMS) to mobile infrastructure has been identified by the Commission in Case COMP/2598 — TDC/CMG/Migway JV, at paragraphs 28-29.
- ⁽⁶⁵⁾ In applying these criteria, the Commission has found that, as far as the fixed infrastructure is concerned, demand for the lease of transmission capacity and the provision of related services to other operators occurs at wholesale level (the market for carrier's carrier services; see Case IV/M.683 — GTS-Hermes Inc./HIT Rail BV, paragraph 14, Case IV/M.1069 — WorldCom/MCI (OJ L 116, 4.5.1999, p. 1), Unisource (OJ L 318, 20.11.1997, p. 1), Phoenix/Global One (OJ L 239, 19.9.1996, p. 57), Case IV/JV.2 — Enel/FT/DT. In Case COMP/M.1439 — Telia/Telenor, the Commission identified distinct patterns of demand for wholesale and retail (subscriber) access to network infrastructure (provision or access to the local loop, and provision or access to long distance and international network infrastructure), paragraphs 75-83.
- ⁽⁶⁶⁾ See footnote 58.
- ⁽⁶⁷⁾ Fibre optics are currently competitive only on upstream transmission markets whereas wireless local loops which are still to be deployed will target mainly professionals and individuals with particular communications needs. With the exception of certain national markets, existing cable TV networks need costly upgrades to support two ways broadband communications, and, compared with xDSL technologies, they do not offer a guaranteed bandwidth since customers share the same cable channel.
- ⁽⁶⁸⁾ See also Case IV/JV.11 — @Home Benelux BV.
- ⁽⁶⁹⁾ For example, if a fixed operator wants to terminate calls to the subscribers of a particular network, in principle, it will have no other choice but to call or interconnect with the network to which the called party has subscribed. For instance, in light of the 'calling party pays' principle, mobile operators have no incentives to compete on prices for terminating traffic to their own network. See also, OECD, 'Competition issues in telecommunications-background note for the secretariat', DAFFE/CLP/WP2(2001)3, and Commission's press release IP/02/483.
- ⁽⁷⁰⁾ Case 27/76 *United Brands v Commission* [1978] ECR 207.
- ⁽⁷¹⁾ See, also, recital 25 of the framework Directive.
- ⁽⁷²⁾ See Article 14, paragraph 2, and recital 28 of the framework Directive.
- ⁽⁷³⁾ It should be noted that NRAs do not have to find an abuse of a dominant position in order to designate an undertaking as having SMP.
- ⁽⁷⁴⁾ Case 85/76, *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 39. It should be stressed here that for the purposes of *ex-ante* regulation, if an undertaking has already been imposed regulatory obligations, the fact that competition may have been restored in the relevant market as a result precisely of the obligations thus imposed, this does not mean that that undertaking is no longer in a dominant position and that it should no longer continue being designated as having SMP.
- ⁽⁷⁵⁾ The absence of any substitutable service or product may justify a finding of a situation of economic dependence which is characteristic of the existence of a dominant position. See Commission decisions, *Decca Navigator System* (OJ L 43, 15.2.1987, p. 27) and *Magill TV Guide*: ITP, BBC, RTE (OJ L 78, 21.3.1989, p. 43). See also, Case 22/78 *Hugin v Commission* 1979 [ECR] 1869, Case 226/84, *British Leyland v Commission* 1986 [ECR] p. 3263.
- ⁽⁷⁶⁾ See, also, recital 15 of Council Regulation (EEC) No 4064/89.
- ⁽⁷⁷⁾ *United Brands v Commission*, op. cit. The greater the difference between the market share of the undertaking in question and that of its competitors, the more likely it will be that the said undertaking is in a dominant position. For instance, in Case COMP/M.1741 — MCI WorldCom/Sprint it was found that the merged entity would have in the market for the provision of top-level Internet connectivity an absolute combined market share of more than [35-45]%, several times larger than its closest competitor, enabling it to behave independently of its competitors and customers (see paragraphs 114, 123, 126, 146, 155 and 196).
- ⁽⁷⁸⁾ Case C-62/86, *AKZO v Commission*, [1991] ECR I-3359, paragraph 60; Case T-228/97, *Irish Sugar v Commission*, [1999] ECR II-2969, paragraph 70, Case *Hoffmann-La Roche v Commission*, op. cit, paragraph 41, Case T-139/98, *AAMS and Others v Commission* [2001 ECR II-0000, paragraph 51. However, large market shares can become accurate measurements only on the assumption that competitors are unable to expand their output by sufficient volume to meet the shifting demand resulting from a rival's price increase.

- ⁽⁷⁹⁾ Case *Hoffmann-La Roche v Commission*, op. cit., paragraph 41, Case C-62/86, *Akzo v Commission* [1991] ECR I-3359, paragraphs 56, 59. 'An undertaking which has a very large market share and holds it for some time, by means of the volume of production and the sale of the supply which it stands for — without holders of much smaller market shares being able to meet rapidly the demand from those who would like to break away from the undertaking which has largest market share — is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which, because of this alone, secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position', Case *AAMS and Others v Commission*, op. cit., paragraph 51.
- ⁽⁸⁰⁾ Notice on market definition, op. cit., at p. 5.
- ⁽⁸¹⁾ See Case COMP/M.1741 — MCI WorldCom/Sprint, paragraph 239-240. In bidding markets, however, it is important not to rely only on market shares as they in themselves may not be representative of the undertakings actual position, for further discussion, see, also, Case COMP/M.2201 — MAN/Aüwarter.
- ⁽⁸²⁾ See, Determination of organisations with significant power (SMP) for the implementation of the ONP Directive, DG XIII, 1 March 1999, at <http://europa.eu.int/ISPO/infosoc/telecompolicy/en/SMPdeter.pdf>, at paragraph 3.2.
- ⁽⁸³⁾ *Idem*, at paragraph 5.2.
- ⁽⁸⁴⁾ With regard to the interconnection market of fixed and mobile networks, the termination traffic to be measured should include own network traffic and interconnection traffic received from all other fixed and mobile networks, national or international.
- ⁽⁸⁵⁾ *Hoffmann-La Roche v Commission*, op. cit., at paragraph 48. One of the most important types of entry barriers is sunk costs. Sunk costs are particularly relevant to the electronic communications sector in view of the fact that large investments are necessary to create, for instance, an efficient electronic communications network for the provision of access services and it is likely that little could be recovered if a new entrant decides to exit the market. Entry barriers are exacerbated by further economies of scope and density which generally characterise such networks. Thus, a large network is always likely to have lower costs than a smaller one, with the result that an entrant in order to take a large share of the market and be able to compete would have to price below the incumbent, making it thus difficult to recover sunk costs.
- ⁽⁸⁶⁾ Joined Cases C-241/91 P and C-242/91 P, *RTE and ITP v Commission*, [1995] ECR I-743, Case C-7/97, *Oscar Bronner* [1998] ECR I-7791, and Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94, *European Night Services and others v Commission* [1998] ECR II-3141.
- ⁽⁸⁷⁾ Case COMP/M.1741 — MCI WorldCom/Sprint, paragraph 196.
- ⁽⁸⁸⁾ Case C-333/94 P, *Tetra Pak v Commission* [1996] ECR I-5951.
- ⁽⁸⁹⁾ See, also, Case COMP/M.2146 — Tetra Laval/Sidel, paragraphs 325-389, *sub judice*, T-5/02.
- ⁽⁹⁰⁾ See Access notice, paragraph 65.
- ⁽⁹¹⁾ In the case of horizontal markets, the market analysis should focus on establishing the existence of close associative links which will enable an undertaking dominant in one market to behave independently of its competitors in a neighbouring market. Such links may be found to exist by reference to the type of conduct of suppliers and users in the markets under consideration (same customers and/or suppliers in both markets, i.e. customers buying both retail voice calls and retail Internet access) or the fact that the input product or service is essentially the same (i.e. provision by a fixed operator of network infrastructure to ISPs for wholesale call origination and wholesale call termination); see, also, Case T-83/91, *Tetra Pak v Commission*, op. cit., paragraph 120 and Case COMP/M.2416 — *Tetra Laval/Sidel*.
- ⁽⁹²⁾ Article 14(3) of the framework Directive is not intended to apply in relation to market power leveraged from a 'regulated' market into an emerging, 'non-regulated' market. In such cases, any abusive conduct in the 'emerging' market would normally be dealt with under Article 82 of the EC Treaty.
- ⁽⁹³⁾ See Access notice, paragraph 79.
- ⁽⁹⁴⁾ Joined cases C-395/96 P and C-396/96 P, *Compagnie maritime belge and others v Commission* [2000] ECR I-1365.
- ⁽⁹⁵⁾ *Idem*, at paragraph 39.
- ⁽⁹⁶⁾ Case T102/96, *Gencor v Commission* [1999] ECR II-753.
- ⁽⁹⁷⁾ See Joined Cases T-68/89, T-77/89 and T-78/89, *SIV and Others v Commission* [1992] ECR II-1403, paragraph 358, Case C-393/92 *Almelo* [1994] ECR I-1477, paragraph 43, Case C-96/94, *Centro Servizi Speditoporto* [1995] ECR I-2883, paragraph 33, Joined Cases C-140/94, 141/94, and C-142/94, *DIP*, [1995] ECR I-3257, paragraph 62, Case C-70/95, *Sodemare* [1997] ECR I-3395, paragraph 46, and Joined Cases C-68/94 and C-30/95 *France and Others v Commission* [1998] ECR I-1375, paragraph 221.
- ⁽⁹⁸⁾ Case IV/M.619 — *Gencor Lonhro* (OJ L 11, 14.1.1997, p. 30).
- ⁽⁹⁹⁾ *Gencor v Commission*, op. cit., at paragraph 276.
- ⁽¹⁰⁰⁾ *Idem*, at paragraph 277.
- ⁽¹⁰¹⁾ *Compagnie maritime belge transports and Others*, op. cit., at paragraph 39, see, also, Case T-342/99 *Airtours/Commission* [2002] ECR II-0000, paragraph 76.
- ⁽¹⁰²⁾ See, in particular, *France and Others v Commission*, op. cit., paragraph 221.
- ⁽¹⁰³⁾ *Compagnie maritime belge*, at paragraph 39.
- ⁽¹⁰⁴⁾ *Idem* at paragraph 44.
- ⁽¹⁰⁵⁾ *Idem* at paragraph 45.
- ⁽¹⁰⁶⁾ The use here of the term 'coordinated effects' is no different from the term 'parallel anticompetitive behaviour' also used in Commission's decisions applying the concept of collective (oligopolistic) dominance.

- (107) See in particular, Cases COMP/M.2498 — UPM-Kymmene/Haindl, and COMP/M.2499 — Norske Skog/Parenco/Walsum, Case COMP/M.2201 — MAN/Auwärter, Case COMP/M.2097 — SCA/Matsä Tissue, Case COMP/M.1882 — Pirelli/BICC, Case COMP/M.1741 — MCI WorldCom/Sprint, *sub judice*, T-310/00 Case IV/M.1524 — Airtours/First Choice (OJ L 93, 13.4.2000, p. 1), *sub judice* T-342/99, Case IV/M.1383 — Exxon/Mobil, Case IV/M.1313 — Danish Crown/Vestjyske Slagterier (OJ L 20, 25.1.2000, p. 1), Case IV/M.1225 — Enso/Stora (OJ L 254, 29.9.1999, p. 9), Case IV/M.1016 — Price Waterhouse/Coopers & Lybrand (OJ L 50, 26.2.1999, p. 27), Case IV/M.619 — Gencor/Lonrho, *cit.*, Case IV/M.308, Kali + Salz/MdK/Treuhand (OJ L 186, 21.7.1994, p. 38) and Case IV/M.190 — Nestlé/Perrier (OJ L 356, 5.12.1992, p. 1).
- (108) This is in essence the type of analysis carried out by the Commission in past decisions related to collective dominance, see, for instance, Case IV/M.190 — Nestlé/Perrier, (OJ L 356, 5.12.1992, p. 1), Gencor/Lonrho, *cit.*, Case IV/M.1383 — Exxon/Mobil, paragraph 259, Case IV/M.1524 — Airtours/First Choice (OJ L 93, 13.4.2000, p. 1), and Case COMP/M.2499 — Norske Skog/Parenco/Walsum, paragraph 76; see, also, *Airtours v Commission*, *op. cit.*, paragraph 62.
- (109) See, also, recital 26 of the framework Directive: 'two or more undertakings can be found to enjoy a joint dominant position not only where there exist structural or other links between them but also where the structure of the relevant market is conducive to coordinated effects, that is, it encourages parallel or aligned anticompetitive behaviour on the market'.
- (110) See Case COMP/M.2498 — UPM-Kymmene/Haindl, and Case COMP/M.2499 — Norske Skog/Parenco/Walsum, at paragraph 77.
- (111) See, for instance, Case COMP/M.2097 — SCA/Metsä Tissue.
- (112) For instance, in Case COMP/M.2201 — MAN/Auwärter, despite the fact that two of the parties present in the German city-bus market in Germany, MAN/Auwärter and EvoBus, would each supply just under half of that market, the Commission concluded that there was no risk of joint dominance. In particular, the Commission found that any tacit division of the market between EvoBus and MAN/Auwärter was not likely as there would be no viable coordination mechanism. Secondly, significant disparities between EvoBus and MAN/Auwärter, such as different cost structures, would make it likely that the companies would compete rather than collude. Likewise, in the Alcoa/British Aluminium case, the Commission found that despite the fact that two of the parties present in the relevant market accounted for almost 80 % of the sales, the market could not be said to be conducive to oligopolistic dominance since (i) market shares were volatile and unstable; and (ii) demand was quite irregular making it difficult for the parties to be able to respond to each other's action in order to tacitly coordinate their behaviour. Furthermore, the market was not transparent in relation to prices and purchasers had significant countervailing power. The Commission's conclusions were further reinforced by the absence of any credible retaliation mechanism likely to sustain any tacit coordination and the fact that competition in the market was not only based on prices but depended to a large extent on technological innovation and after-sales follow-up, Case COMP/M.2111 — Alcoa/British Aluminium.
- (113) Likewise, in Case COMP/M.2348 — Outokumpu/Norzink, the Commission found that even if the zinc market was composed of few players, entry barriers were high and demand growth perspectives low, the likelihood of the emergence of a market structure conducive to coordinated outcome was unlikely if it could be shown that (i) parties could not manipulate the formation of prices; (ii) producers had asymmetric cost structures and there was no credible retaliation mechanism in place.
- (114) See Case COMP/M.1741 — MCI WorldCom/Sprint, paragraph 263.
- (115) *Idem*, paragraphs 257-302.
- (116) Case COMP/M.1838 — BT/Esat.
- (117) *Idem*, paragraphs 10 to 14.
- (118) Case IV/M.1430 — Vodafone/Airtouch.
- (119) *Idem*, at paragraph 28. The likely emergence of a duopolistic market concerned only the three largest mobile operators, that is D2 and E-Plus, on the one hand, and T-Mobil on the other hand, given that VIAG Interkom's market share was below 5 %. The Commission's concerns were finally removed after the parties proposed to divest Vodafone's entire stake in E-Plus.
- (120) Case COMP/M.2016 — France Telecom/Orange, at paragraph 26.
- (121) *Idem*, at paragraphs 39-40. In its working document 'On the initial findings of the sector inquiry into mobile roaming charges', the Commission made reference to (i) the likely existence of a number of economic links between mobile operators, namely through their interconnection agreements, their membership of the GSM Association, the WAP and the UMTS forum, the fact that terms and conditions of roaming agreements were almost standardised; and (ii) the likely existence of high barriers to entry. In its preliminary assessment the Commission also stressed that the fact that the mobile market is, in general, technology driven, did not seem to have affected the conditions of competition prevailing on the wholesale international roaming market, see: http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/roaming/, at pages. 24 and 25.
- (122) GATS commitments taken by EC on telecommunications: <http://gats-info.eu.int/gats-info/swtsovc.pl?SECCODE=02.C>.
- (123) The Communications Committee in Article 22 of the framework Directive also aims at ensuring effective cooperation between the Commission and the Member States.
- (124) The specific Articles covered are as follows: Articles 15 and 16 of the framework Directive (the latter of which refers to Articles 16-19 of the universal service Directive and Articles 7 and 8 of the access Directive), Articles 5 and 8 of the access Directive (the latter of which refers to the obligations provided for in Articles 9-13 of the access Directive) and Article 16 of the universal service Directive (which refers to Articles 17-19 of universal service Directive). In addition, Article 6 of the access Directive, although not explicitly referenced in Article 7 of the framework Directive, itself contains cross-reference to Article 7 of the framework Directive and is therefore covered by the procedures therein.
- (125) Recital 38 of the framework Directive.
- (126) As provided for in Article 3 of Council Decision 1999/468/EC laying the procedure for the exercising of implementing powers conferred on the Commission, the Commission shall take the utmost account of the opinion delivered by the Committee, but shall not be bound by the opinion.

**COMMISSION NOTICE on the definition of relevant market for the purposes of Community competition law
(97/C 372/03)**

(Text with EEA relevance)

I. INTRODUCTION

1. The purpose of this notice is to provide guidance as to how the Commission applies the concept of relevant product and geographic market in its ongoing enforcement of Community competition law, in particular the application of Council Regulation No 17 and (EEC) No 4064/89, their equivalents in other sectoral applications such as transport, coal and steel, and agriculture, and the relevant provisions of the EEA Agreement ⁽¹⁾. Throughout this notice, references to Articles 85 and 86 of the Treaty and to merger control are to be understood as referring to the equivalent provisions in the EEA Agreement and the ECSC Treaty.

2. Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved ⁽²⁾ face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure. It is from this perspective that the market definition makes it possible inter alia to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance or for the purposes of applying Article 85.

3. It follows from point 2 that the concept of 'relevant market' is different from other definitions of market often used in other contexts. For instance, companies often use the term 'market' to refer to the area where it sells its products or to refer broadly to the industry or sector where it belongs.

4. The definition of the relevant market in both its product and its geographic dimensions often has a decisive influence on the assessment of a competition case. By rendering public the procedures which the Commission follows when considering market definition and by indicating the criteria and evidence on which it relies to reach a decision, the Commission expects to increase the transparency of its policy and decision-making in the area of competition policy.

5. Increased transparency will also result in companies and their advisers being able to better anticipate the possibility that the Commission may raise competition concerns in an individual case. Companies could, therefore, take such a possibility into account in their own internal decision-making when contemplating, for instance, acquisitions, the creation of joint ventures, or the establishment of certain agreements. It is also intended that companies should be in a better position to understand what sort of information the Commission considers relevant for the purposes of market definition.

6. The Commission's interpretation of 'relevant market' is without prejudice to the interpretation which may be given by the Court of Justice or the Court of First Instance of the European Communities.

II. DEFINITION OF RELEVANT MARKET

Definition of relevant product market and relevant geographic market

7. The Regulations based on Article 85 and 86 of the Treaty, in particular in section 6 of Form A/B with respect to Regulation No 17, as well as in section 6 of Form CO with respect to Regulation (EEC) No 4064/89 on the control of concentrations having a Community dimension have laid down the following definitions, 'Relevant product markets' are defined as follows:

'A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'.

8. 'Relevant geographic markets' are defined as follows:

'The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas'.

9. The relevant market within which to assess a given competition issue is therefore established by the combination of the product and geographic markets. The Commission interprets the definitions in paragraphs 7 and 8 (which reflect the case-law of the Court of Justice and the Court of First Instance as well as its own decision-making practice) according to the orientations defined in this notice.

⁽¹⁾ The focus of assessment in State aid cases is the aid recipient and the industry/sector concerned rather than identification of competitive constraints faced by the aid recipient. When consideration of market power and therefore of the relevant market are raised in any particular case, elements of the approach outlined here might serve as a basis for the assessment of State aid cases.

⁽²⁾ For the purposes of this notice, the undertakings involved will be, in the case of a concentration, the parties to the concentration; in investigations within the meaning of Article 86 of the Treaty, the undertaking being investigated or the complainants; for investigations within the meaning of Article 85, the parties to the Agreement.

Concept of relevant market and objectives of Community competition policy

10. The concept of relevant market is closely related to the objectives pursued under Community competition policy. For example, under the Community's merger control, the objective in controlling structural changes in the supply of a product/service is to prevent the creation or reinforcement of a dominant position as a result of which effective competition would be significantly impeded in a substantial part of the common market. Under the Community's competition rules, a dominant position is such that a firm or group of firms would be in a position to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers⁽³⁾. Such a position would usually arise when a firm or group of firms accounted for a large share of the supply in any given market, provided that other factors analysed in the assessment (such as entry barriers, customers' capacity to react, etc.) point in the same direction.

11. The same approach is followed by the Commission in its application of Article 86 of the Treaty to firms that enjoy a single or collective dominant position. Within the meaning of Regulation No 17, the Commission has the power to investigate and bring to an end abuses of such a dominant position, which must also be defined by reference to the relevant market. Markets may also need to be defined in the application of Article 85 of the Treaty, in particular, in determining whether an appreciable restriction of competition exists or in establishing if the condition pursuant to Article 85 (3) (b) for an exemption from the application of Article 85 (1) is met.

12. The criteria for defining the relevant market are applied generally for the analysis of certain types of behaviour in the market and for the analysis of structural changes in the supply of products. This methodology, though, might lead to different results depending on the nature of the competition issue being examined. For instance, the scope of the geographic market might be different when analysing a concentration, where the analysis is essentially prospective, from an analysis of past behaviour. The different time horizon considered in each case might lead to the result that different geographic markets are defined for the same products depending on whether the Commission is examining a change in the structure of supply, such as a concentration or a cooperative joint venture, or examining issues relating to certain past behaviour.

Basic principles for market definition

Competitive constraints

13. Firms are subject to three main sources or competitive constraints: demand substitutability, supply substitutability and potential competition. From an economic point of view, for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions. A firm or a group of firms cannot have a significant impact on the prevailing conditions of sale, such as prices, if its customers are in a position to switch easily to available substitute products or to suppliers located elsewhere. Basically, the exercise of market definition consists in identifying the effective alternative sources of supply for the customers of the undertakings involved, in terms both of products/services and of geographic location of suppliers.

14. The competitive constraints arising from supply side substitutability other than those described in paragraphs 20 to 23 and from potential competition are in general less immediate and in any case require an analysis of additional factors. As a result such constraints are taken into account at the assessment stage of competition analysis.

Demand substitution

15. The assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer. One way of making this determination can be viewed as a speculative experiment, postulating a hypothetical small, lasting change in relative prices and evaluating the likely reactions of customers to that increase. The exercise of market definition focuses on prices for operational and practical purposes, and more precisely on demand substitution arising from small, permanent changes in relative prices. This concept can provide clear indications as to the evidence that is relevant in defining markets.

16. Conceptually, this approach means that, starting from the type of products that the undertakings involved sell and the area in which they sell them, additional products and areas will be included in, or excluded from, the market definition depending on whether competition from these other products and areas affect or restrain sufficiently the pricing of the parties' products in the short term.

17. The question to be answered is whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range 5 % to 10 %) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market. This would be done until the set of products and geographical areas is such that small, permanent increases in relative prices would be profitable. The equivalent analysis is applicable in cases concerning the concentration of buying power, where the starting point would then be the supplier and the price test serves to identify the alternative distribution channels or outlets for the supplier's products. In the application of these principles, careful account should be taken of certain particular situations as described within paragraphs 56 and 58.

⁽³⁾ Definition given by the Court of Justice in its judgment of 13 February 1979 in Case 85/76, Hoffmann-La Roche [1979] ECR 461, and confirmed in subsequent judgments.

18. A practical example of this test can be provided by its application to a merger of, for instance, soft-drink bottlers. An issue to examine in such a case would be to decide whether different flavours of soft drinks belong to the same market. In practice, the question to address would be whether consumers of flavour A would switch to other flavours when confronted with a permanent price increase of 5 % to 10 % for flavour A. If a sufficient number of consumers would switch to, say, flavour B, to such an extent that the price increase for flavour A would not be profitable owing to the resulting loss of sales, then the market would comprise at least flavours A and B. The process would have to be extended in addition to other available flavours until a set of products is identified for which a price rise would not induce a sufficient substitution in demand.

19. Generally, and in particular for the analysis of merger cases, the price to take into account will be the prevailing market price. This may not be the case where the prevailing price has been determined in the absence of sufficient competition. In particular for the investigation of abuses of dominant positions, the fact that the prevailing price might already have been substantially increased will be taken into account.

Supply substitution

20. Supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This means that suppliers are able to switch production to the relevant products and market them in the short term ⁽⁴⁾ without incurring significant additional costs or risks in response to small and permanent changes in relative prices. When these conditions are met, the additional production that is put on the market will have a disciplinary effect on the competitive behaviour of the companies involved. Such an impact in terms of effectiveness and immediacy is equivalent to the demand substitution effect.

21. These situations typically arise when companies market a wide range of qualities or grades of one product; even if, for a given final customer or group of consumers, the different qualities are not substitutable, the different qualities will be grouped into one product market, provided that most of the suppliers are able to offer and sell the various qualities immediately and without the significant increases in costs described above. In such cases, the relevant product market will encompass all products that are substitutable in demand and supply, and the current sales of those products will be aggregated so as to give the total value or volume of the market. The same reasoning may lead to group different geographic areas.

22. A practical example of the approach to supply-side substitutability when defining product markets is to be found in the case of paper. Paper is usually supplied in a range of different qualities, from standard writing paper to high quality papers to be used, for instance, to publish art books. From a demand point of view, different qualities of paper cannot be used for any given use, i.e. an art book or a high quality publication cannot be based on lower quality papers. However, paper plants are prepared to manufacture the different qualities, and production can be adjusted with negligible costs and in a short time-frame. In the absence of particular difficulties in distribution, paper manufacturers are able therefore, to compete for orders of the various qualities, in particular if orders are placed with sufficient lead time to allow for modification of production plans. Under such circumstances, the Commission would not define a separate market for each quality of paper and its respective use. The various qualities of paper are included in the relevant market, and their sales added up to estimate total market value and volume.

23. When supply-side substitutability would entail the need to adjust significantly existing tangible and intangible assets, additional investments, strategic decisions or time delays, it will not be considered at the stage of market definition. Examples where supply-side substitution did not induce the Commission to enlarge the market are offered in the area of consumer products, in particular for branded beverages. Although bottling plants may in principle bottle different beverages, there are costs and lead times involved (in terms of advertising, product testing and distribution) before the products can actually be sold. In these cases, the effects of supply-side substitutability and other forms of potential competition would then be examined at a later stage.

Potential competition

24. The third source of competitive constraint, potential competition, is not taken into account when defining markets, since the conditions under which potential competition will actually represent an effective competitive constraint depend on the analysis of specific factors and circumstances related to the conditions of entry. If required, this analysis is only carried out at a subsequent stage, in general once the position of the companies involved in the relevant market has already been ascertained, and when such position gives rise to concerns from a competition point of view.

III. EVIDENCE RELIED ON TO DEFINE RELEVANT MARKETS

The process of defining the relevant market in practice

Product dimension

25. There is a range of evidence permitting an assessment of the extent to which substitution would take place. In individual cases, certain types of evidence will be determinant, depending very much on the characteristics and specificity of the industry and products or services that are being examined. The same type of evidence may be of no importance in

⁽⁴⁾ That is such a period that does not entail a significant adjustment of existing tangible and intangible assets (see paragraph 23).

other cases. In most cases, a decision will have to be based on the consideration of a number of criteria and different items of evidence. The Commission follows an open approach to empirical evidence, aimed at making an effective use of all available information which may be relevant in individual cases. The Commission does not follow a rigid hierarchy of different sources of information or types of evidence.

26. The process of defining relevant markets may be summarized as follows: on the basis of the preliminary information available or information submitted by the undertakings involved, the Commission will usually be in a position to broadly establish the possible relevant markets within which, for instance, a concentration or a restriction of competition has to be assessed. In general, and for all practical purposes when handling individual cases, the question will usually be to decide on a few alternative possible relevant markets. For instance, with respect to the product market, the issue will often be to establish whether product A and product B belong or do not belong to the same product market. It is often the case that the inclusion of product B would be enough to remove any competition concerns.

27. In such situations it is not necessary to consider whether the market includes additional products, or to reach a definitive conclusion on the precise product market. If under the conceivable alternative market definitions the operation in question does not raise competition concerns, the question of market definition will be left open, reducing thereby the burden on companies to supply information.

Geographic dimension

28. The Commission's approach to geographic market definition might be summarized as follows: it will take a preliminary view of the scope of the geographic market on the basis of broad indications as to the distribution of market shares between the parties and their competitors, as well as a preliminary analysis of pricing and price differences at national and Community or EEA level. This initial view is used basically as a working hypothesis to focus the Commission's enquiries for the purposes of arriving at a precise geographic market definition.

29. The reasons behind any particular configuration of prices and market shares need to be explored. Companies might enjoy high market shares in their domestic markets just because of the weight of the past, and conversely, a homogeneous presence of companies throughout the EEA might be consistent with national or regional geographic markets. The initial working hypothesis will therefore be checked against an analysis of demand characteristics (importance of national or local preferences, current patterns of purchases of customers, product differentiation/brands, other) in order to establish whether companies in different areas do indeed constitute a real alternative source of supply for consumers. The theoretical experiment is again based on substitution arising from changes in relative prices, and the question to answer is again whether the customers of the parties would switch their orders to companies located elsewhere in the short term and at a negligible cost.

30. If necessary, a further check on supply factors will be carried out to ensure that those companies located in differing areas do not face impediments in developing their sales on competitive terms throughout the whole geographic market. This analysis will include an examination of requirements for a local presence in order to sell in that area the conditions of access to distribution channels, costs associated with setting up a distribution network, and the presence or absence of regulatory barriers arising from public procurement, price regulations, quotas and tariffs limiting trade or production, technical standards, monopolies, freedom of establishment, requirements for administrative authorizations, packaging regulations, etc. In short, the Commission will identify possible obstacles and barriers isolating companies located in a given area from the competitive pressure of companies located outside that area, so as to determine the precise degree of market interpenetration at national, European or global level.

31. The actual pattern and evolution of trade flows offers useful supplementary indications as to the economic importance of each demand or supply factor mentioned above, and the extent to which they may or may not constitute actual barriers creating different geographic markets. The analysis of trade flows will generally address the question of transport costs and the extent to which these may hinder trade between different areas, having regard to plant location, costs of production and relative price levels.

Market integration in the Community

32. Finally, the Commission also takes into account the continuing process of market integration, in particular in the Community, when defining geographic markets, especially in the area of concentrations and structural joint ventures. The measures adopted and implemented in the internal market programme to remove barriers to trade and further integrate the Community markets cannot be ignored when assessing the effects on competition of a concentration or a structural joint venture. A situation where national markets have been artificially isolated from each other because of the existence of legislative barriers that have now been removed will generally lead to a cautious assessment of past evidence regarding prices, market shares or trade patterns. A process of market integration that would, in the short term, lead to wider geographic markets may therefore be taken into consideration when defining the geographic market for the purposes of assessing concentrations and joint ventures.

The process of gathering evidence

33. When a precise market definition is deemed necessary, the Commission will often contact the main customers and the main companies in the industry to enquire into their views about the boundaries of product and geographic markets and to obtain the necessary factual evidence to reach a conclusion. The Commission might also contact the relevant professional associations, and companies active in upstream markets, so as to be able to define, in so far as necessary, separate product and geographic markets, for different levels of production or distribution of the products/services in question. It might also request additional information to the undertakings involved.

34. Where appropriate, the Commission will address written requests for information to the market players mentioned above. These requests will usually include questions relating to the perceptions of companies about reactions to hypothetical price increases and their views of the boundaries of the relevant market. They will also ask for provision of the factual information the Commission deems necessary to reach a conclusion on the extent of the relevant market. The Commission might also discuss with marketing directors or other officers of those companies to gain a better understanding on how negotiations between suppliers and customers take place and better understand issues relating to the definition of the relevant market. Where appropriate, they might also carry out visits or inspections to the premises of the parties, their customers and/or their competitors, in order to better understand how products are manufactured and sold.

35. The type of evidence relevant to reach a conclusion as to the product market can be categorized as follows:

Evidence to define markets - product dimension

36. An analysis of the product characteristics and its intended use allows the Commission, as a first step, to limit the field of investigation of possible substitutes. However, product characteristics and intended use are insufficient to show whether two products are demand substitutes. Functional interchangeability or similarity in characteristics may not, in themselves, provide sufficient criteria, because the responsiveness of customers to relative price changes may be determined by other considerations as well. For example, there may be different competitive constraints in the original equipment market for car components and in spare parts, thereby leading to a separate delineation of two relevant markets. Conversely, differences in product characteristics are not in themselves sufficient to exclude demand substitutability, since this will depend to a large extent on how customers value different characteristics.

37. The type of evidence the Commission considers relevant to assess whether two products are demand substitutes can be categorized as follows:

38. Evidence of substitution in the recent past. In certain cases, it is possible to analyse evidence relating to recent past events or shocks in the market that offer actual examples of substitution between two products. When available, this sort of information will normally be fundamental for market definition. If there have been changes in relative prices in the past (all else being equal), the reactions in terms of quantities demanded will be determinant in establishing substitutability. Launches of new products in the past can also offer useful information, when it is possible to precisely analyse which products have lost sales to the new product.

39. There are a number of quantitative tests that have specifically been designed for the purpose of delineating markets. These tests consist of various econometric and statistical approaches estimates of elasticities and cross-price elasticities⁽⁵⁾ for the demand of a product, tests based on similarity of price movements over time, the analysis of causality between price series and similarity of price levels and/or their convergence. The Commission takes into account the available quantitative evidence capable of withstanding rigorous scrutiny for the purposes of establishing patterns of substitution in the past.

40. Views of customers and competitors. The Commission often contacts the main customers and competitors of the companies involved in its enquiries, to gather their views on the boundaries of the product market as well as most of the factual information it requires to reach a conclusion on the scope of the market. Reasoned answers of customers and competitors as to what would happen if relative prices for the candidate products were to increase in the candidate geographic area by a small amount (for instance of 5 % to 10 %) are taken into account when they are sufficiently backed by factual evidence.

41. Consumer preferences. In the case of consumer goods, it may be difficult for the Commission to gather the direct views of end consumers about substitute products. Marketing studies that companies have commissioned in the past and that are used by companies in their own decision-making as to pricing of their products and/or marketing actions may provide useful information for the Commission's delineation of the relevant market. Consumer surveys on usage patterns and attitudes, data from consumer's purchasing patterns, the views expressed by retailers and more generally, market research studies submitted by the parties and their competitors are taken into account to establish whether an economically significant proportion of consumers consider two products as substitutable, also taking into account the importance of brands for the products in question. The methodology followed in consumer surveys carried out ad hoc by the undertakings involved or their competitors for the purposes of a merger procedure or a procedure pursuant to Regulation No 17 will usually be scrutinized with utmost care. Unlike pre-existing studies, they have not been prepared in the normal course of business for the adoption of business decisions.

42. Barriers and costs associated with switching demand to potential substitutes. There are a number of barriers and costs that might prevent the Commission from considering two prima facie demand substitutes as belonging to one single product market. It is not possible to provide an exhaustive list of all the possible barriers to substitution and of switching costs. These barriers or obstacles might have a wide range of origins, and in its decisions, the Commission has been confronted with regulatory barriers or other forms of State intervention, constraints arising in downstream markets, need to incur specific capital investment or loss in current output in order to switch to alternative inputs, the location of customers, specific investment in production process, learning and human capital investment, retooling costs or other investments, uncertainty about quality and reputation of unknown suppliers, and others.

⁽⁵⁾ Own-price elasticity of demand for product X is a measure of the responsiveness of demand for X to percentage change in its own price. Cross-price elasticity between products X and Y is the responsiveness of demand for product X to percentage change in the price of product Y.

43. Different categories of customers and price discrimination. The extent of the product market might be narrowed in the presence of distinct groups of customers. A distinct group of customers for the relevant product may constitute a narrower, distinct market when such a group could be subject to price discrimination. This will usually be the case when two conditions are met: (a) it is possible to identify clearly which group an individual customer belongs to at the moment of selling the relevant products to him, and (b) trade among customers or arbitrage by third parties should not be feasible.

Evidence for defining markets - geographic dimension

44. The type of evidence the Commission considers relevant to reach a conclusion as to the geographic market can be categorized as follows:

45. Past evidence of diversion of orders to other areas. In certain cases, evidence on changes in prices between different areas and consequent reactions by customers might be available. Generally, the same quantitative tests used for product market definition might as well be used in geographic market definition, bearing in mind that international comparisons of prices might be more complex due to a number of factors such as exchange rate movements, taxation and product differentiation.

46. Basic demand characteristics. The nature of demand for the relevant product may in itself determine the scope of the geographical market. Factors such as national preferences or preferences for national brands, language, culture and life style, and the need for a local presence have a strong potential to limit the geographic scope of competition.

47. Views of customers and competitors. Where appropriate, the Commission will contact the main customers and competitors of the parties in its enquiries, to gather their views on the boundaries of the geographic market as well as most of the factual information it requires to reach a conclusion on the scope of the market when they are sufficiently backed by factual evidence.

48. Current geographic pattern of purchases. An examination of the customers' current geographic pattern of purchases provides useful evidence as to the possible scope of the geographic market. When customers purchase from companies located anywhere in the Community or the EEA on similar terms, or they procure their supplies through effective tendering procedures in which companies from anywhere in the Community or the EEA submit bids, usually the geographic market will be considered to be Community-wide.

49. Trade flows/pattern of shipments. When the number of customers is so large that it is not possible to obtain through them a clear picture of geographic purchasing patterns, information on trade flows might be used alternatively, provided that the trade statistics are available with a sufficient degree of detail for the relevant products. Trade flows, and above all, the rationale behind trade flows provide useful insights and information for the purpose of establishing the scope of the geographic market but are not in themselves conclusive.

50. Barriers and switching costs associated to divert orders to companies located in other areas. The absence of trans-border purchases or trade flows, for instance, does not necessarily mean that the market is at most national in scope. Still, barriers isolating the national market have to be identified before it is concluded that the relevant geographic market in such a case is national. Perhaps the clearest obstacle for a customer to divert its orders to other areas is the impact of transport costs and transport restrictions arising from legislation or from the nature of the relevant products. The impact of transport costs will usually limit the scope of the geographic market for bulky, low-value products, bearing in mind that a transport disadvantage might also be compensated by a comparative advantage in other costs (labour costs or raw materials). Access to distribution in a given area, regulatory barriers still existing in certain sectors, quotas and custom tariffs might also constitute barriers isolating a geographic area from the competitive pressure of companies located outside that area. Significant switching costs in procuring supplies from companies located in other countries constitute additional sources of such barriers.

51. On the basis of the evidence gathered, the Commission will then define a geographic market that could range from a local dimension to a global one, and there are examples of both local and global markets in past decisions of the Commission.

52. The paragraphs above describe the different factors which might be relevant to define markets. This does not imply that in each individual case it will be necessary to obtain evidence and assess each of these factors. Often in practice the evidence provided by a subset of these factors will be sufficient to reach a conclusion, as shown in the past decisional practice of the Commission.

IV. CALCULATION OF MARKET SHARE

53. The definition of the relevant market in both its product and geographic dimensions allows the identification of the suppliers and the customers/consumers active on that market. On that basis, a total market size and market shares for each supplier can be calculated on the basis of their sales of the relevant products in the relevant area. In practice, the total market size and market shares are often available from market sources, i.e. companies' estimates, studies commissioned from industry consultants and/or trade associations. When this is not the case, or when available estimates are not reliable, the Commission will usually ask each supplier in the relevant market to provide its own sales in order to calculate total market size and market shares.

54. If sales are usually the reference to calculate market shares, there are nevertheless other indications that, depending on the specific products or industry in question, can offer useful information such as, in particular, capacity, the number of players in bidding markets, units of fleet as in aerospace, or the reserves held in the case of sectors such as mining.

55. As a rule of thumb, both volume sales and value sales provide useful information. In cases of differentiated products, sales in value and their associated market share will usually be considered to better reflect the relative position and strength of each supplier.

V. ADDITIONAL CONSIDERATIONS

56. There are certain areas where the application of the principles above has to be undertaken with care. This is the case when considering primary and secondary markets, in particular, when the behaviour of undertakings at a point in time has to be analysed pursuant to Article 86. The method of defining markets in these cases is the same, i.e. assessing the responses of customers based on their purchasing decisions to relative price changes, but taking into account as well, constraints on substitution imposed by conditions in the connected markets. A narrow definition of market for secondary products, for instance, spare parts, may result when compatibility with the primary product is important. Problems of finding compatible secondary products together with the existence of high prices and a long lifetime of the primary products may render relative price increases of secondary products profitable. A different market definition may result if significant substitution between secondary products is possible or if the characteristics of the primary products make quick and direct consumer responses to relative price increases of the secondary products feasible.

57. In certain cases, the existence of chains of substitution might lead to the definition of a relevant market where products or areas at the extreme of the market are not directly substitutable. An example might be provided by the geographic dimension of a product with significant transport costs. In such cases, deliveries from a given plant are limited to a certain area around each plant by the impact of transport costs. In principle, such an area could constitute the relevant geographic market. However, if the distribution of plants is such that there are considerable overlaps between the areas around different plants, it is possible that the pricing of those products will be constrained by a chain substitution effect, and lead to the definition of a broader geographic market. The same reasoning may apply if product B is a demand substitute for products A and C. Even if products A and C are not direct demand substitutes, they might be found to be in the same relevant product market since their respective pricing might be constrained by substitution to B.

58. From a practical perspective, the concept of chains of substitution has to be corroborated by actual evidence, for instance related to price interdependence at the extremes of the chains of substitution, in order to lead to an extension of the relevant market in an individual case. Price levels at the extremes of the chains would have to be of the same magnitude as well.

RECOMMENDATIONS

COMMISSION

COMMISSION RECOMMENDATION

of 15 October 2008

on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services

(notified under document number C(2008) 5925)

(Text with EEA relevance)

(2008/850/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ⁽¹⁾, and in particular Article 19(1) thereof,

Whereas:

- (1) Under the regulatory framework for electronic communications networks and services, national regulatory authorities are obliged to contribute to the development of the internal market by cooperating with each other and with the Commission in a transparent manner in order to ensure the development of consistent regulatory practice and the consistent application of the directives making up the regulatory framework.
- (2) To ensure that decisions taken at national level do not have an adverse effect on the single market or on the objectives pursued by the regulatory framework, national regulatory authorities must notify the Commission and other national regulatory authorities of those draft measures stipulated in Article 7(3) of Directive 2002/21/EC.
- (3) As an additional requirement, national regulatory authorities must obtain Commission authorisation for

obligations covered by the second subparagraph of Article 8(3) of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities ⁽²⁾, which is a separate process.

- (4) The Commission will give national regulatory authorities, if they so request, the opportunity to discuss any draft measures, before formal notification of such measures under Article 7 of Directive 2002/21/EC and Article 8(3) of Directive 2002/19/EC. Where, pursuant to Article 7(4) of Directive 2002/21/EC, the Commission has indicated to the national regulatory authority that it considers that the draft measure would create a barrier to the single market or where it has serious doubts as to its compatibility with Community law, the national regulatory authority concerned should be given an early opportunity to express its views regarding the issues raised by the Commission.
- (5) Directive 2002/21/EC lays down certain binding time limits for the consideration of notifications under Article 7.
- (6) To ensure the effectiveness of cooperation and the consultation mechanism set out in Article 7 of Directive 2002/21/EC and to guarantee legal certainty, clear rules dealing with the main procedural aspects of the notifications made under Article 7 were put in place by Commission Recommendation 2003/561/EC of 23 July 2003 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC

⁽¹⁾ OJ L 108, 24.4.2002, p. 33.

⁽²⁾ OJ L 108, 24.4.2002, p. 7.

of the European parliament and of the Council on a common regulatory framework for electronic communications networks and services⁽¹⁾. Recommendation 2003/561/EC should be replaced by this Recommendation with a view to further simplifying and improving the notification process.

- (7) To give further guidance to national regulatory authorities on the content of draft measures and to increase legal certainty on the completeness of a notification, certain minimum information should be provided on what a draft measure should contain in order to be properly assessed.
- (8) Account has to be taken of the need to ensure effective assessment, on the one hand, and to simplify administration as far as possible, on the other hand. In this respect, the notification mechanism should not involve any unnecessary administrative burden on the national regulatory authorities. It would also be beneficial to clarify procedural arrangements in the context of the second subparagraph of Article 8(3) of Directive 2002/19/EC.
- (9) To help simplify the examination of a notified draft measure and to make the process quicker, national regulatory authorities should use standard formats for notifications.
- (10) In order to improve the efficiency of the notification mechanism, to increase legal certainty for national regulatory authorities and market players and to ensure timely implementation of regulatory measures, it is desirable that a notification by a national regulatory authority covering a market analysis also includes the remedies proposed by the national regulatory authority to address the market failures identified. Where the draft measure relates to a market which is found to be competitive and remedies already exist in relation to that market, the notification should also include the proposals for withdrawing those obligations.
- (11) In general, a short notification form should be used for certain categories of draft measures in order to reduce the administrative burden on national regulatory authorities and the Commission. However, notification of these categories by way of the standard notification procedure remains possible.
- (12) Where a national regulatory authority intends to withdraw regulatory obligations in relation to markets not included in Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services⁽²⁾, notification of such a draft measure under Article 7 of Directive 2002/21/EC should be made by means of the short notification form.
- (13) Where a national regulatory authority carries out a review of a market that has been found to be effectively competitive in a previous review and finds once more that this market is effectively competitive, the notification should be made by means of the short notification form.
- (14) National regulatory authorities frequently amend technical details of the remedies imposed to take account of changes in economic indicators (such as equipment, labour, inflation, cost of capital, property rental rates, etc.), or to update forecasts or assumptions. Changes or updates of details which do not change the nature or the general scope of remedies (e.g. extension of reporting obligations, details of required insurance coverage, amounts of penalties, or delivery times) should be notified by means of the short notification form. Only material changes to the nature or scope of the remedies that have an appreciable impact on the market (such as price levels, amendments to the methodologies used to calculate costs or prices, determination of glide paths) should be notified by the standard notification procedure.
- (15) With regard to certain markets (in particular, voice call termination markets), national regulatory authorities may come to the same conclusion as in a previous review and wish to impose remedies on further operators (e.g. new entrants) with a similar customer base or total turnover to operators covered by a previous review which do not materially differ from draft measures already notified. The short notification form should be used for these draft measures.
- (16) A draft measure notified by means of a short notification form will in principle not give rise to comments by the Commission to the national regulatory authority in accordance with Article 7(3) of Directive 2002/21/EC.
- (17) In order to increase transparency on a notified draft measure and to facilitate the exchange of information about such measures between national regulatory authorities both the standard and the short notification forms should contain a summarised description of the main elements of the notified draft measure.

⁽¹⁾ OJ L 190, 30.7.2003, p. 13.

⁽²⁾ OJ L 344, 28.12.2007, p. 65.

(18) The European Regulators Group for Electronic Communications Networks and Services established by Commission Decision 2002/627/EC⁽¹⁾ has recognised the need for these arrangements.

(19) To meet the objectives laid down in Article 8 of Directive 2002/21/EC, in particular the need to ensure consistent regulatory practices and consistent application of that Directive, full compliance with the notification mechanism laid down in Article 7 is essential.

(20) The Communications Committee has delivered its opinion in accordance with Article 22(2) of Directive 2002/21/EC,

HEREBY RECOMMENDS:

1. Terms defined in Directive 2002/21/EC and the specific directives have the same meaning when used in this Recommendation. In addition:

(a) 'recommendation on relevant markets' means Recommendation 2007/879/EC and any subsequent Recommendation on relevant markets;

(b) 'notification' means the notification to the Commission by a national regulatory authority of a draft measure pursuant to Article 7(3) of Directive 2002/21/EC or a request pursuant to the second subparagraph of Article 8(3) of Directive 2002/19/EC, accompanied by the standard notification form or short notification form as provided in this Recommendation (Annex I and Annex II).

2. Notifications should be made by electronic mail with a request for acknowledgement of receipt.

Documents sent by electronic mail will be presumed to have been received by the addressee on the day on which they were sent.

Notifications will be registered in the order in which they are received.

3. Notifications will become effective on the date on which the Commission registers them (date of registration). The date of registration will be the date on which a complete notification is received by the Commission.

Notice will be given on the Commission's website and by electronic means to all national regulatory authorities of the

date of registration of the notification, the subject matter of the notification and any supporting documentation received.

4. Notifications should be in any of the official languages of the Community. The standard notification form (Annex I) or the short notification form (Annex II) may be in an official language other than that of the draft measure in order to facilitate consultation by all other national regulatory authorities.

Any comments made or decisions adopted by the Commission pursuant to Article 7 of Directive 2002/21/EC will be in the language of the notified draft measure, translated where possible into the language used on the standard notification form.

5. Draft measures notified by a national regulatory authority should be accompanied by the documentation needed for the Commission to carry out its tasks. For those draft measures that fall under point 6 below and are notified by means of the short notification form, the Commission does not need in principle any additional documentation to carry out its tasks.

Draft measures should be duly substantiated.

6. The following draft measures should be made available to the Commission by means of the short notification form contained in Annex II:

(a) draft measures concerning markets which have been removed from or have not been previously listed in the Recommendation on relevant markets, either where the market is found to be competitive by the national regulatory authority, or where the national regulatory authority considers that the three cumulative criteria referred to in point 2 of the Recommendation on relevant markets for identifying markets that are susceptible to *ex ante* regulation are no longer met;

(b) draft measures concerning markets which, while included in the Recommendation on relevant markets in force, had been found to be competitive in a previous market review, and remain competitive;

(c) draft measures that change the technical details of previously imposed regulatory remedies and do not have an appreciable impact on the market (e.g. annual updates of costs and estimates of accounting models, reporting times, delivery times); and

⁽¹⁾ OJ L 200, 30.7.2002, p. 38.

- (d) draft measures concerning a relevant market that has already been analysed and notified in relation to other undertakings, where the national regulatory authorities imposes similar remedies on other undertakings, without materially changing the principles applied in the previous notification.
7. The Commission, in close cooperation with the national regulatory authorities, will monitor the practical consequences of the short notification procedure with a view to make any further adjustments as may be necessary or add other categories of draft measures that should be notified using the short notification form.
8. Draft measures not falling under point 6 should be made available to the Commission by means of the standard notification form set out in Annex I. The draft measures notified should include each of the following where applicable:
- (a) the relevant product or service market, in particular, a description of the products and services to be included in and excluded from the relevant market on the basis of demand-side and supply-side substitutability;
 - (b) the relevant geographic market, including a reasoned analysis of the competitive conditions on the basis of demand-side and supply-side substitutability;
 - (c) the main undertakings active on the relevant market;
 - (d) the results of the analysis of the relevant market, in particular the findings as to the presence or absence of effective competition, together with the reasons therefore. For these purposes, the draft measure should contain an analysis of the market shares of the different undertakings and a reference to other relevant criteria, as appropriate, such as barriers to entry, economies of scale and scope, vertical integration, control of infrastructure not easily duplicated, technological advantages or superiority, absence of or low countervailing buying power, easy or privileged access to capital markets/financial resources, overall size of the undertaking, product/services diversification, highly developed distribution and sales network, absence of potential competition and barriers to expansion;
 - (e) where appropriate, the undertakings to be designated as having, individually or jointly, significant market power within the meaning of Article 14 of Directive 2002/21/EC and the reasoning, evidence and any other relevant factual information in support of such designation;
- (f) the results of the prior public consultation carried out by the national regulatory authority;
 - (g) the opinion issued by the national competition authority, where provided;
 - (h) evidence that, at the time of notification to the Commission, appropriate steps had been taken to notify the draft measures to the national regulatory authorities in all other Member States;
 - (i) in the case of notification of draft measures which fall within the scope of Articles 5 or 8 of Directive 2002/19/EC or Article 16 of Directive 2002/22/EC of the European Parliament and of the Council ⁽¹⁾, the specific regulatory obligations proposed to address the lack of effective competition in the relevant market concerned or, in cases where a relevant market is found to be effectively competitive and such obligations have already been imposed in respect of that market, the draft measures proposed to withdraw those obligations.
9. Where, for the purposes of the market analysis, a draft measure defines a relevant market which differs from those in the Recommendation on relevant markets, national regulatory authorities should provide sufficient reasoning of the criteria used for such a market definition.
10. Notifications made in accordance with the second subparagraph of Article 8(3) of Directive 2002/19/EC should also contain adequate reasoning as to why obligations other than those listed in Articles 9 to 13 of the Directive should be imposed on operators with significant market power.
11. Notifications falling within the scope of Article 8(5) of Directive 2002/19/EC should also contain adequate reasoning as to why the intended draft measures are required to comply with international commitments.
12. Notifications made by means of the standard notification procedure that include the applicable information within the meaning of point 8 will be presumed to be complete. Where the information, including documents, contained in the notification is incomplete in any material respect, the Commission will inform the national regulatory authority concerned within five working days and specify to what extent it considers the notification to be incomplete. The notification will not be registered until the national regulatory authority concerned has provided the requisite information. In such cases, for the purposes of Article 7 of Directive 2002/21/EC, the notification will become effective on the date on which the Commission receives the complete information.

⁽¹⁾ OJ L 108, 24.4.2002, p. 51.

13. Without prejudice to point 8 above, following registration of a notification, the Commission, acting in accordance with Article 5(2) of Directive 2002/21/EC, may seek further information or clarification from the national regulatory authority concerned. National regulatory authorities should endeavour to provide the information requested within three working days, where this is readily available.
 14. The Commission will verify whether or not the draft measure made available by means of a short notification form falls within the categories listed under point 6. Where the Commission considers this not to be the case, it will inform the national regulatory authority concerned within five working days and ask the notifying regulatory authority to submit the draft measure by means of the standard notification procedure.
 15. Where the Commission makes comments in accordance with Article 7(3) of Directive 2002/21/EC, it will notify the national regulatory authority concerned by electronic means and publish such comments on its website.
 16. Where a national regulatory authority makes comments in accordance with Article 7(3) of Directive 2002/21/EC, it shall communicate those comments to the Commission and the other national regulatory authorities by electronic means.
 17. Where, in application of Article 7(4) of Directive 2002/21/EC, the Commission considers that a draft measure would create a barrier to the single market or it has serious doubts as to its compatibility with Community law and in particular the objectives referred to in Article 8 of Directive 2002/21/EC; or it subsequently withdraws its objections, or takes a decision requiring a national regulatory authority to withdraw a draft measure, it will notify the national regulatory authority concerned by electronic means and post a notice on its website.
 18. With regard to notifications made pursuant to the second subparagraph of Article 8(3) of Directive 2002/19/EC, the Commission, acting in accordance with Article 14(2) of that directive, will normally take a decision authorising or preventing the national regulatory authority from adopting the proposed draft measure within a period not exceeding three months. The Commission may decide to extend this period for a further two months in view of the difficulties raised.
 19. A national regulatory authority may decide at any time to withdraw the notified draft measure, in which case the notified measure will be removed from the register. The Commission will publish a notice to that effect on its website.
 20. Where a national regulatory authority adopts the draft measure after receiving comments from the Commission or another national regulatory authority made in accordance with Article 7(3) of Directive 2002/21/EC, it shall communicate to the Commission and other national regulatory authorities of the manner in which it took the utmost account of the comments made.
 21. When requested by a national regulatory authority, the Commission will informally discuss a draft measure prior to notification.
 22. In accordance with Regulation (EEC, Euratom) No 1182/71 of the Council⁽¹⁾, any period of time referred to in Directive 2002/21/EC or in this Recommendation will be calculated as follows:
 - (a) where a period expressed in days, weeks or months is to be calculated from the moment at which an event occurs, the day during which that event occurs shall not be counted as falling within the period in question;
 - (b) a period expressed in weeks or in months shall end with the expiry of whichever day in the last week or month is the same day of the week or falls on the same date as the day during which the event from which the period is to be calculated occurred. Where, in a period expressed in months the day on which it should expire does not occur in the last month, the period shall end with the expiry of the last day of that month;
 - (c) time periods shall include official holidays, Saturdays and Sundays.
 - (d) working days mean all days other than official and/or public holidays, Saturdays and Sundays.
- Should a time period end on a Saturday, Sunday or an official holiday, it shall be extended until the end of the first following working day. The list of official holidays as determined by the Commission is published in the *Official Journal of the European Union* before the beginning of each year.

⁽¹⁾ OJ L 124, 8.6.1971, p. 1.

23. The Commission, together with the national regulatory authorities, will evaluate the necessity of reviewing this Recommendation as appropriate after the date established in the review of the regulatory framework for the transposition by the Member States into national law.
24. This Recommendation is addressed to the Member States.

Done at Brussels, 15 October 2008.

For the Commission
Viviane REDING
Member of the Commission

ANNEX I

Standard form relating to notifications of draft measures pursuant to Article 7 of Directive 2002/21/EC*(Standard notification form)*

INTRODUCTION

The standard notification form specifies the summary information to be provided by national regulatory authorities to the Commission when notifying draft measures under the standard notification procedure in accordance with Article 7 of Directive 2002/21/EC.

The Commission intends to discuss issues relating to the implementation of Article 7 with national regulatory authorities, especially during pre-notification meetings. Accordingly, national regulatory authorities are encouraged to consult the Commission on any aspect of the standard notification form and in particular on the kind of information they are requested to supply or, conversely, the possibility of dispensing with the obligation to provide certain information in relation to the market analysis carried out pursuant to Articles 15 and 16 of Directive 2002/21/EC.

CORRECT AND COMPLETE INFORMATION

All information submitted by national regulatory authorities should be correct and complete and summarised on the standard notification form set out below. The standard notification form is not meant to replace the notified draft measure, but it should enable the Commission and the national regulatory authorities of other Member States to verify that the notified draft measure does indeed contain, by reference to the information contained in the standard notification form, all the information needed for the Commission to carry out its tasks under Article 7 of Directive 2002/21/EC within the time frame set therein.

The information required should be set out in the sections and paragraphs of the standard notification form, with cross-references to the body of the draft measure where this information is to be found.

LANGUAGE

The standard notification form should be completed in one of the official languages of the European Community and may be different from the language used in the notified draft measure. Any opinion issued or decision taken by the Commission in accordance with Article 7 of Directive 2002/21/EC will be in the language of the notified draft measure, translated where possible into the language used in the standard notification form.

Section 1*Market definition*

Please state where applicable:

- 1.1. The relevant product/service market. Is this market mentioned in the Recommendation on relevant markets?
- 1.2. The relevant geographic market.
- 1.3. A brief summary of the opinion of the national competition authority, where provided.
- 1.4. A brief overview of the results of the public consultation to date on the proposed market definition (e.g. how many comments were received, which respondents agreed with the proposed market definition, which respondents disagreed with it).
- 1.5. Where the relevant market is different from those listed in the Recommendation on relevant markets, a summary of the main reasons justifying the proposed market definition by reference to Section 2 of the Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services⁽¹⁾, and the three main criteria mentioned in recitals 5 to 13 of the Recommendation on relevant markets and Section 2.2 of the accompanying Explanatory Note⁽²⁾.

⁽¹⁾ OJ C 165, 11.7.2002, p. 6.

⁽²⁾ Explanatory Note accompanying the Commission Recommendation 2007/789/EC on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, C(2007) 5406 published at http://ec.europa.eu/information_society/policy/ecomm/doc/implementation_enforcement/article_7/sec_2007_1483_2.pdf

Section 2

Designation of undertakings with significant market power

Please state where applicable:

- 2.1. The name of the undertakings designated as having, individually or jointly, significant market power.
Where applicable, the name of the undertakings considered no longer to have significant market power.
- 2.2. The criteria used to designate an undertaking as having significant market power, individually or jointly, or not.
- 2.3. The name of the main undertakings (competitors) active in the relevant market.
- 2.4. The market shares of the undertakings mentioned above and the basis for calculation of market share (e.g. turnover, number of subscribers).

Please provide a brief summary of:

- 2.5. The opinion of the national competition, authority where provided.
- 2.6. The results of the public consultation to date on the proposed designation(s) as undertakings having significant market power (e.g. total number of comments received, numbers agreeing/disagreeing).

Section 3

Regulatory obligations

Please state where applicable:

- 3.1. The legal basis for the obligations to be imposed, maintained, amended or withdrawn (Articles 9 to 13 of Directive 2002/19/EC).
- 3.2. The reasons for which the imposition, maintenance or amendment of obligations on undertakings is considered proportional and justified in the light of the objectives laid down in Article 8 of Directive 2002/21/EC. Alternatively, indicate the paragraphs, sections or pages of the draft measure where such information is to be found.
- 3.3. Where the remedies proposed are other than those set out in Articles 9 to 13 of Directive 2002/19/EC, please indicate what 'exceptional circumstances' within the meaning of Article 8(3) of that Directive justify the imposition of such remedies. Alternatively, indicate the paragraphs, sections or pages of the draft measure where such information is to be found.

Section 4

Compliance with international obligations

In relation to the third intend of the first subparagraph of Article 8(3) of Directive 2002/19/EC, please state where applicable:

- 4.1. Whether the proposed draft measure intends to impose, amend or withdraw obligations on market players as provided for in Article 8(5) of Directive 2002/19/EC.
- 4.2. The name of the undertakings concerned.
- 4.3. What international commitments entered into by the Community and the Member States are to be met.

ANNEX II

Short form relating to notifications of draft measures pursuant to Article 7 of Directive 2002/21/EC*(Short notification form)*

INTRODUCTION

The short notification form specifies the summary information to be provided by national regulatory authorities to the Commission when notifying draft measures under the short notification procedure in accordance with Article 7 of Directive 2002/21/EC.

It is not necessary to provide a copy of the draft regulatory measure or to attach any other document to the short notification form. However, it is necessary to indicate the Internet reference through which the draft measure can be accessible in the short notification form.

1. One or several markets which has/have been removed from or have not been previously listed in the Recommendation on relevant markets is/are found to be competitive or not to meet the three criteria	
Please briefly describe the content of the notified draft measure. In particular, please refer to the relevant market concerned and the reasons why you consider that the market is effectively competitive or the three criteria are not met:	
Please indicate the Article 7 notification reference of the previously notified draft measures:	
Does the NCA agree with the proposed draft measure as regards the analysis of the relevant market?	Yes No <input type="checkbox"/> <input type="checkbox"/> If no, please outline reasons:
Internet reference to the draft measure:	
Comments:	
2. One or several markets which was/were found to be competitive in a previous market review is/are still competitive:	
Please briefly describe the content of the draft measure, indicating the relevant market concerned:	
Please indicate the Article 7 notification reference of the previously notified draft measures:	
Are there changes: to the market definition, as compared with previously notified draft measures?	Yes No <input type="checkbox"/> <input type="checkbox"/> If yes, please describe briefly
Does the NCA agree with the proposed draft measure as regards the analysis of the relevant market?	Yes No <input type="checkbox"/> <input type="checkbox"/> If no, please outline reasons:
Internet reference to the draft measure:	
Comments:	
3. Changes to technical details of a previously imposed regulatory remedy.	
Please summarise the notified changes to the remedies indicating the relevant market concerned:	
Please justify your conclusion that the measure consists of a change on a technical detail of a remedy and does not change the nature or the general scope of a remedy:	
Please indicate the Article 7 notification reference of the previously notified draft measures:	
Internet reference to the draft measure:	
Comments:	

4. Imposition on further operators of remedies already analysed and notified in relation to other undertakings that are similar as regards their customer base or total turnover in telecoms markets, without changing the principles applied by the NRA in the previous notification.	
Please briefly summarise the content of the draft measure, indicating the relevant market concerned:	
Please indicate the Article 7 notification reference of the previously notified draft measures:	
Please list the operators on whom this draft measure imposes obligations:	
Does the NCA agree with the proposed draft measure as regards the analysis of the relevant market?	Yes No <input type="checkbox"/> <input type="checkbox"/> If no, please outline reasons
Internet reference to the draft measure:	
Comments:	

II – FREQUENCY POLICY

I

(Acts whose publication is obligatory)

DECISION No 676/2002/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**of 7 March 2002****on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision)**

THE EUROPEAN PARLIAMENT AND THE
COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the Economic and Social Committee ⁽²⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽³⁾.

Whereas:

- (1) On 10 November 1999 the Commission presented a communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions proposing the next steps in radio spectrum policy on the basis of the results of the public consultation on the Green Paper on radio spectrum policy in the context of European Community policies such as telecommunications, broadcasting, transport and research and development (R & D). This Communication was welcomed by the European Parliament in a Resolution of 18 May 2000 ⁽⁴⁾. It should be emphasised that a certain degree of further harmonisation of Community policy on the radio spectrum is desirable for services and applications, in particular for services and applications with Community or European coverage, and that it is necessary to ensure that the Member States make applicable in the required manner certain decisions of the European Conference of Postal and Telecommunications Administrations (CEPT).
- (2) A policy and legal framework therefore needs to be created in the Community in order to ensure coordination of policy approaches and, where appropriate, harmonised conditions with regard to the availability and efficient use of radio spectrum necessary for the establishment and functioning of the internal market in Community policy areas, such as electronic

communications, transport and R & D. The policy approach with regard to the use of radio spectrum should be coordinated and, where appropriate, harmonised at Community level, in order to fulfil Community policy objectives efficiently. Community coordination and harmonisation may also help achieving harmonisation and coordination of the use of the radio spectrum at global level in certain cases. At the same time, appropriate technical support can be provided at national level.

- (3) Radio spectrum policy in the Community should contribute to freedom of expression, including freedom of opinion and freedom to receive and disseminate information and ideas, irrespective of borders, as well as freedom and plurality of the media.
- (4) This Decision is based on the principle that, where the European Parliament and the Council have agreed on a Community policy which depends on radio spectrum, committee procedures should be used for the adoption of accompanying technical implementing measures. Technical implementing measures should specifically address harmonised conditions with regard to the availability and efficient use of radio spectrum, as well as the availability of information related to the use of radio spectrum. The measures necessary for the implementation of this Decision should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission ⁽⁵⁾.
- (5) Any new Community policy initiative depending on radio spectrum should be agreed by the European Parliament and the Council as appropriate, on the basis of a proposal from the Commission. Without prejudice to the right of initiative of the Commission, this proposal should include, *inter alia*, information on the impact of the envisaged policy on existing spectrum user communities as well as indications regarding any general radio frequency reallocation that this new policy would require.
- (6) For the development and adoption of technical implementing measures and with a view to contributing to the formulation, preparation and implementation of

⁽¹⁾ OJ C 365 E, 19.12.2000, p. 256 and OJ C 25 E, 29.1.2002, p. 468.

⁽²⁾ OJ C 123, 25.4.2001, p. 61.

⁽³⁾ Opinion of the European Parliament of 5 July 2001 (not yet published in the Official Journal), Council Common Position of 16 October 2001 (OJ C 9, 11.1.2002, p. 7) and Decision of the European Parliament of 12 December 2001 (not yet published in the Official Journal). Council Decision of 14 February 2002.

⁽⁴⁾ OJ C 59, 23.2.2001, p. 245.

⁽⁵⁾ OJ L 184, 17.7.1999, p. 23.

Community radio spectrum policy, the Commission should be assisted by a committee, to be called the Radio Spectrum Committee, composed of representatives of the Member States and chaired by a representative of the Commission. The Committee should consider proposals for technical implementing measures related to radio spectrum. These may be drafted on the basis of discussions in the Committee and may in specific cases require technical preparatory work by national authorities responsible for radio spectrum management. Where committee procedures are used for the adoption of technical implementing measures, the Committee should also take into account the views of the industry and of all users involved, both commercial and non-commercial, as well as of other interested parties, on technological, market and regulatory developments which may affect the use of radio spectrum. Radio spectrum users should be free to provide all input they believe is necessary. The Committee may decide to hear representatives of radio spectrum user communities at its meetings where necessary to illustrate the situation in a particular sector.

- (7) Where it is necessary to adopt harmonisation measures for the implementation of Community policies which go beyond technical implementing measures, the Commission may submit to the European Parliament and to the Council a proposal on the basis of the Treaty.
- (8) Radio spectrum policy cannot be based only on technical parameters but also needs to take into account economic, political, cultural, health and social considerations. Moreover, the ever increasing demand for the finite supply of available radio spectrum will lead to conflicting pressures to accommodate the various groups of radio spectrum users in sectors such as telecommunications, broadcasting, transport, law enforcement, military and the scientific community. Therefore, radio spectrum policy should take into account all sectors and balance the respective needs.
- (9) This Decision should not affect the right of Member States to impose restrictions necessary for public order and public security purposes and defence. Where a technical implementing measure would affect *inter alia* radio frequency bands used by a Member State exclusively and directly for its public security and defence purposes, the Commission may, if the Member State requests it on the basis of justified reasons, agree to transitional periods and/or sharing mechanisms, in order to facilitate the full implementation of that measure. In this regard, Member States may also notify the Commission of their national radio frequency bands used exclusively and directly to pursue public security and defence purposes.
- (10) In order to take into account the views of Member States, Community institutions, industry and of all users involved, both commercial and non-commercial, as well as of other interested parties on technological, market and regulatory developments which may affect the use of radio spectrum, the Commission may organise consultations outside the framework of this Decision.
- (11) Radio spectrum technical management includes the harmonisation and allocation of radio spectrum. Such harmonisation should reflect the requirements of general policy principles identified at Community level. However, radio spectrum technical management does not cover assignment and licensing procedures, nor the decision whether to use competitive selection procedures for the assignment of radio frequencies.
- (12) With a view to the adoption of technical implementing measures addressing the harmonisation of radio frequency allocation and of information availability, the Committee should cooperate with radio spectrum experts from national authorities responsible for radio spectrum management. Building on the experience of mandating procedures gained in specific sectors, for example as a result of the application of Decision No 710/97/EC of the European Parliament and of the Council of 24 March 1997 on a coordinated authorisation approach in the field of satellite personal-communication services in the Community ⁽¹⁾ and Decision No 128/1999/EC of the European Parliament and of the Council of 14 December 1998 on the coordinated introduction of a third generation mobile and wireless communications system (UMTS) in the Community ⁽²⁾, technical implementing measures should be adopted as a result of mandates to the CEPT. Where it is necessary to adopt harmonised measures for the implementation of Community policies which do not fall within the remit of CEPT, the Commission could adopt implementation measures with the assistance of the Radio Spectrum Committee.
- (13) The CEPT comprises 44 European countries. It drafts technical harmonisation measures with the objective of harmonising the use of radio spectrum beyond the Community borders, which is particularly important for those Member States where the use of radio spectrum may be affected by that of the non-EU members of CEPT. Decisions and measures taken in accordance with this Decision should take account of the specific situation of Member States with external frontiers. Where necessary, the Commission should be able to make the results of mandates issued to CEPT compulsory for Member States, and where the results of such mandates are not available or deemed not

⁽¹⁾ OJ L 105, 23.4.1997, p. 4. Decision as amended by Decision No 1215/2000/EC (OJ L 139, 10.6.2000, p. 1).

⁽²⁾ OJ L 17, 22.1.1999, p. 1.

acceptable, to take appropriate alternative action. This will in particular provide for the harmonisation of use of radio frequencies across the Community, in line with Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) ⁽¹⁾ and taking into account the provisions of Directive 2002/20/EC of the European Parliament and the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) ⁽²⁾.

- (14) The coordinated and timely provision to the public of appropriate information concerning the allocation, availability and use of radio spectrum in the Community is an essential element for investments and policy making. So are technological developments which will give rise to new radio spectrum allocation and management techniques and radio frequency assignment methods. Development of long-term strategic aspects require proper understanding of the implications of how technology evolves. Such information should therefore be made accessible in the Community, without prejudice to confidential business and personal information protection under Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector ⁽³⁾. The implementation of a cross-sectoral radio spectrum policy makes the availability of information on the whole radio spectrum necessary. In view of the general purpose of harmonising radio spectrum use in the Community and elsewhere in Europe, the availability of such information needs to be harmonised at European level in a user-friendly manner.
- (15) It is therefore necessary to complement existing Community and international requirements for publication of information on use of radio spectrum. At international level, the reference paper on regulatory principles negotiated in the context of the World Trade Organisation by the Group on Basic Telecommunications also requires that the existing state of allocated radio frequency bands be made publicly available. Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications ⁽⁴⁾ required Member States to publish every year or make available on request the allocation scheme of radio frequencies, including plans for future extension of such frequencies, but covered only mobile and personal communications services. Moreover, Directive 1999/5/EC of the

European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity ⁽⁵⁾, as well as Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services ⁽⁶⁾, require Member States to notify the Commission of the interfaces which they have regulated so as to assess their compatibility with Community law.

- (16) Directive 96/2/EC was at the origin of the adoption of a first set of measures by CEPT such as European Radiocommunications Committee Decision (ERC/DEC/(97)01) on the publication of national tables of radio spectrum allocations. It is necessary to ensure that CEPT solutions reflect the needs of Community policy and are given the appropriate legal basis so as to be implemented in the Community. For that purpose, specific measures have to be adopted in the Community both on procedure and substance.
- (17) Community undertakings should obtain fair and non-discriminatory treatment on access to radio spectrum in third countries. As access to radio spectrum is a key factor for business development and public interest activities, it is also necessary to ensure that Community requirements for radio spectrum are reflected in international planning.
- (18) Implementation of Community policies may require coordination of radio spectrum use, in particular with regard to the provision of communications services including Community-wide roaming facilities. Moreover, certain types of radio spectrum use entail a geographical coverage which goes beyond the borders of a Member State and allow for transborder services without requiring the movement of persons, such as satellite communications services. The Community should therefore be adequately represented in the activities of all relevant international organisations and conferences related to radio spectrum management matters, such as within the International Telecommunication Union (ITU) and its World Radiocommunications Conferences.
- (19) The existing preparation and negotiation mechanisms for ITU World Radiocommunication Conferences have generated excellent results due to willing cooperation within the CEPT, and the Community's interests have

⁽¹⁾ See page 33 of this Official Journal.

⁽²⁾ See page 21 of this Official Journal.

⁽³⁾ OJ L 24, 30.1.1998, p. 1.

⁽⁴⁾ OJ L 20, 26.1.1996, p. 59.

⁽⁵⁾ OJ L 91, 7.4.1999, p. 10.

⁽⁶⁾ OJ L 204, 21.7.1998, p. 37. Directive as amended by Directive 98/48/EC (OJ L 217, 5.8.1998, p. 18).

been taken into account in the preparations. In international negotiations, Member States and the Community should develop a common action and closely cooperate during the whole negotiations process so as to safeguard the unity of the international representation of the Community in line with the procedures which had been agreed in the Council conclusions of 3 February 1992 for the World Administrative Radio Conference and as confirmed by the Council conclusions of 22 September 1997 and 2 May 2000. For such international negotiations, the Commission should inform the European Parliament and the Council whether Community policies are affected, with a view to obtaining endorsement by the Council on the Community policy objectives to be achieved and on the positions to be taken by Member States at international level. In order to ensure that such positions also appropriately address the technical dimension related to radio spectrum management, the Commission may issue mandates to the CEPT for this purpose. Member States should accompany any act of acceptance of any agreement or regulation within international fora in charge of, or concerned with, radio spectrum management by a joint declaration stating that they will apply such agreement or regulation in accordance with their obligations under the Treaty.

- (20) In addition to international negotiations specifically addressing radio spectrum, there are other international agreements involving the Community and third countries which may affect radio frequency bands usage and sharing plans and which may address issues such as trade and market access, including in the World Trade Organisation framework, free circulation and use of equipment, communications systems of regional or global coverage such as satellites, safety and distress operations, transportation systems, broadcasting technologies, and research applications such as radio astronomy and earth observation. It is therefore important to ensure compatibility between the Community's arrangements for negotiating trade and market access issues with the radio spectrum policy objectives to be pursued under this Decision.
- (21) It is necessary, due to the potential commercial sensitivity of information which may be obtained by national authorities in the course of their action relating to radio spectrum policy and management, that the national authorities apply common principles in the field of confidentiality laid down in this Decision.
- (22) Since the objective of the proposed action, namely to establish a common framework for radio spectrum policy, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out

in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Decision does not go beyond what is necessary in order to achieve that objective.

- (23) Member States should implement this common framework for radio spectrum policy in particular through their national authorities and provide the Commission with the relevant information required to assess its proper implementation throughout the Community, taking into account international trade obligations of the Community and its Member States.
- (24) Decisions No 710/97/EC and No 128/1999/EC remain in force.
- (25) The Commission should report annually to the European Parliament and the Council on the results achieved under this Decision, as well as on planned future actions. This may allow the European Parliament and the Council to express their political support, where appropriate,

HAVE ADOPTED THIS DECISION:

Article 1

Aim and scope

1. The aim of this Decision is to establish a policy and legal framework in the Community in order to ensure the coordination of policy approaches and, where appropriate, harmonised conditions with regard to the availability and efficient use of the radio spectrum necessary for the establishment and functioning of the internal market in Community policy areas such as electronic communications, transport and research and development (R & D).
2. In order to meet this aim, this Decision establishes procedures in order to:
- (a) facilitate policy making with regard to the strategic planning and harmonisation of the use of radio spectrum in the Community taking into consideration *inter alia* economic, safety, health, public interest, freedom of expression, cultural, scientific, social and technical aspects of Community policies as well as the various interests of radio spectrum user communities with the aim of optimising the use of radio spectrum and of avoiding harmful interference;
- (b) ensure the effective implementation of radio spectrum policy in the Community, and in particular establish a

general methodology to ensure harmonised conditions for the availability and efficient use of radio spectrum;

Article 4

- (c) ensure the coordinated and timely provision of information concerning the allocation, availability and use of radio spectrum in the Community;
- (d) ensure the effective coordination of Community interests in international negotiations where radio spectrum use affects Community policies.
3. Activities pursued under this Decision shall take due account of the work of international organisations related to radio spectrum management, e.g. the International Telecommunication Union (ITU) and the European Conference of Postal and Telecommunications Administrations (CEPT).
4. This Decision is without prejudice to measures taken at Community or national level, in compliance with Community law, to pursue general interest objectives, in particular relating to content regulation and audio-visual policy, to the provisions of Directive 1999/5/EC and to the right of Member States to organise and use their radio spectrum for public order and public security purposes and defence.

Article 2

Definition

For the purposes of this Decision, 'radio spectrum' includes radio waves in frequencies between 9 kHz and 3 000 GHz; radio waves are electromagnetic waves propagated in space without artificial guide.

Article 3

Committee procedure

1. The Commission shall be assisted by a committee ('the Radio Spectrum Committee').
2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.
3. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

The period provided for in Article 5(6) of Decision 1999/468/EC shall be set at three months.

4. The Committee shall adopt its rules of procedure.

Function of the Radio Spectrum Committee

1. In order to meet the aim set out in Article 1, the Commission shall submit to the Radio Spectrum Committee, in accordance with the procedures set out in this Article, appropriate technical implementing measures with a view to ensuring harmonised conditions for the availability and efficient use of radio spectrum, as well as the availability of information related to the use of radio spectrum, as referred to in Article 5.

2. For the development of technical implementing measures referred to in paragraph 1 which fall within the remit of the CEPT, such as the harmonisation of radio frequency allocation and of information availability, the Commission shall issue mandates to the CEPT, setting out the tasks to be performed and the timetable therefor. The Commission shall act in accordance with the procedure referred to in Article 3(2).

3. On the basis of the work completed pursuant to paragraph 2, the Commission shall decide whether the results of the work carried out pursuant to the mandates shall apply in the Community and on the deadline for their implementation by the Member States. These decisions shall be published in the *Official Journal of the European Communities*. For the purpose of this paragraph, the Commission shall act in accordance with the procedure referred to in Article 3(3).

4. Notwithstanding paragraph 3, if the Commission or any Member State considers that the work carried out on the basis of a mandate issued pursuant to paragraph 2 is not progressing satisfactorily having regard to the set timetable or if the results of the mandate are not acceptable, the Commission may adopt, acting in accordance with the procedure referred to in Article 3(3), measures to achieve the objectives of the mandate.

5. The measures referred to in paragraphs 3 and 4 may, where appropriate, provide the possibility for transitional periods and/or radio spectrum sharing arrangements in a Member State to be approved by the Commission, where justified, taking into account the specific situation in the Member State, on the basis of a reasoned request by the Member State concerned and provided such exception would not unduly defer implementation or create undue differences in the competitive or regulatory situations between Member States.

6. To achieve the aim set out in Article 1, the Commission may also adopt technical implementing measures referred to in paragraph 1 which are not covered by paragraph 2, acting in accordance with the procedure referred to in Article 3(3).

7. With a view to contributing to the formulation, preparation and implementation of Community radio spectrum policy, and without prejudice to the procedures set out in this Article, the Commission shall consult the Radio Spectrum Committee periodically on the matters covered by Article 1.

Article 5

Availability of information

Member States shall ensure that their national radio frequency allocation table and information on rights, conditions, procedures, charges and fees concerning the use of radio spectrum, shall be published if relevant in order to meet the aim set out in Article 1. They shall keep this information up to date and shall take measures to develop appropriate databases in order to make such information available to the public, where applicable in accordance with the relevant harmonisation measures taken under Article 4.

Article 6

Relations with third countries and international organisations

1. The Commission shall monitor developments regarding radio spectrum in third countries and in international organisations, which may have implications for the implementation of this Decision.
2. Member States shall inform the Commission of any difficulties created, *de jure* or *de facto*, by third countries or international organisations for the implementation of this Decision.
3. The Commission shall report regularly on the results of the application of paragraphs 1 and 2 to the European Parliament and the Council and may propose measures with the aim of securing the implementation of the principles and objectives of this Decision, where appropriate. When necessary to meet the aim set out in Article 1, common policy objectives shall be agreed to ensure Community coordination among Member States.
4. Measures taken pursuant to this Article shall be without prejudice to the Community's and Member States' rights and obligations under relevant international agreements.

Article 7

Notification

Member States shall give the Commission all information necessary for the purpose of verifying the implementation of this Decision. In particular, Member States shall immediately inform the Commission of the implementation of the results of the mandates pursuant to Article 4(3).

Article 8

Confidentiality

1. Member States shall not disclose information covered by the obligation of business confidentiality, in particular information about undertakings, their business relations or their cost components.
2. Paragraph 1 shall be without prejudice to the right of relevant authorities to undertake disclosure where it is essential for the purposes of fulfilling their duties, in which case such disclosure shall be proportionate and shall have regard to the legitimate interests of undertakings in the protection of their business secrets.
3. Paragraph 1 shall not preclude publication of information on conditions linked to the granting of rights to use radio spectrum which does not include information of a confidential nature.

Article 9

Report

The Commission shall report on an annual basis to the European Parliament and the Council on the activities developed and the measures adopted pursuant to this Decision, as well as on future actions envisaged pursuant to this Decision.

Article 10

Implementation

Member States shall take all measures necessary, by laws, regulations and administrative provisions, for the implementation of this Decision and all resulting measures.

Article 11

Entry into force

This Decision shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Article 12

Addressees

This Decision is addressed to the Member States.

Done at Brussels, 7 March 2002.

For the European Parliament

The President

P. COX

For the Council

The President

J. C. APARICIO

Directive 2009/114/EC of the European Parliament and of the Council

of 16 September 2009

amending Council Directive 87/372/EEC on the frequency bands to be reserved for the coordinated introduction of public pan-European cellular digital land-based mobile communications in the Community (*)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,

Having consulted the Committee of the Regions, Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽²⁾,

Whereas:

- (1) Council Directive 87/372/EEC ⁽³⁾, complemented by Council Recommendation of 25 June 1987 on the coordinated introduction of public pan-European cellular digital land-based mobile communications in the Community ⁽⁴⁾ and by Council Resolution of 14 December 1990 on the final stage of the coordinated introduction of pan-European land-based public digital mobile cellular communications in the Community (GSM) ⁽⁵⁾, recognised the need to use the resources offered by modern telecommunications networks to the full, in particular mobile radio, in the interests of the economic development of the Community. The unique opportunity offered by the move to the second generation cellular digital mobile communications system in order to establish truly pan-European mobile communications has also been recognised.
- (2) The 890-915 MHz and 935-960 MHz frequency bands were reserved for a public pan-European cellular digital mobile communications service to be provided in each Member State in accordance with a common specification, known as GSM. Subsequently the so-called extension band (880-890 MHz and 925-935 MHz) became available for GSM operation, and together these frequency bands are known as the 900 MHz band.
- (3) Since 1987, new digital radio technologies capable of providing innovative pan-European electronic communications have been developed, which can coexist with GSM in the 900 MHz band in a more technologically neutral regulatory context than before. The 900 MHz band has good propagation

characteristics, covering greater distances than higher frequency bands and allowing modern voice, data and multimedia services to be extended to less populated and rural areas.

- (4) In order to contribute to the objectives of the internal market and of the Commission Communication of 1 June 2005 entitled "i2010 initiative — A European Information Society for growth and employment", while maintaining the availability of GSM for users throughout Europe, and to maximise competition by offering users a wide choice of services and technologies, the use of the 900 MHz band should be available to other technologies for the provision of additional compatible and advanced pan-European services that would coexist with GSM.
- (5) The future use of the 900 MHz band and in particular the question of how long GSM will remain the reference technology for technical coexistence in this band is a question of strategic importance for the internal market. It should be examined together with other issues concerning the Community's wireless access policy in the future radio spectrum policy programmes, to be adopted in accordance with Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) ⁽⁶⁾. Those programmes will set out the policy orientations and objectives for the strategic planning of the use of radio spectrum, in close cooperation with the Radio Spectrum Policy Group (RSPG) established by Commission Decision 2002/622/EC ⁽⁷⁾.
- (6) The liberalisation of the use of the 900 MHz band could possibly result in competitive distortions. In particular, where certain mobile operators have not been assigned spectrum in the 900 MHz band, they could be put at a disadvantage in terms of cost and efficiency in comparison with operators that will be able to provide 3G services in that band. Under the regulatory framework on electronic communications, and in particular Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) ⁽⁸⁾, Member States can amend and/or review rights of use of spectrum and thus have the tools to deal, where required, with such possible distortions.
- (7) Within six months of the entry into force of this Directive, Member States should transpose Directive 87/372/EEC as amended. While this

(*) OJ L 274, 20.10.2009, p. 25.

⁽¹⁾ Opinion of 25 February 2009 (not yet published in the Official Journal).

⁽²⁾ Opinion of the European Parliament of 6 May 2009 (not yet published in the Official Journal) and Council Decision of 27 July 2009.

⁽³⁾ OJ L 196, 17.7.1987, p. 85.

⁽⁴⁾ OJ L 196, 17.7.1987, p. 81.

⁽⁵⁾ OJ C 329, 31.12.1990, p. 25.

⁽⁶⁾ OJ L 108, 24.4.2002, p. 33.

⁽⁷⁾ OJ L 198, 27.7.2002, p. 49.

⁽⁸⁾ OJ L 108, 24.4.2002, p. 21.

does not in itself require Member States to modify existing rights of use or to initiate an authorisation procedure, Member States must comply with the requirements of Directive 2002/20/EC once the 900 MHz band has been made available in accordance with this Directive. In doing so, they should in particular examine whether the implementation of this Directive could distort competition in the mobile markets concerned. If they conclude that this is the case, they should consider whether it is objectively justified and proportionate to amend the rights of use of those operators that were granted rights of use of 900 MHz frequencies and, where proportionate, to review these rights of use and to redistribute such rights in order to address such distortions. Any decision to take such a course of action should be preceded by a public consultation.

- (8) Any spectrum made available under this Directive should be allocated in a transparent manner and in such a way as to ensure no distortion of competition in the relevant markets.
- (9) In order for other systems to coexist with GSM systems in the same band, harmful interference should be avoided by applying technical usage conditions applicable to technologies other than GSM using the 900 MHz band.
- (10) Decision No 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision) ⁽⁹⁾ allows the Commission to adopt technical implementing measures to ensure harmonised conditions for the availability and efficient use of radio spectrum.
- (11) As requested by the Commission, the European Conference of Postal and Telecommunications Administrations (CEPT) has produced technical reports demonstrating that UMTS systems (Universal Mobile Telecommunications System) could coexist with GSM systems in the 900 MHz band. The 900 MHz band should therefore be opened to UMTS, a system that can coexist with GSM systems, as well as to other systems as soon as it can be demonstrated that they can coexist with GSM systems in accordance with the procedure laid down in the Radio Spectrum Decision for the adoption of harmonised conditions for the availability and efficient use of radio spectrum. Where a Member State decides to assign rights of use for systems using the UMTS 900 specification, the application of the Radio Spectrum Decision, and the provisions of Directive 2002/21/EC, will ensure that such systems are protected from harmful interference from other systems in operation.
- (12) Appropriate protection should be ensured between users of the bands covered by this Directive and for existing users in adjacent bands. Furthermore, prospective systems for aviation communications above 960 MHz, which help fulfil Community policy objectives in this sector, should be taken into account. CEPT has produced technical advice in this respect.

- (13) Flexibility in spectrum management and access to spectrum should be increased in order to contribute to the objectives of the internal market in electronic communications. The 900 MHz band should therefore be open to other systems for the provision of other pan-European services as soon as it can be demonstrated that those systems can coexist with GSM systems.
- (14) In order to allow new digital technologies to be deployed in the 900 MHz band in coexistence with GSM systems, Directive 87/372/EEC should be amended and the exclusive reservation of this band for GSM should be removed,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 87/372/EEC

Directive 87/372/EEC is hereby amended as follows:

[see consolidated version of Directive 87/372/EEC]

Article 2

Entry into force

This Directive shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

Article 3

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 16 September 2009.

For the European Parliament

For the Council

The President

The President

J. BUZEK

C. MALMSTRÖM

⁽⁹⁾ OJ L 108, 24.4.2002, p. 1.

Council Directive 87/372/EEC

of 25 June 1987

on the frequency bands to be reserved for the coordinated introduction of public pan-European cellular digital land-based mobile communications in the Community (*)

as amended by Directive 2009/114/EC ()**
(unofficially consolidated version)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100 thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the European Parliament ⁽²⁾,

Whereas recommendation 84/549/EEC ⁽³⁾ calls for the introduction of services on the basis of a common harmonized approach in the field of telecommunications;

Whereas the resources offered by modern telecommunications networks should be utilized to the full for the economic development of the Community;

Whereas mobile radio services are the only means of contacting users on the move and the most efficient means for those users to be connected to public telecommunications networks;

Whereas mobile communications depend on the allocation and availability of frequency bands in order to transmit and receive between fixed-base stations and mobile stations;

Whereas the frequencies and land-based mobile communications systems currently in use in the Community vary widely and do not allow all users on the move in vehicles, boats, trains, or on foot throughout the Community, including on inland or coastal waters, to reap the benefits of European-wide services and European-wide markets;

Whereas the change-over to the second generation cellular digital mobile communications system will provide a unique opportunity of establishing truly pan-European mobile communications;

Whereas the European Conference of Postal and Telecommunications Administrations (CEPT) has recommended that frequencies 890-915 and 935-960 MHz be allocated to such a system, in accordance with the International Telecommunications Union (ITU) Radio Regulations allocating such frequencies to mobile radio services use as well;

Whereas parts of these frequency bands are being used or are intended for use by certain Member States for interim systems and other radio services;

Whereas the progressive availability of the full range of the frequency bands set out above will be indispensable for the establishment of truly pan-European mobile communications;

Whereas the implementation of Council recommendation 87/371/EEC of 25 June 1987 on the coordinated introduction of public pan-European cellular digital land-based mobile communications in the Community ⁽⁴⁾, aiming at starting a pan-European system by 1991 at the latest, will allow the speedy specification of the radio transmission path;

Whereas on the basis of present technological and market trends it would appear to be realistic to envisage the exclusive occupation of the 890-915 and 935-960 MHz frequency bands by the pan-European system within 10 years of 1 January 1991;

Whereas Council Directive 86/361/EEC of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment ⁽⁵⁾ will allow the rapid establishment of common conformity specifications for the pan-European cellular digital mobile communications system;

Whereas the report on public mobile communications drawn up by the Analysis and Forecasting Group (GAP) for the Senior Officials Group on Telecommunications (SOG-T) has drawn attention to the necessity for the availability of adequate frequencies as a vital pre-condition for pan-European cellular digital mobile communications;

Whereas favourable opinions on this report have been delivered by the telecommunications administrations, by the European Conference of Postal and Telecommunications Administrations (CEPT) and the telecommunications equipment manufacturers in the Member States,

HAS ADOPTED THIS DIRECTIVE:

Article 1

1. Member States shall make the 880-915 MHz and 925-960 MHz frequency bands (the 900 MHz band) available for GSM and UMTS systems, as well as for other terrestrial systems capable of providing electronic communications services that can coexist with GSM systems, in accordance with technical implementing measures adopted pursuant to Decision No 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision) [];

(*) OJ L 196, 17.07.1987, p. 85.

(**) OJ L 274, 20.10.2009, p. 25.

⁽¹⁾ OJ No C 69, 17. 3. 1987, p. 9.

⁽²⁾ OJ No C 125, 11. 5. 1987, p. 159.

⁽³⁾ OJ No L 298, 16. 11. 1984, p. 49.

⁽⁴⁾ See page 81 of this Official Journal. [L 196, 17.07.1987]

⁽⁵⁾ OJ No L 217, 5. 8. 1986, p. 21.

2. Member States shall, when implementing this Directive, examine whether the existing assignment of the 900 MHz band to the competing mobile operators in their territory is likely to distort competition in the mobile markets concerned and, where justified and proportionate, they shall address such distortions in accordance with Article 14 of Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive).

Article 2

For the purposes of this Directive, the following definitions shall apply:

- (a) 'GSM system' shall mean an electronic communications network that complies with the GSM standards, as published by ETSI, in particular EN 301 502 and EN 301 511;
- (b) 'UMTS system' shall mean an electronic communications network that complies with the UMTS standards as published by ETSI, in particular EN 301 908-1, EN 301 908-2, EN 301 908-3 and EN 301 908-11.

Article 3

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 9 May 2010. They shall forthwith communicate to the Commission the text of those measures and a correlation table between those measures and this Directive.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States;

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 4

[deleted by Directive 2009/114/EC]

Article 5

This Directive is addressed to the Member States.

Done at Luxembourg, 25 June 1987.

For the Council

The President

H. DE CROO

COMMISSION DECISION 2009/978/EU

of 16.12.2009

amending Decision 2002/622/EC establishing a Radio Spectrum Policy Group (*)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on European Union and to the Treaty on the Functioning of the European Union,

Whereas:

- (1) Decision No 2002/676/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision)¹ has established the regulatory framework in the European Union for radio spectrum policy to ensure the coordination of policy approaches and, where appropriate, harmonised conditions with regard to the availability and efficient use of the radio spectrum necessary for the establishment and functioning of the internal market in the European Union policy areas such as electronic communications, transport and Research and Development. This Decision recalls that the Commission may organise consultations in order to take into account the views of Member States, European Union institutions, industry and of all radio spectrum users involved, both commercial and non-commercial, as well as of other interested parties on technological, market and regulatory developments which may relate to the use of radio spectrum. Pursuant to these provisions, the Commission adopted, on 26 July 2002, Decision 2002/622/EC establishing a radio Spectrum Policy Group² (hereinafter "the Group").
- (2) On the occasion of the revision of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)³, it appeared necessary to amend Decision 2002/622/EC in order to adapt the tasks of the Group to this new regulatory framework.
- (3) Decision 2002/622/EC should therefore be amended accordingly,

HAS ADOPTED THIS DECISION:

Article 1

Decision 2002/622/EC is amended as follows:

[see consolidated version of Decision 2002/622/EC]

Article 2

Entry into Force

This Decision shall enter into force on the 20th day after its publication in the Official Journal of the European Union.

Done at Brussels, 16.12.2009

For the Commission

José Manuel Barroso

President of the Commission

(*) OJ L 336, 18.12.2009, p. 50.

(¹) OJ L 229, 27.8.2002, p.15-23.

(²) OJ L 198, 27.2.2002, p.49

(³) OJ L 108, 24.4.2002, p.33.

Commission Decision 2002/622/EC

of 26 July 2002

establishing a Radio Spectrum Policy Group (*)

as amended by Commission Decision 2009/978/EU ()**
(unofficially consolidated version)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Whereas:

- (1) Decision No 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community ⁽¹⁾ (hereinafter the Radio Spectrum Decision) establishes a policy and legal framework in the Community for radio spectrum policy so as to ensure the coordination of policy approaches and, where appropriate, harmonised conditions with regard to the availability and efficient use of the radio spectrum necessary for the establishment and functioning of the internal market in Community policy areas such as electronic communications, transport and Research and Development.
- (2) The Radio Spectrum Decision recalls that the Commission may organise consultations in order to take into account the views of Member States, Community institutions, industry and of all radio spectrum users involved, both commercial and non-commercial, as well as of other interested parties on technological, market and regulatory developments which may relate to the use of radio spectrum.
- (3) A consultative group to be called the Radio Spectrum Policy Group (hereinafter the Group) should be established. The Group should assist and advise the Commission on radio spectrum policy issues such as radio spectrum availability, harmonisation and allocation of radio spectrum, provision of information concerning allocation, availability and use of radio spectrum, methods for granting rights to use spectrum, refarming, relocation, valuation and efficient use of radio spectrum as well as protection of human health.
- (4) The Group should contribute to the development of a radio spectrum policy in the Community that takes into account not only technical parameters but also economic, political, cultural, strategic, health and social considerations, as well as the various potentially conflicting needs of radio spectrum users with a view to ensuring that a fair, non-discriminatory and proportionate balance is achieved.
- (5) The Group should gather high-level governmental experts from the Member States and a high level representative of the Commission. The Group could also include observers and invite other

persons to attend meetings as appropriate, including regulators, competition authorities, market participants, user or consumer groups. The Group should therefore allow cooperation between Member States and the Commission in such a way as to contribute to the development of the internal market.

- (6) As the focal point for addressing radio spectrum policy issues in the context of all relevant Community policies, close operational links should be maintained between the Group and specific groups or committees established for the implementation of sectoral Community policies including transport policy, internal market policy for radio equipment, audiovisual policy, space policy, and communications.
- (7) The Radio Spectrum Decision has created a Radio Spectrum Committee to assist the Commission in the elaboration of binding implementing measures addressing harmonised conditions for the availability and efficient use of radio spectrum. The work of the Group should not interfere with the work of the Committee.
- (8) In order to guarantee effective discussions, each national delegation attending the Group should have a consolidated and coordinated national view of all policies which affect the use of radio spectrum in that Member State in relation not only to the internal market but also to public order, public security, civil protection and defence policies as the use of radio spectrum for such policies may influence the organisation of radio spectrum as a whole. At present, different national government departments have responsibility over different parts of the radio spectrum.
- (9) The Group should consult extensively and in a forward-looking manner on technological, market and regulatory developments relating to the use of radio spectrum with all radio spectrum users involved, both commercial and non-commercial, as well as with any other interested parties.
- (10) The use of radio spectrum does not stop at borders and given the forthcoming accession of additional Member States, the Group may be opened to these countries and to countries which are members of the European Economic Area.
- (11) CEPT (European Conference of Postal and Telecommunications administrations, comprising 44 European countries) should be invited as observer with the work of the Group considering the impact of the activities of the Group on radio spectrum at a pan-European level and considering the technical expertise gained by CEPT and its affiliate bodies in radio spectrum management. It is also appropriate to draw on such expertise on

(*) OJ L 198, 27.07.2002, p. 49.

(**) OJ L 336, 18.12.2009, p. 50.

(1) OJ L 108, 24.4.2002, p. 1.

the basis of mandates to be granted pursuant to the Radio Spectrum Decision in view to the development of technical implementing measures in the areas of radio spectrum allocation and information availability. In view of the importance of European standardisation for the development of equipment using radio spectrum, it is likewise important to associate as observer the European Telecommunications Standardisation Institute (ETSI),

HAS DECIDED AS FOLLOWS:

Article 1

Subject matter

An advisory group on radio spectrum policy, called the Radio Spectrum Policy Group (hereinafter referred to as the Group), is hereby established.

Article 2

Tasks

The Group shall assist and advise the Commission on radio spectrum policy issues, on coordination of policy approaches, on the preparation of multiannual radio spectrum policy programmes and, where appropriate, on harmonised conditions with regard to the availability and efficient use of radio spectrum necessary for the establishment and functioning of the internal market.

Furthermore, the Group shall assist the Commission in proposing common policy objectives to the European Parliament and the Council, when necessary for ensuring the effective coordination of the interest of the European Union in international organisations competent in radio spectrum matters".

Article 3

Membership

The Group shall be composed of one high level governmental expert from each Member State as well as of a high-level representative from the Commission.

The Commission shall provide the secretariat to the Group.

Article 4

Operational arrangements

At the Commission's request or at its own initiative, the Group shall adopt opinions to be addressed to the Commission, upon consensus or, if not possible, on the basis of a simple majority, each member having one vote except the Commission which shall not vote. Dissenting opinions shall be attached to the adopted opinions. Observers may participate in the deliberation but shall not vote.

Following a request of the European Parliament and/or the Council to the European Commission for an opinion or a report of the Group on radio spectrum policy issues relating to electronic communications, the Group shall adopt, according to the same rules as in the preceding sub-paragraph, such an opinion or report. Those opinions

and reports shall be transmitted by the Commission to the institution which so requests. Where appropriate, they may be in the form of oral presentation to the European Parliament and/or the Council by the chairman of the group or a member nominated by the Group.

The Group shall elect a chairperson from among its members. The Commission may organise the work of the Group into subgroups and expert working groups as appropriate.

The Commission shall convene the meetings of the Group through the secretariat in agreement with the chairperson. The Group shall adopt its rules of procedure upon a proposal from the Commission, by consensus or, in the absence of consensus, by a two-thirds majority vote, one vote being expressed per Member State, subject to the approval of the Commission.

The Group may invite observers, including those from EEA States and those States that are candidates for accession to the European Union, as well as from the European Parliament, CEPT and ETSI, to attend its meetings and it may hear experts and interested parties.

Article 5

Consultation

The Group shall consult extensively and at an early stage with market participants, consumers and end-users in an open and transparent manner.

Article 6

Confidentiality

Without prejudice to the provisions of Article 287 of the Treaty, where the Commission informs them that the opinion requested or the question raised is on a matter of a confidential nature, members of the Group as well as observers and any other person attending shall be under an obligation not to disclose information which has come to their knowledge through the work of the Group, its subgroups or expert working groups. The Commission may decide in such cases that only members of the Group may be present at meetings.

Article 7

Entry into force

This Decision shall enter into force on the day of its publication in the Official Journal of the European Communities.

The Group shall take up its duties on the date of entry into force of this Decision.

Done at Brussels, 26 July 2002.

For the Commission

Erkki Liikanen

Member of the Commission

DECISIONS ADOPTED JOINTLY BY THE EUROPEAN PARLIAMENT AND THE COUNCIL

DECISION No 626/2008/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 30 June 2008

on the selection and authorisation of systems providing mobile satellite services (MSS)

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,

After consulting the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽²⁾,

Whereas:

- (1) As confirmed by the Council in its conclusions of 3 December 2004, effective and coherent use of radio spectrum is essential for the development of electronic communications services and contributes to stimulating growth, competitiveness and employment; access to spectrum must be eased to improve efficiency and promote innovation as well as greater flexibility for users and more choice for consumers, while taking account of general interest objectives.
- (2) The European Parliament, in its resolution of 14 February 2007 entitled 'Towards a European Policy on the Radio Spectrum' ⁽³⁾, emphasised the importance of communi-

cations for rural and less developed regions, for which the diffusion of broadband, lower frequency mobile communications and new wireless technologies could provide efficient solutions to achieving universal coverage in the 27 Member States with a view to the sustainable development of all areas. The European Parliament also noted that Member States' regimes for spectrum allocation and exploitation differ widely and that those differences represent serious obstacles to the achievement of a well-functioning internal market.

- (3) The Commission, in its Communication of 26 April 2007 on European Space Policy, has also established an objective of facilitating the introduction of innovative satellite communications services, in particular by aggregating demand in remote and rural areas, while stressing the need for pan-European licensing of satellite services and spectrum.

- (4) Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) ⁽⁴⁾ aims at encouraging efficient use and ensuring effective management of radio frequencies and numbering resources, removing the remaining obstacles to the provision of the relevant networks and services, ensuring that there is no discrimination and encouraging the establishment and development of trans-European networks and the interoperability of pan-European services.

- (5) The introduction of new systems providing mobile satellite services (MSS) would contribute to the development of the internal market and enhance competition by increasing the availability of pan-European services and end-to-end connectivity as well as encouraging efficient investment. MSS constitute an innovative alternative platform for various types of pan-European telecommunications and broadcasting/multicasting services,

⁽¹⁾ OJ C 44, 16.2.2008, p. 50.

⁽²⁾ Opinion of the European Parliament of 21 May 2008 (not yet published in the Official Journal) and Council Decision of 23 June 2008.

⁽³⁾ OJ C 287 E, 29.11.2007, p. 364.

⁽⁴⁾ OJ L 108, 24.4.2002, p. 33. Directive as amended by Regulation (EC) No 717/2007 (OJ L 171, 29.6.2007, p. 32).

regardless of the location of end users, such as high-speed Internet/intranet access, mobile multimedia and public protection and disaster relief. MSS could, in particular, improve coverage of rural areas in the Community, thus bridging the digital divide in terms of geography, strengthening cultural diversity and media pluralism and simultaneously contributing to the competitiveness of European information and communication technology industries in line with the objectives of the renewed Lisbon strategy. Directive 89/552/EEC of 3 October 1989 of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) ⁽¹⁾ should apply, as appropriate, to audiovisual media services transmitted using MSS systems.

- (6) Satellite communications, by their very nature, cross national borders and, as such, are susceptible to international or regional in addition to national regulation. Pan-European satellite services are an important element of the internal market and could make a substantial contribution to achieving European Union objectives, such as expansion of geographical coverage of broadband in line with the i2010 initiative ⁽²⁾. New applications of mobile satellite systems will emerge in the coming years.
- (7) Commission Decision 2007/98/EC of 14 February 2007 on the harmonised use of radio spectrum in the 2 GHz frequency bands for the implementation of systems providing mobile satellite services ⁽³⁾ provides that Member States shall make these frequency bands available to systems providing MSS in the Community as of 1 July 2007.
- (8) Radio spectrum technical management, as organised by Decision No 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision) ⁽⁴⁾ in general and Decision 2007/98/EC in particular, does not cover procedures for assignment of spectrum and granting rights of use for radio frequencies.
- (9) With the exception of Article 8 of Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) ⁽⁵⁾, operators of mobile satellite systems are selected and authorised at national level under the existing Community regulatory framework for electronic communications.
- (10) Regulations of the International Telecommunications Union (ITU) provide for procedures for satellite radio frequency coordination as a tool for management of harmful interference, but do not extend to selection or authorisation.
- (11) In order to prevent Member States from taking decisions that might lead to fragmentation of the internal market and undermine the objectives identified in Article 8 of Directive 2002/21/EC, selection criteria for mobile satellite systems should exceptionally be harmonised so that the selection process results in availability of MSS across the European Union. High up-front investment required for the development of mobile satellite systems and the associated high technological and financial risks necessitate an economy of scale for such systems in the form of wide pan-European geographic coverage, so that they remain economically viable.
- (12) Moreover, the successful launch of MSS requires coordination of regulatory action by Member States. Differences in national selection procedures could still create fragmentation of the internal market due to the divergent implementation of selection criteria, including the weighting of the criteria, or different timescales of the selection procedures. This would result in a patchwork of successful applicants selected in contradiction to the pan-European nature of those MSS. Selection of different operators of mobile satellite systems by different Member States could imply complex harmful interference situations or could even mean that a selected operator is prevented from providing a pan-European satellite service, for instance where different radio frequencies are assigned to the operator in different Member States. Therefore, harmonisation of the selection criteria should be supplemented by the establishment of a common selection mechanism that would provide a coordinated selection outcome for all Member States.
- (13) Since authorisation of the selected operators of mobile satellite systems involves attachment of conditions to such authorisations and a broad range of national provisions applicable in the field of electronic communications must thus be taken into account, the authorisation issues should be dealt with by the competent authorities of the Member States. However, in order to ensure consistency of authorisation approaches between different Member States, provisions relating to the synchronised assignment of spectrum and harmonised authorisation conditions should be established at the Community level, without prejudice to specific national conditions compatible with Community law.

⁽¹⁾ OJ L 298, 17.10.1989, p. 23. Directive as last amended by Directive 2007/65/EC (OJ L 332, 18.12.2007, p. 27).

⁽²⁾ Commission Communication of 1 June 2005 entitled 'i2010 — A European Information Society for growth and employment'.

⁽³⁾ OJ L 43, 15.2.2007, p. 32.

⁽⁴⁾ OJ L 108, 24.4.2002, p. 1.

⁽⁵⁾ OJ L 108, 24.4.2002, p. 21.

- (14) MSS can generally reach geographic areas not well covered by other electronic communications services, in particular rural areas. The coordinated selection and authorisation of new systems providing MSS could therefore play an important role in bridging the digital divide by improving the accessibility, speed, and quality of electronic communications services in these areas, thus contributing to social cohesion. Therefore, the proposed coverage area of MSS (service area), as well as the time frame for providing MSS within all Member States, are important characteristics which should be taken into account in an appropriate manner during the selection procedure.
- (15) Taking into account a comparatively long period of time and complex technical development steps required for the launch of MSS, progress in the technical and commercial development of mobile satellite systems should be assessed as part of the selection procedure.
- (16) Satellite radio frequency coordination is critical for the effective provision of MSS in the Member States and should therefore be considered when the credibility of applicants and the viability of the proposed mobile satellite systems are assessed during the selection procedure.
- (17) The comparative selection procedure should aim to bring mobile satellite systems in the 2 GHz frequency band into use without undue delay, while taking into account the right of applicants to fair and non-discriminatory participation.
- (18) Complementary ground components are an integral part of a mobile satellite system and are used, typically, to enhance the services offered via the satellite in areas where it may not be possible to retain a continuous line of sight with the satellite due to obstructions in the skyline caused by buildings and terrain. In accordance with Decision 2007/98/EC, complementary ground components use the same frequency bands as MSS (1 980 to 2 010 MHz and 2 170 to 2 200 MHz). The authorisation of such complementary ground components will therefore mainly rely on conditions related to local circumstances. They should therefore be selected and authorised at national level, subject to conditions established by Community law. This should be without prejudice to specific requests made by competent national authorities to the selected applicants to provide technical information indicating how particular complementary ground components would improve the availability of the proposed MSS in geographical areas where communications with one or more space stations cannot be ensured with the required quality, provided that such technical information has not already been provided in accordance with Title II.
- (19) The limited amount of radio spectrum available implies that the number of undertakings that may be selected and authorised is also necessarily limited. However, if the selection process leads to a finding that there is no radio spectrum scarcity, all eligible candidates should be selected. The limited amount of radio spectrum available may mean that any merger or takeover of any operator providing MSS with or by another could significantly reduce competition and would therefore be subject to scrutiny under competition law.
- (20) The right to use the specific radio frequencies should be granted to the selected applicants as soon as possible after their selection, in accordance with Article 5(3) of Directive 2002/20/EC.
- (21) Decisions on the withdrawal of authorisations granted in relation to MSS or complementary ground components due to the non-fulfilment of obligations should be enforced at national level.
- (22) While monitoring of the use of radio spectrum by the selected and authorised operators of mobile satellite systems and any required enforcement action is undertaken at national level, it should remain possible for the Commission to define the modalities of a coordinated monitoring and/or enforcement procedure. Wherever necessary, the Commission should have the right to raise enforcement issues relating to the fulfilment by operators of common authorisation conditions, in particular coverage requirements.
- (23) The measures necessary for the implementation of this Decision should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission⁽¹⁾. Decisions on selection of applicants should be adopted in accordance with the regulatory procedure in view of the importance of the Community procedure for any further national authorisation procedures.
- (24) In particular, the Commission should be empowered to define the modalities for coordinated application of the rules on enforcement. Since those measures are of general scope and are designed to amend non-essential elements of this Decision by supplementing it with new non-essential elements, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC.

⁽¹⁾ OJ L 184, 17.7.1999, p. 23. Decision as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11).

(25) Since the objective of this Decision, namely to establish a common framework for the selection and authorisation of operators of mobile satellite systems, cannot be sufficiently achieved by Member States and can therefore, by reason of the scale and effects of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Decision does not go beyond what is necessary in order to achieve that objective,

2. The following definitions shall also apply:

(a) 'mobile satellite systems' shall mean electronic communications networks and associated facilities capable of providing radio-communications services between a mobile earth station and one or more space stations, or between mobile earth stations by means of one or more space stations, or between a mobile earth station and one or more complementary ground components used at fixed locations. Such a system shall include at least one space station;

(b) 'complementary ground components' of mobile satellite systems shall mean ground-based stations used at fixed locations, in order to improve the availability of MSS in geographical areas within the footprint of the system's satellite(s), where communications with one or more space stations cannot be ensured with the required quality.

HAVE ADOPTED THIS DECISION:

TITLE I

OBJECTIVE, SCOPE AND DEFINITIONS

Article 1

Objective and scope

1. The purpose of this Decision is to facilitate the development of a competitive internal market for mobile satellite services (MSS) across the Community and to ensure gradual coverage in all Member States.

This Decision creates a Community procedure for the common selection of operators of mobile satellite systems that use the 2 GHz frequency band in accordance with Decision 2007/98/EC, comprising radio spectrum from 1 980 to 2 010 MHz for earth to space communications, and from 2 170 to 2 200 MHz for space to Earth communications. It also lays down provisions for the coordinated authorisation by Member States of the selected operators to use the assigned radio spectrum within this band for the operation of mobile satellite systems.

2. Operators of mobile satellite systems shall be selected through a Community procedure, in accordance with Title II.

3. The selected operators of mobile satellite systems shall be authorised by Member States in accordance with Title III.

4. Operators of complementary ground components of mobile satellite systems shall be authorised by Member States in accordance with Title III.

Article 2

Definitions

1. The definitions laid down in Directive 2002/21/EC and Directive 2002/20/EC shall apply for the purposes of this Decision.

TITLE II

SELECTION PROCEDURE

Article 3

Comparative selection procedure

1. A comparative selection procedure shall be organised by the Commission for the selection of operators of mobile satellite systems. The Commission shall be assisted by the Communications Committee referred to in Article 10(1).

2. Applicants shall be given a fair and non-discriminatory opportunity to participate in the comparative selection procedure, which shall be transparent.

The call for applications shall be published in the *Official Journal of the European Union*.

3. Access to documents relating to the comparative selection procedure, including applications, shall be granted in accordance with Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents⁽¹⁾.

4. The Commission may seek advice and assistance from external experts for the analysis and/or evaluation of applications. Such external experts shall be selected on the basis of their expertise and high level of independence and impartiality.

⁽¹⁾ OJ L 145, 31.5.2001, p. 43.

*Article 4***Admissibility of applications**

1. The following admissibility requirements shall apply:
 - (a) applicants shall be established in the Community;
 - (b) applications shall identify the amount of radio spectrum requested, which shall be no more than 15 MHz for earth to space and 15 MHz for space to earth in relation to any single applicant and shall include statements and evidence concerning the radio spectrum requested, the required milestones and the selection criteria;
 - (c) applications shall include a commitment on the part of the applicant that:
 - (i) the mobile satellite system proposed shall cover a service area of at least 60 % of the aggregate land area of the Member States, from the time the provision of MSS commences;
 - (ii) MSS shall be available in all Member States and to at least 50 % of the population and over at least 60 % of the aggregate land area of each Member State by the time stipulated by the applicant but in any event no later than seven years from the date of publication of the Commission's decision adopted pursuant to Articles 5(2) or 6(3).

2. Applications shall be submitted to the Commission. The Commission may request applicants to supply additional information regarding the fulfilment of admissibility requirements within a specific time frame of between five and 20 working days. The application shall be deemed inadmissible if such information is not supplied within the specified time frame.

3. The Commission shall decide on the admissibility of applications. Any decision of the Commission on non-admissibility of applications shall be reasoned and adopted in accordance with the advisory procedure referred to in Article 10(2).

4. The Commission shall forthwith inform the applicants whether their applications have been considered as admissible and publish the list of admissible applicants.

*Article 5***First selection phase**

1. Within 40 working days following publication of the list of admissible applicants, the Commission shall assess whether applicants have demonstrated the required level of technical and commercial development of their respective mobile satellite

systems. Such assessment shall rely on the satisfactory completion of milestones one to five as set out in the Annex. The credibility of applicants and the viability of the proposed mobile satellite systems shall be taken into account throughout the first selection phase.

2. If the combined demand for radio spectrum requested by eligible applicants retained according to paragraph 1 of this Article does not exceed the amount of radio spectrum available identified in Article 1(1), the Commission shall, by means of a reasoned decision, determine, in accordance with the regulatory procedure referred to in Article 10(3), that all eligible applicants shall be selected and identify the respective frequencies which each selected applicant shall be authorised to use, in each Member State, in accordance with Title III.

3. The Commission shall forthwith inform the applicants whether their applications have been considered as eligible for the second selection phase or have been selected according to paragraph 2. The Commission shall publish the list of eligible or selected applicants. Within 30 working days of such publication, eligible applicants that intend to proceed no further in the selection procedure, and selected applicants that intend not to use the radio frequencies, shall inform the Commission thereof in writing.

*Article 6***Second selection phase**

1. If the combined demand for radio spectrum requested by eligible applicants identified in the first selection phase exceeds the amount of radio spectrum available identified in Article 1(1), the Commission shall select eligible applicants by assessing to what extent the proposed mobile satellite systems of the eligible applicants fulfil the following weighted selection criteria:

- (a) consumer and competitive benefits provided (20 % weighting) comprising the following two sub-criteria:
 - (i) the number of end-users and the range of MSS to be provided by the date of commencement of the continuous provision of commercial MSS;
 - (ii) the date of commencement of the continuous provision of commercial MSS;
- (b) spectrum efficiency (20 % weighting) comprising the following two sub-criteria:
 - (i) the total amount of spectrum required;
 - (ii) the aggregated data stream capacity;

(c) pan-EU geographic coverage (40 % weighting) comprising the following three sub-criteria:

- (i) the number of Member States in which at least 50 % of the population is within the service area by the date of commencement of the continuous provision of commercial MSS;
- (ii) the degree of geographical coverage, based on the service area of the aggregate land area of the Member States by the date of commencement of the continuous provision of commercial MSS;
- (iii) the time stipulated by the applicant when MSS will be available in all Member States and to at least 50 % of the population and in at least 60 % of the aggregate land area of each Member State;

(d) the extent to which public policy objectives, not dealt with by the criteria referred to in points (a), (b) and (c), are achieved (20 % weighting) in accordance with the following three equally weighted sub-criteria:

- (i) the provision of public interest services contributing to the protection of health or safety and security of citizens in general or specific groups of citizens;
- (ii) the integrity and security of services;
- (iii) the range of services provided to consumers in rural or remote areas.

2. Any rules for implementing this Article shall be adopted by the Commission in accordance with the regulatory procedure referred to in Article 10(3). The credibility of the applicants and the viability of the proposed mobile satellite systems shall be taken into account throughout the second selection phase.

3. Within 80 working days following publication of the list of eligible applicants identified in the first selection phase, the Commission shall, on the basis of the report of the external expert panel, if applicable, and in accordance with the regulatory procedure referred to in Article 10(3), adopt a decision on the selection of applicants. The decision shall identify the selected applicants ranked on the basis of the extent to which they meet the selection criteria, the reasons on which the decision is based, as well as the frequencies which each selected applicant is to be authorised to use, in each Member State, in accordance with Title III.

4. The Commission shall publish the decisions adopted pursuant to Articles 5(2) or 6(3) in the *Official Journal of the European Union* within one month of their adoption.

TITLE III

AUTHORISATION

Article 7

Authorisation of the selected applicants

1. Member States shall ensure that the selected applicants, in accordance with the time frame and the service area to which the selected applicants have committed themselves, in accordance with Article 4(1)(c), and in accordance with national and Community law, have the right to use the specific radio frequency identified in the Commission decision adopted pursuant to Articles 5(2) or 6(3) and the right to operate a mobile satellite system. They shall inform selected applicants of those rights accordingly.

2. The rights covered by paragraph 1 shall be subject to the following common conditions:

- (a) selected applicants shall use the assigned radio spectrum for the provision of MSS;
- (b) selected applicants shall meet milestones six to nine set out in the Annex within 24 months of the selection decision adopted pursuant to Articles 5(2) or 6(3);
- (c) selected applicants shall honour any commitments they give in their applications or during the comparative selection procedure, irrespective of whether the combined demand for radio spectrum exceeds the amount available;
- (d) selected applicants shall provide to the competent authorities of all Member States an annual report detailing the status of development of their proposed mobile satellite system;
- (e) any necessary rights of use and authorisations shall be granted for a duration of eighteen years from the date of the selection decision adopted pursuant to Articles 5(2) or 6(3).

3. Member States may grant rights of use of spectrum identified in Article 1(1) for such time and to the extent that they remain outside the service area to which the selected applicants have committed themselves pursuant to this Decision, in accordance with Decision 2007/98/EC.

4. Member States may impose objectively justified, non-discriminatory, proportionate and transparent obligations to ensure communications between emergency services and authorities during major disasters, in accordance with Community law, including Directive 2002/20/EC.

Article 8

Complementary ground components

1. Member States shall, in accordance with national and Community law, ensure that their competent authorities grant to the applicants selected in accordance with Title II and authorised to use the spectrum pursuant to Article 7 the authorisations necessary for the provision of complementary ground components of mobile satellite systems on their territories.

2. Member States shall not select or authorise operators of complementary ground components of mobile satellite systems before the selection procedure provided for in Title II is completed by a Commission decision adopted pursuant to Articles 5(2) or 6(3). This is without prejudice to the use of the 2 GHz frequency band by systems other than those providing MSS in accordance with Decision 2007/98/EC.

3. Any national authorisations issued for the operation of complementary ground components of mobile satellite systems in the 2 GHz frequency band shall be subject to the following common conditions:

- (a) operators shall use the assigned radio spectrum for the provision of complementary ground components of mobile satellite systems;
- (b) complementary ground components shall constitute an integral part of a mobile satellite system and shall be controlled by the satellite resource and network management mechanism; they shall use the same direction of transmission and the same portions of frequency bands as the associated satellite components and shall not increase the spectrum requirement of the associated mobile satellite system;
- (c) independent operation of complementary ground components in case of failure of the satellite component of the associated mobile satellite system shall not exceed 18 months;
- (d) rights of use and authorisations shall be granted for a period of time ending no later than the expiry of the authorisation of the associated mobile satellite system.

Article 9

Monitoring and enforcement

1. Selected operators shall be responsible for compliance with any conditions attached to their authorisations and for payment of any applicable authorisation and/or usage fees and charges as required by laws of Member States.

2. Member States shall ensure that rules on enforcement, including rules on penalties applicable in the event of breaches of the common conditions provided for in Article 7(2), are in accordance with Community law, in particular Article 10 of Directive 2002/20/EC. Penalties must be effective, proportionate and dissuasive.

Member States shall ensure monitoring of compliance with these common conditions and take appropriate measures to address non-compliance. Member States shall inform the Commission of the results of such monitoring on an annual basis, in the event that any common conditions have not been complied with and in the event that any enforcement measures have been taken.

The Commission may, with the assistance of the Communications Committee referred to in Article 10(1), examine any alleged specific breach of the common conditions. Where a Member State informs the Commission of a particular breach, the Commission shall examine the alleged breach with the assistance of the Communications Committee.

3. The measures defining any appropriate modalities for coordinated application of the rules on enforcement referred to in paragraph 2, including rules for the coordinated suspension or withdrawal of authorisations for breaches of the common conditions provided for in Article 7(2), designed to amend non-essential elements of this Decision by supplementing it shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 10(4).

TITLE IV

GENERAL AND FINAL PROVISIONS

Article 10

Committee

1. The Commission shall be assisted by the Communications Committee set up by Article 22 of Directive 2002/21/EC.

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

3. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at one month.

4. Where reference is made to this paragraph, Article 5a(1) to (4) and (5)(b), and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

The time limits laid down in Article 5a(3)(c), (4)(b) and (4)(e) of Decision 1999/468/EC shall be set at one month.

Article 11

Entry into force

This Decision shall enter into force on the third day following its publication in the *Official Journal of the European Union*.

Article 12

Addressees

This Decision is addressed to the Member States.

Done at Brussels, 30 June 2008.

For the European Parliament

The President

H.-G. PÖTTERING

For the Council

The President

M. KUCLER DOLINAR

ANNEX

MILESTONES

1. Submission of International Telecommunications Union (ITU) request for coordination

The applicant shall provide clear evidence that the administration responsible for the ITU filing of a mobile satellite system to be used for the provision of commercial MSS within the territories of the Member States has submitted the relevant ITU Radio Regulations Appendix 4 information.

2. Satellite manufacturing

The applicant shall provide clear evidence of a binding agreement for the manufacture of the satellites required for the provision of commercial MSS within the territories of the Member States. The document shall identify the construction milestones leading to the completion of manufacture of satellites required for the provision of commercial MSS. The document shall be signed by the applicant and the satellite manufacturing company.

3. Satellite launch agreement

The applicant shall provide clear evidence of a binding agreement to launch the minimum number of satellites required for the continuous provision of commercial MSS within the territories of the Member States. The document shall identify the launch dates and launch services and the contractual terms and conditions concerning indemnity. The document shall be signed by the mobile satellite system operator and the satellite launching company.

4. Gateway Earth Stations

The applicant shall provide clear evidence of a binding agreement for the construction and installation of Gateway Earth Stations that would be used for the provision of commercial MSS within the territories of the Member States.

5. Completion of the Critical Design Review

The Critical Design Review is the stage in the spacecraft implementation process at which the design and development phase ends and the manufacturing phase starts.

The applicant shall provide clear evidence of the completion, no later than 80 working days after the submission of the application, of the Critical Design Review in accordance with the construction milestones indicated in the satellite manufacturing agreement. The relevant document shall be signed by the satellite manufacturing company and shall indicate the date of the completion of the Critical Design Review.

6. Satellite mating

The mating is the stage in the spacecraft implementation process at which the Communication Module (CM) is integrated with the Service Module (SM).

The applicant shall provide clear evidence that the Test Readiness Review for SM/CM mating has taken place in accordance with the construction milestones indicated in the satellite manufacturing agreement. The relevant document shall be signed by the satellite manufacturing company and shall indicate the date of the completion of the satellite mating.

7. Launch of satellites

The applicant shall provide clear evidence of the successful launch and in-orbit deployment of the number of satellites required for the continuous provision of commercial MSS within the territories of the Member States.

8. Frequency coordination

The applicant shall provide clear evidence of the successful frequency coordination of the system in accordance with the relevant provisions of the ITU Radio Regulations. However, a system which demonstrates compliance with milestones one to seven inclusive is not obliged to demonstrate at this stage completion of successful frequency coordination with those mobile satellite systems which fail to comply adequately and reasonably with milestones one to seven inclusive.

9. Provision of MSS within the territories of Member States

The applicant shall provide clear evidence that it is effectively providing the continuous commercial MSS within the territories of the Member States using the number of satellites it has previously identified under milestone three to cover the geographical area the applicant has committed to in its application by the date of the commencement of the provision of MSS.

European Commission

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