Electronic Communications Law
- REGULATORY INSTRUMENTS

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# ELECTRONIC COMMUNICATIONS LAW

This compendium is produced for the purpose of teaching the courses JUS5640 and JUR1640. The compendium constitutes permitted auxiliary material for the purposes of taking the examination in these courses.

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**B**  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)  

Amended by:

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)

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


(2) OJ C 123, 25.4.2001, p. 56.


of access to an inexpensive, world-class communications infra-
structure and a wide range of services.

(5) The convergence of the telecommunications, media and infor-
mation 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 authoris-
ation of electronic communications networks and services (Auth-
Parliament and of the Council of 7 March 2002 on access to,
and interconnection of, electronic communications networks and
on universal service and users’ rights relating to electronic
communications networks and services (Universal Service
and of the Council of 15 December 1997 concerning the
processing of personal data and the protection of privacy in the
telecommunications sector (4), (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 communi-
cations 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
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 (5).
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 regu-
latory authorities of specific and proportional obligations
applicable to providers of electronic communications services.

(1) See page 21 of this Official Journal.
(2) See page 7 of this Official Journal.
(3) See page 51 of this Official Journal.
(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 (1), 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.


(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 (3) 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 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) (1) 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 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

(1) See page 1 of this Official Journal.
universal service and interoperability through application of the principles of open network provision (ONP) (1) 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 (2) 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


(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 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.


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.

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.

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.

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.

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.

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 (*').

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.

Certain directives and decisions in this field should be repealed.

(1') OJ L 184, 17.7.1999, p. 23.
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 (1).

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 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;
‘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;

‘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;

‘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;

‘user’ means a legal entity or natural person using or requesting a publicly available electronic communications service;

‘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;

‘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;

‘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;


‘provision of an electronic communications network’ means the establishment, operation, control or making available of such a network;

‘end-user’ means a user not providing public communications networks or publicly available electronic communications services.

‘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;

‘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 radio communications 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 radio communications 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 resources to enable them to actively participate in and contribute to the Body of European Regulators for Electronic Communications (BEREC) (1).

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.

3. Member States shall collect information on the general subject matter of appeals, the number of requests for appeal, the duration of

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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 Commsion'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;

(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;

(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.


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;
(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 that 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 imple-
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.

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.

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.

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.

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.

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).

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.

Article 19

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.

Article 20
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.
Article 21

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.

**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 sub-paragraph:

— Directive 90/387/EEC,
— Directive 95/47/EC,
— Directive 97/13/EC,
— Directive 97/33/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.
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.
This document is meant purely as a documentation tool and the institutions do not assume any liability for its contents

**B** 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)  

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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)

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.


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(4) See page 33 of this Official Journal.
(5) See page 21 of this Official Journal.
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 (1).

(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 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.

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.

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.

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.

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) (1), 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 (2), 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 (3), 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 (1).

(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 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) (1).

(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 (2) 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 (3).

(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 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 (\(^1\)).

(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:

\(^1\) OJ L 184, 17.7.1999, p. 23.
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 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) (1), 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).

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

(1) See page 51 of this Official Journal.
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, the 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. 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 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 need to comply with international commitments,

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.

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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 Europeans Regulators for Electronic Communications (BEREC) and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) (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.

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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 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 offer;

- (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.

Article 13a

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 entailing 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.


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).
CHAPTER IV

PROCEDURAL PROVISIONS

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.

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 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 17

Review procedures

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 18(1), second subparagraph. For this purpose, the Commission may request from the Member States information, which shall be supplied without undue delay.
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 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.
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).
ANNEX II

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 (1).

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).

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


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.

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.
This document is meant purely as a documentation tool and the institutions do not assume any liability for its contents

B. 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)

Amended by:

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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)

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.

(2) OJ C 139, 11.5.2001, p. 15.
(3) OJ C 144, 16.5.2001, p. 60.
(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 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 pene-
The provision 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 (1) 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 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 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 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 (1), 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) (2), 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

(2) See page 33 of this Official Journal.
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 (1) 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 (2), 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 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) (1).

(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

(1) See page 7 of this Official Journal.
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 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 (1).

(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 (2).

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 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;

(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);

(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.


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.

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.


(1) See page 21 of this Official Journal.
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.

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 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.

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.

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
► M1 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 (1). 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 applic-
 ability 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 BEREC, may adopt technical implementing
 measures. However, these technical implementing measures shall be
 adopted without prejudice to, and shall have no impact on, the organi-
 sation 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 econom-
 ically 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.

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.

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).

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**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.
ANNEX I

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

<table>
<thead>
<tr>
<th>PARAMETER</th>
<th>DEFINITION</th>
<th>MEASUREMENT METHOD</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supply time for initial connection</td>
<td>ETSI EG 202 057</td>
<td>ETSI EG 202 057</td>
</tr>
<tr>
<td>Fault rate per access line</td>
<td>ETSI EG 202 057</td>
<td>ETSI EG 202 057</td>
</tr>
<tr>
<td>Fault repair time</td>
<td>ETSI EG 202 057</td>
<td>ETSI EG 202 057</td>
</tr>
</tbody>
</table>

For undertakings providing a publicly available telephone service

<table>
<thead>
<tr>
<th>PARAMETER</th>
<th>DEFINITION</th>
<th>MEASUREMENT METHOD</th>
</tr>
</thead>
<tbody>
<tr>
<td>Call set up time</td>
<td>ETSI EG 202 057</td>
<td>ETSI EG 202 057</td>
</tr>
<tr>
<td>Response times for directory enquiry services</td>
<td>ETSI EG 202 057</td>
<td>ETSI EG 202 057</td>
</tr>
<tr>
<td>Proportion of coin and card operated public pay-telephones in working order</td>
<td>ETSI EG 202 057</td>
<td>ETSI EG 202 057</td>
</tr>
<tr>
<td>Bill correctness complaints</td>
<td>ETSI EG 202 057</td>
<td>ETSI EG 202 057</td>
</tr>
<tr>
<td>Unsuccessful call ratio</td>
<td>ETSI EG 202 057</td>
<td>ETSI EG 202 057</td>
</tr>
</tbody>
</table>

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.
ANNEX IV

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?
ANNEX VI

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.
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.


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 (1). 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 (16). 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 (17), 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 telecommunications 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. Nevertheles, 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)
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 (27), 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' responses 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 (27). 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).

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' (28). 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 (20). 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 (20). Products or services which are only to a small, or relative degree interchangeable with each other do not form part of the same market (20). 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 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 been 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 (64). 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 (65). 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 (66).

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) (67). 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 (68). 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 (69). In the market for fixed telephony retail services, the Commission has also distinguished between the initial connection and the monthly rental (70). 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 (71). 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 (72).

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 (73). 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 (74).

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 (75). 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 (76). 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) (77). At the retail level, a further segmentation may take place between business and residential customers (78).

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 (79), 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 (80). Future innovative and technological changes may, however, justify different conclusions (81).

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 (82).

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 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. 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. 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. 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. 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. 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.

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.
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 mechanistically 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/Parencos/Valsum, the Commission came to the conclusion that even if the markets for newspaper 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.

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.
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.

Mechanisms to consolidate the internal market for electronic communications

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 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.

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. Therefore, the notion of an effect on trade between Member States is likely to cover a broad range of measures.

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.

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

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.

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.

During this two-month period, the Commission may, after consulting the Communications Committee following the advisory procedure, 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

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.

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 this up-to-date information is made publicly available in a manner that guarantees all interested parties easy access to that information.

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(5) To be adopted.
(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.
(15) 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.
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.

See Notice on market definition, paragraphs 17-18.

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 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.

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.

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 captive consumers may not be significant and may not thus deter demand or supply-side substitution.

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.

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.

See, also, Case COMP/M.2574 — Pirelli/Edizione/Olivetti/Telecom Italia, paragraph 58.


See, for instance, Case IV/M.1025 — Mannesmann/Olivetti/Infostra, paragraph 17, and Case COMP/JV.23 — Telefónica Portugal Telecom/Média Telecom.

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.
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 (lack of voice mail abroad) further supports the 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.

Physical interconnection agreements may also be taken into consideration for defining the geographical scope of the market, Case IV/M.570 — TBT/BT/TeleDanmark/Telenor, paragraph 35.

Case IV/M.856 — British Telecom/MCI (II), paragraph 19c., 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.

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.

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.

See Notice on market definition, paragraphs 57 and 58. For instance, chain substitutability could occur where an undertaking providing services at national level constraints 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 — Total/Fina/Elf (OJ L 143, 29.5.2001, p. 1), paragraph 188.

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.

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 Telecom/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/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.1745 — MCI WorldCom/Sprint, paragraph 84, Case COMP/M.2257 — France Telecom/Equant, paragraph 18), directory-assistance services (Case IV/M.2468 — SEAT Pagine Gialle/ENI, paragraph 19, Case COMP/M.1957 — ViAG Interkom/Telenor Media, paragraph 8), Internet-access services to end users (Case IV/M.1439 — Teli/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.1997 — Vodafone/Airtouch/Mannesmann, Case COMP/M.2016 — France Telecom/Orange, paragraph 13), 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).


See, also, Article 15 of the framework Directive.

See Access notice, paragraph 45.

See Case COMP/M.1439 — Teli/Telenor.

See Teli/Telenor, BT/AT & T, France Télécom/Equant, op. cit. See also Commission Decision of 20 May 1999, Cégetel + 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.

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. 53), 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 different relevant markets’. 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.

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.).

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 — Teli/Oracle/Drutt, paragraph 15, and Case COMP/JV.48 Vodafone/Vivendi/Canal+. 
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.

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.

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 Éireann, 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 — Telefónica/Tyco/IV, at paragraph 8.

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 IV, at paragraphs 28-29.

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/MI/ (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.

See footnote 58.

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.

See also Case IV/JV.11 — @Home Benelux BV.

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.


See, also, recital 25 of the framework Directive.

See Article 14, paragraph 2, and recital 28 of the framework Directive.

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.

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.


See, also, recital 15 of Council Regulation (EEC) No 4064/89.

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 will it 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, 153 and 196).

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.
(9) 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.

(10) Notice on market definition, op. cit., at p. 5.

(11) 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/Auwarter.


(13) Idem, at paragraph 5.2.

(14) 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.

(15) 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.


(17) Case COMP/M.1741 — MCI WorldCom/Sprint, paragraph 196.


(19) See, also, Case COMP/M.2146 — Tetra Laval/Sidel, paragraphs 325-389, sub judice, T-5/02.

(20) See Access notice, paragraph 65.

(21) 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.

(22) 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.

(23) See Access notice, paragraph 79.


(30) Idem, at paragraph 277.

(31) 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.

(32) See, in particular, France and Others v Commission, op. cit., paragraph 221.

(33) Compagnie maritime belge, at paragraph 39.

(34) Idem at paragraph 44.

(35) Idem at paragraph 45.

(36) 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.
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 in Article 22 of the framework Directive also aims at ensuring effective cooperation between the Commission and the Member States.


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'.

See Case COMP/M.2498 — UPM-Kymmenec/Haindl, and COMP/M.2499 — Norske Skog/Parenco/Walsum, at paragraph 77.

See, for instance, Case COMP/M.2097 — SCA/Metsä Tissue.

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.

Likewise, in Case COMP/M.2348 — Outokumpu/Nor Zinc, 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.

See Case COMP/M.1741 — MCI WorldCom/Sprint, paragraph 263.

Idem, paragraphs 257-302.

Case COMP/M.1383 — BT/Esat.

Idem, paragraphs 10 to 14.

Case IV/M.1430 — Vodafone/Airtours.

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.

Case COMP/M.2016 — France Telecom/Orange, at paragraph 26.

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/other/sectors/sector_inquiries/roaming/, at pages 24 and 25.

GATS commitments taken by EC on telecommunications: http://gats-info.eu.int/gats-info//wto/0342.pl?&SECCODE=02.C.

The Communications Committee in Article 22 of the framework Directive also aims at ensuring effective cooperation between the Commission and the Member States.

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.

Recital 38 of the framework Directive.

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 RECOMMENDATION

of 17 December 2007


(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,

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 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).

(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.


(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.

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.

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.

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.

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.

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.

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.

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.
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.

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.

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

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.

RECOMMENDATIONS

COMMISSION RECOMMENDATION
of 20 September 2010
on regulated access to Next Generation Access Networks (NGA)
(Text with EEA relevance)
(2010/572/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof,

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,

Having regard to the opinions of the Body of European Regulators for Electronic Communications (BEREC) and of the Communication Committee (COCOM),

Whereas:

(1) The EU single market for electronic communications services, and in particular the development of very high-speed broadband services, is key to creating economic growth and achieving the goals of the Europe 2020 Strategy. The fundamental role of telecommunications and broadband deployment in terms of EU investment, job creation and overall economic recovery was notably highlighted by the European Council in the conclusions of its March 2009 meeting. One of the seven flagship initiatives of Europe 2020 is the development of the ‘Digital Agenda for Europe’, which was presented in May 2010.

(2) The Digital Agenda for Europe sets targets for the deployment and take up of fast and very fast broadband, and foresees a number of measures to foster the deployment of Next Generation Access Networks (NGA) based on optical fibre and to support the substantial investments required in the coming years. The present Recommendation, which is to be seen in this context, aims at promoting efficient investment and innovation in new and enhanced infrastructure, taking due account of the risks incurred by all investing undertakings and the need to maintain effective competition, which is an important driver of investment over time.

(3) National Regulatory Authorities (NRAs) under Article 16(4) of Directive 2002/21/EC are developing regulatory responses to the challenges raised by the transition from copper to fibre-based networks. The relevant markets in this connection are the markets for wholesale network infrastructure access (Market 4) and wholesale broadband access (Market 5). Consistency of regulatory approaches taken by NRAs is of fundamental importance to avoiding distortions of the single market and to creating legal certainty for all investing undertakings. It is therefore appropriate to provide guidance to NRAs aimed at preventing any inappropriate divergence of regulatory approaches, while allowing NRAs to take proper account of national circumstances when designing appropriate remedies. The appropriate array of remedies imposed by an NRA should reflect a proportionate application of the ladder of investment principle.

(4) The scope of this Recommendation primarily covers remedies to be imposed upon operators designated with Significant Market Power (SMP) on the basis of a market analysis procedure carried out under Article 16 of Directive 2002/21/EC. However, where it is justified on the grounds that duplication of infrastructure is economically inefficient or physically impracticable, Member States may also impose obligations of reciprocal sharing of facilities on undertakings operating an electronic communications network in accordance with Article 12 of that Directive which would be appropriate to overcome bottlenecks in the civil engineering infrastructure and terminating segments.

(5) Demand and supply conditions are expected to change significantly at both wholesale and retail level following the deployment of NGA networks. Therefore new remedies may need to be imposed, and a new combination of active and passive access remedies on Markets 4 and 5 may be necessary.

(6) Regulatory certainty is key to promoting efficient investments by all operators. Applying a consistent regulatory approach over time is important to give investors confidence for the design of their business plans. In order to mitigate the uncertainty associated with periodical market reviews, NRAs should clarify to the greatest extent possible how foreseeable changes in market circumstances might affect remedies.

The transition from copper-based to fibre-based networks (7) Where new fibre networks are installed on greenfield sites, NRAs should revise and, if necessary, adjust existing regulatory obligations to make sure they apply independently of the network technology deployed.

The deployment of NGA networks is likely to lead to important changes in the economics of service provision and the competitive situation. (8) In such context, NRAs should carefully examine the emerging conditions of competition resulting from the deployment of NGAs. NRAs should define sub-national geographic markets in accordance with 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 (1) if they can clearly identify substantially and objectively different conditions of competition which are stable over time. In situations where it cannot be concluded that the different competition conditions would justify the definition of sub-national geographic markets, it could nevertheless be appropriate for NRAs to respond to diverging competitive conditions between different areas within a geographically defined market, for instance due to the presence of several alternative infrastructures or infrastructure-based operators, by imposing differentiated remedies and access products.

The transition from copper-based to fibre-based networks may change the conditions of competition in different geographic areas and may necessitate a review of the geographical scope of Markets 4 and 5 or of Market 4 and 5 remedies in cases where such markets or remedies have been segmented on the basis of competition from local loop unbundling (LLU). (9) Where SMP is found within Market 4 an appropriate set of remedies should be applied.

Access to civil engineering infrastructure is crucial for the deployment of parallel fibre networks. It is therefore important that NRAs obtain the necessary information to assess whether and where ducts and other local loop facilities are available for the purpose of deploying NGA networks. NRAs should use their powers under Directive 2002/21/EC to obtain all relevant information on location, capacity and availability of such facilities. Alternative operators should ideally have the possibility to deploy their fibre networks at the same time as the SMP operator, sharing the costs of civil engineering works. (10) The deployment of NGA networks is likely to lead to important changes in the economics of service provision and the competitive situation.

Access to civil engineering infrastructure is crucial for the deployment of parallel fibre networks. It is therefore important that NRAs obtain the necessary information to assess whether and where ducts and other local loop facilities are available for the purpose of deploying NGA networks. NRAs should use their powers under Directive 2002/21/EC to obtain all relevant information on location, capacity and availability of such facilities. Alternative operators should ideally have the possibility to deploy their fibre networks at the same time as the SMP operator, sharing the costs of civil engineering works. (11) Where SMP is found within Market 4 an appropriate set of remedies should be applied.

Mandating access to civil engineering will be effective only if the SMP operator provides access under the same conditions to its own downstream arm and to third-party access seekers. NRAs should build on their experience in developing procedures and tools for LLU to put in place the necessary business processes concerning ordering and operational access to civil engineering facilities. Mandating the publication by the SMP operator of an adequate reference offer, as soon as possible after it has been requested by an access seeker, is proportionate to the objective of encouraging efficient investment and infrastructure competition. Such reference offer should specify the conditions and procedures of access to the civil engineering infrastructure, including access prices. (12) Access to civil engineering infrastructure is crucial for the deployment of parallel fibre networks. It is therefore important that NRAs obtain the necessary information to assess whether and where ducts and other local loop facilities are available for the purpose of deploying NGA networks. NRAs should use their powers under Directive 2002/21/EC to obtain all relevant information on location, capacity and availability of such facilities. Alternative operators should ideally have the possibility to deploy their fibre networks at the same time as the SMP operator, sharing the costs of civil engineering works.

Cost-oriented prices imply a reasonable return on capital employed. When investments in non-replicable physical assets such as civil engineering infrastructure are not specific to the deployment of NGA networks (and do not entail a similar level of systematic risk), their risk profile should not be considered to be different from that of existing copper infrastructure. (13) Mandating access to civil engineering will be effective only if the SMP operator provides access under the same conditions to its own downstream arm and to third-party access seekers. NRAs should build on their experience in developing procedures and tools for LLU to put in place the necessary business processes concerning ordering and operational access to civil engineering facilities. Mandating the publication by the SMP operator of an adequate reference offer, as soon as possible after it has been requested by an access seeker, is proportionate to the objective of encouraging efficient investment and infrastructure competition. Such reference offer should specify the conditions and procedures of access to the civil engineering infrastructure, including access prices.

There are several alternative infrastructures or infrastructure-based operators, which enables entrants to achieve minimum efficient scale to support effective and sustainable competition. Where necessary specific interfaces could be required to ensure efficient access. (15) Where possible NRAs should work towards ensuring that newly-built facilities of the SMP operator are designed so as to allow several operators to deploy their fibre lines.

In a Fibre to the Home (FTTH) context duplication of the terminating segment of the fibre loop will normally be costly and inefficient. To allow for sustainable infrastructure competition, it is therefore necessary that access be provided to the terminating segment of the fibre infrastructure deployed by the SMP operator. To ensure efficient entry, it is important that access is granted at a level in the network of the SMP operator which enables entrants to achieve minimum efficient scale to support effective and sustainable competition. Where necessary specific interfaces could be required to ensure efficient access. (16) In a Fibre to the Home (FTTH) context duplication of the terminating segment of the fibre loop will normally be costly and inefficient. To allow for sustainable infrastructure competition, it is therefore necessary that access be provided to the terminating segment of the fibre infrastructure deployed by the SMP operator. To ensure efficient entry, it is important that access is granted at a level in the network of the SMP operator which enables entrants to achieve minimum efficient scale to support effective and sustainable competition. Where necessary specific interfaces could be required to ensure efficient access.

Transparency and non-discrimination obligations are required to ensure the effectiveness of access to the terminating segment. Where so requested, the publication by the SMP operator of an adequate reference offer within a short timeframe is necessary in order to allow access seekers to make investment choices. (17) Transparency and non-discrimination obligations are required to ensure the effectiveness of access to the terminating segment. Where so requested, the publication by the SMP operator of an adequate reference offer within a short timeframe is necessary in order to allow access seekers to make investment choices.

NRAs need to ensure that access prices reflect the costs effectively borne by the SMP operator, including due consideration of the level of investment risk. (18) NRAs need to ensure that access prices reflect the costs effectively borne by the SMP operator, including due consideration of the level of investment risk.
(19) Networks based on multiple fibre lines can be deployed at a marginally higher cost than single fibre networks, while allowing alternative operators each to control their own connection up to the end-user. These are likely to be conducive to long-term sustainable competition in line with the objectives of the EU regulatory framework. It is thus desirable that NRAs use their powers to facilitate the deployment of multiple fibre lines in the terminating segment, taking into account in particular demand and costs involved.

(20) Alternative operators, some of whom have already deployed their own networks to connect to the unbundled copper loop of the SMP operator, need to be provided with appropriate access products in order to continue to compete in an NGA context. For FTTH these may consist of access to civil engineering infrastructure, to the terminating segment, to the unbundled fibre loop (including dark fibre) or of wholesale broadband access, as the case may be. Where remedies imposed on Market 4 lead to effective competition in the corresponding downstream market, in the whole market or in certain geographic areas, other remedies could be withdrawn in the market or areas concerned. Such withdrawal would be indicated, for instance, if the successful imposition of physical access remedies were to render additional bitstream remedies redundant. Moreover, in exceptional circumstances, NRAs could refrain from imposing unbundled access to the fibre loop in geographic areas where the presence of several alternative infrastructures, such as FTTH networks and/or cable, in combination with competitive access offers on the basis of unbundling, is likely to result in effective competition on the downstream level.

(21) Obligations imposed under Article 16 of Directive 2002/21/EC are based on the nature of the problem identified, without regard to the technology or the architecture implemented by an SMP operator. Therefore the fact of whether an SMP operator deploys a point-to-multipoint or point-to-point network topology should not as such affect the choice of remedies, keeping in mind the availability of new unbundling technologies to deal with potential technical problems in this respect. NRAs should be able to adopt measures for a transitional period mandating alternative access products which offer the nearest equivalent constituting a substitute to physical unbundling, provided that these are accompanied by the most appropriate safeguards to ensure equivalence of access and effective competition (1). In any event, NRAs should in such cases mandate physical unbundling as soon as technically and commercially feasible.

(22) Where unbundled access to the fibre loop is mandated, the existing LLU reference offer should be amended to include all relevant access conditions including financial conditions relative to the unbundling of the fibre loop, according to Annex II to Directive 2002/19/EC of the European Parliament and of the Council (2). Such amendment should be published without unnecessary delay to create the necessary degree of transparency and planning security for access seekers.

(23) The deployment of FTTH will normally entail considerable risks, given its high deployment costs per household and the currently still limited number of retail services requiring enhanced characteristics (such as higher throughput) which can only be delivered via fibre. Investments into fibre depend for their amortisation on the take-up of new services provided over NGA networks in the short and medium terms. The costs of capital of the SMP operator for the purpose of setting access prices should reflect the higher risk of investment relative to investment into current networks based on copper.

(24) Diversifying the risk of deployment may lead to more timely and more efficient deployment of NGA networks. NRAs should therefore assess pricing schemes proposed by the SMP operator to diversify the risk of the investment.

(25) Where SMP operators offer lower access prices to the unbundled fibre loop in return for up-front commitments on long-term or volume contracts, these should not be regarded as unduly discriminatory where NRAs are satisfied that the lower prices appropriately reflect an actual reduction of the investment risk. However, NRAs should ensure that such pricing arrangements do not lead to a margin-squeeze preventing efficient market entry.

(26) Margin squeeze can be demonstrated by showing that the SMP operator’s own downstream operations could not trade profitably on the basis of the upstream price charged to its competitors by the upstream operating arm of the SMP operator (‘equally efficient competitor’ test). Alternatively, a margin squeeze can also be demonstrated by showing that the margin between the price charged to competitors on the upstream market for access and the price which the downstream arm of the SMP operator charges in the downstream market is insufficient to allow a reasonably efficient service provider in the downstream market to obtain a normal profit (reasonably efficient competitor test). In the specific


context of *ex ante* price controls aiming to maintain effective competition between operators not benefiting from the same economies of scale and scope and having different unit network costs, a 'reasonably efficient competitor test' will normally be more appropriate. Moreover the assessment of any margin squeeze should be performed over an appropriate timeframe. To foster predictability, NRAs should properly specify in advance the methodology they will follow to identify the imputation test, the parameters to be used and the remedial mechanisms in case of established margin squeeze.

(27) Networks based on multiple fibre lines ensure that access seekers can obtain full control over fibre lines, without having to duplicate costly investments or risking discriminatory treatment in case of mandated single fibre unbundling. Networks based on multiple fibre lines are therefore likely to lead to more timely and more intense competition on the downstream market. Co-investment into NGA networks can reduce both the costs and the risk incurred by an investing undertaking, and can thus lead to more extensive deployment of FTTH.

(28) Arrangements for co-investment in FTTH based on multiple fibre lines may in certain conditions lead to a situation of effective competition in the geographic areas covered by the co-investment. These conditions relate in particular to the number of operators involved, the structure of the jointly controlled network and other arrangements between the co-investors which aim at ensuring effective competition on the downstream market. In such a situation, if competitive conditions in the areas concerned are substantially and objectively different from those prevailing elsewhere, this could justify the definition of a separate market where, after the market analysis according to Article 16 of Directive 2002/21/EC, no SMP is found.

(29) NRAs should assess the costs of sub-loop unbundling. NRAs should, where appropriate, organise a prior consultation of alternative operators potentially interested in sharing street cabinets, and on this basis determine where street cabinets should be adapted and how costs should be allocated.

(30) When imposing sub-loop unbundling remedies, NRAs should adopt appropriate backhaul measures to make such remedies effective. Access seekers should be able to select the solution best fitting their requirements, whether dark fibre (and where relevant copper), Ethernet backhaul or duct access. NRAs could, where necessary, take measures pertaining to the adequate size of the street cabinets owned by the SMP operator.

(31) The transparency of access conditions to sub-loops can best be ensured by their inclusion in the existing LLU Reference Offer. It is important that this transparency requirement applies to all items necessary for the provision of sub-loop unbundling, including backhaul and ancillary services to allow continuity of existing competitive offerings. The reference offer should incorporate all pricing conditions to allow entrants to calculate the business case for sub-loop unbundling.

(32) Consistent with the pricing of local loop unbundling, the pricing of all items necessary for the provision of sub-loop unbundling is to be cost-oriented and in line with current methodologies used for pricing access to the unbundled copper loop. The replacement of copper by fibre up to an intermediary distribution point represents an important investment entailing some risk, even though the risk is deemed to be lower than for FTTH networks, at least in densely populated areas, in view of the relative deployment costs per household involved and the uncertainty of demand for improved or up-graded services.

(33) NRAs should apply non-discrimination principles in order to avoid any timing advantage for the retail arm of the SMP operator. The latter should be obliged to update its wholesale bitstream offer before it launches new retail services based on fibre to allow competing operators enjoying access a reasonable period to react to the launch of such products. Six months is considered a reasonable period to make the necessary adjustments, unless other effective safeguards exist which guarantee non-discrimination.

(34) It is expected that wholesale broadband access products based on fibre may be technically configured in ways that allow for more flexibility and enhanced service characteristics compared to copper-based bitstream products. To foster retail product competition it is important that such different service characteristics are reflected in various regulated NGA-based products, including business grade services.

(35) Different bitstream products, capable of being distinguished downstream in terms of for instance bandwidth, reliability, quality of services or other parameters, might be delivered via a given NGA network.
(36) New access remedies will need to be carefully specified, for instance with respect to technical protocols and interfaces serving the interconnection of optical networks or the scope and characteristics of new bitstream remedies. NRAs should cooperate with each other, international standards bodies and industry stakeholders to develop common technical standards in this regard.

(37) Where ex ante price regulation is applied, wholesale bitstream access prices should be derived by means of cost-orientation. NRAs could use other appropriate price control methodologies including, e.g. retail-minus, where there are sufficient competitive constraints on the downstream retail arm of the SMP operator. NRAs should set different prices for different bitstream products to the extent that such price differences can be justified by the underlying costs of service provision so as to enable all operators to benefit from sustained price differentiation at both wholesale and retail levels. The risk incurred by the SMP operator should be duly taken into account in setting the access price.

(38) Effective physical access remedies might render, in certain areas, the imposition of an obligation of wholesale broadband access unnecessary for achieving effective competition on the downstream market. In particular, where the SMP operator has deployed an FTTH network and effective access to the unbundled fibre loop is available to alternative operators (in particular in point-to-point deployments), an NRA may consider that such access is sufficient to ensure effective competition on the downstream market, especially in densely populated areas. Refraining from imposing an obligation of wholesale broadband access under such circumstances may result in better investment incentives for all operators and foster timely deployment.

(39) Where there is a proven track record that functional separation or similar arrangements have resulted in fully equivalent access to NGA networks by alternative operators and the downstream arm of the SMP operator, and where there are sufficient competitive constraints on the SMP operator's downstream arm, NRAs have more flexibility when designing remedies for wholesale broadband access. In particular, the price of the bitstream product could be left to the market. However, careful monitoring as well as performance of an appropriate margin-squeeze test as set out above would be essential to avoid anti-competitive outcomes.

(40) Operators currently enjoying access have a legitimate interest to have an appropriate time to prepare for the changes that substantially affect their investments and their business case. In the absence of a commercial agreement NRAs should ensure that there is an appropriate migration path put in place. Such migration path should be transparent and developed at the necessary level of detail so that operators currently enjoying access can prepare for the changes, including rules for any necessary joint work by access seekers and the SMP operator as well as for the precise modalities of decommissioning points of interconnection. Existing SMP obligations should be maintained for an appropriate transitional period. This transitional period should be aligned with the standard investment period for the unbundling of a local loop or local sub-loop which is in general 5 years. In case the SMP operator provides equivalent access at the MDF, the NRA may decide to set a shorter period.

(41) Where the SMP operator envisages to replace part of its existing copper access network with fibre and plans to de-commission currently used points of interconnection, NRAs should obtain the relevant information from the SMP operator, and should under Article 9(1) of Directive 2002/19/EC ensure that undertakings enjoying access to the SMP operator's network receive all necessary information in timely fashion to adjust their own networks and network extension plans accordingly. NRAs should define the format and level of detail of such information, while ensuring that such information is used only for the purpose it is intended to serve and that the confidentiality of information is ensured throughout the process.

HAS ADOPTED THIS RECOMMENDATION:

Aim and Scope

1. The aim of this Recommendation is to foster the development of the single market by enhancing legal certainty and promoting investment, competition and innovation in the market for broadband services in particular in the transition to next generation access networks (NGAs).

2. This Recommendation sets out a common approach for promoting the consistent implementation of remedies with regard to NGAs, on the basis of a market analysis procedure pursuant to Directives 2002/19/EC and 2002/21/EC.

3. Where in the context of market analysis procedures carried out under Article 16 of Directive 2002/21/EC NRAs consider the imposition of regulatory remedies, they should design effective remedies in accordance with the aforementioned Directives and the common approach set out in this Recommendation. The regulatory framework provides NRAs with a range of remedies, allowing them to design appropriate measures to tackle market failures and achieve intended regulatory objectives in each Member State. NRAs should take into account
arrangements entered into by operators aimed at diversifying the risk of deploying optical fibre networks to connect homes or buildings, and at promoting competition.

**Consistent approach**

4. NRAs should use their powers under Article 5 of Directive 2002/21/EC to ensure that the SMP operator provides all information necessary for designing appropriate regulatory remedies in the transition to NGAs, such as information on planned changes to its network topology or on availability of ducts.

5. The review of Markets 4 and 5 of Recommendation 2007/879/EC should take account of NGAs and should be performed in a coordinated and timely manner by each NRA. NRAs should ensure that remedies mandated in Markets 4 and 5 are consistent with each other.

6. Where the relevant market analyses indicate that the market conditions remain broadly constant, NRAs should apply a consistent regulatory approach over appropriate review periods. Where possible, NRAs should explain in their decisions how they intend to adapt remedies in Markets 4 and 5 in future market reviews in reaction to likely changes in market circumstances.

7. When applying symmetric measures under Article 12 of Directive 2002/21/EC granting access to an undertaking's civil engineering infrastructure and terminating segment, NRAs should take into account measures under Article 5 of Directive 2002/19/EC.

8. Where fibre is deployed in the access network on greenfield sites, NRAs should not require the SMP operator additionally to deploy a parallel copper network in order to meet its existing obligations, including universal service obligations, but allow for the provision of any existing regulated products or services by functionally equivalent products or services over fibre.

**Geographical variation**

9. NRAs should examine differences in conditions of competition in different geographical areas in order to determine whether the definition of sub-national geographic markets or the imposition of differentiated remedies are warranted. Where divergences in the conditions of competition are stable and substantial, NRAs should define sub-national geographic markets in accordance with Recommendation 2007/879/EC. In other cases, NRAs should monitor whether the deployment of NGAs networks and the subsequent evolution of competitive conditions within a geographically defined market warrant the imposition of differentiated remedies.

10. Where in the past sub-national geographic markets or remedies have been identified in Market 5 that depend on access products in Market 4, which may become redundant owing to NGA deployment, such segmentations or remedies should be reviewed.

**Definitions**

11. For the purpose of this Recommendation, the following definitions should apply:

   ‘Next generation access (NGA) networks’ (NGAs) means wired access networks which consist wholly or in part of optical elements and which are capable of delivering broadband access services with enhanced characteristics (such as higher throughput) as compared to those provided over already existing copper networks. In most cases NGAs are the result of an upgrade of an already existing copper or co-axial access network.

   ‘Civil engineering infrastructure’ means physical local loop facilities deployed by an electronic communications operator to host local loop cables such as copper wires, optical fibre and co-axial cables. It typically refers, but is not limited to, subterranean or above-ground assets such as sub-ducts, ducts, manholes and poles.

   ‘Duct’ means an underground pipe or conduit used to house (fibre, copper or coax) cables of either core or access networks.

   ‘Manholes’ means holes, usually with a cover, through which a person may enter enter an underground utility vault used to house an access point for making cross-connections or performing maintenance on underground electronic communications cables.

   The ‘Metropolitan Point of Presence’ (MPoP) means the point of inter-connection between the access and core networks of an NGA operator. It is equivalent to the Main Distribution Frame (MDF) in the case of the copper access network. All NGA subscribers’ connections in a given area (usually a town or part of a town) are centralised to the MPoP on an Optical Distribution Frame (ODF). From the ODF, NGA loops are connected to the core network equipment of the NGA operator or of other operators, possibly via intermediate backbone links where equipment is not co-located in the MPoP.
The 'distribution point' means an intermediary node in an NGA network from where one or several fibre cables coming from the MPoP (the feeder segment) are split and distributed to connect to end-users' premises (the terminating or drop segment). A distribution point generally serves several buildings or houses. It can be located either at the base of a building (in case of multi-dwelling units), or in the street. A distribution point hosts a distribution frame mutualising the drop cables, and possibly un-powered equipment such as optical splitters.

The 'terminating segment' means the segment of an NGA access network which connects an end-user's premises to the first distribution point. The terminating segment thus includes vertical in-building wiring and possibly horizontal wiring up to an optical splitter located in a building's basement or a nearby manhole.

'FTTH' or 'fibre-to-the-home' is an access network consisting of optical fibre lines in both the feeder and the drop segments of the access network, i.e. connecting a customer's premises (the home or in multi-dwelling units the apartment) to the MPoP by means of optical fibre. For present purposes, FTTH shall refer to both 'fibre-to-the-home' and 'fibre-to-the-building' (FTTB).

'Multiple fibre FTTH' is a form of fibre deployment in which the investor deploys more fibre lines than needed for its own purposes in both the feeder and the drop segments of the access network in order to sell access to additional fibre lines to other operators, notably in the form of indefeasible rights of use (IRU).

'Co-investment in FTTH' means an arrangement between independent providers of electronic communications services with a view to deploying FTTH networks in a joint manner, in particular in less densely populated areas. Co-investment covers different legal arrangements, but typically co-investors will build network infrastructure and share physical access to that infrastructure.

Access to wholesale physical network infrastructure (Market 4)

12. Where SMP is found on Market 4, NRAs should impose an appropriate set of remedies taking into account in particular the principles set out below.

Access to civil engineering infrastructure of the SMP operator

13. Where duct capacity is available, NRAs should mandate access to civil engineering infrastructure. Access should be provided in accordance with the principle of equivalence as set out in Annex II.

14. NRAs should ensure that access to existing civil engineering infrastructure is provided at cost-oriented prices in accordance with Annex I.

15. Where there is a request for a reference offer for access to civil engineering infrastructure, NRAs should mandate such offer as soon as possible. The reference offer should be in place not later than 6 months after such request has been made.

16. NRAs should, in accordance with market demand, encourage, or, where legally possible under national law, oblige the SMP operator, when building civil engineering infrastructure, to install sufficient capacity for other operators to make use of these facilities.

17. NRAs should work with other authorities with a view to establishing a data-base containing information on geographical location, available capacity and other physical characteristics of all civil engineering infrastructure which could be used for the deployment of optical fibre networks in a given market or market segment. Such database should be accessible to all operators.

Access to the terminating segment in the case of FTTH

18. Where an SMP operator deploys FTTH, NRAs should, in addition to mandating access to civil engineering infrastructure, mandate access to the terminating segment of the access network of the SMP operator, including wiring inside buildings. For this purpose, NRAs should oblige the SMP operator to provide detailed information on its access network architecture and, following consultation with potential access seekers on viable access points, determine where the distribution point of the terminating segment of the access network should be for the purpose of mandating access, in accordance with Article 12(1) of Directive 2002/19/EC. In making such determination, NRAs should take into account the fact that any distribution point will need to host a sufficient number of end-user connections to be commercially viable for the access seeker.

19. The SMP operator should be obliged to provide access to the distribution points in accordance with the principle of equivalence as set out in Annex II. Where there is a request for a reference offer for access to the terminating segment, NRAs should mandate such offer as soon as possible. The reference offer should be in place not later than 6 months after such request has been made.

20. NRAs should ensure that access to the terminating segment is provided at cost-oriented prices in accordance with Annex I.

21. NRAs should, in accordance with market demand, encourage, or, where legally possible under national law, oblige the SMP operator to deploy multiple fibre lines in the terminating segment.
Unbundled access to the fibre loop in the case of FTTH

22. In accordance with the principles provided for in Directive 2002/19/EC (1), where the SMP operator deploys FTTH, NRAs should in principle mandate unbundled access to the fibre loop. Any exception could be justified only in geographic areas where the presence of several alternative infrastructures, such as FTTH networks and/or cable, in combination with competitive access offers is likely to result in effective competition on the downstream level. The imposition of unbundled access to the fibre loop should be accompanied by appropriate measures assuring co-location and backhaul. Access should be given at the most appropriate point in the network, which is normally the Metropolitan Point of Presence (MPoP).

23. NRAs should mandate unbundled access to the fibre loop irrespective of the network architecture and technology implemented by the SMP operator.

24. The existing LLU reference offer should be complemented as soon as possible to include unbundled access to the fibre loop. Directive 2002/19/EC Annex II sets a minimum list of conditions that must be part of the reference offer for LLU, and which should apply mutatis mutandis to unbundled access to the fibre loop. The reference offer should be in place as soon as possible and in any case not later than 6 months after an NRA has imposed the obligation to grant access.

25. The price of access to the unbundled fibre loop should be cost-oriented. NRAs should duly take into account additional and quantifiable investment risk incurred by the SMP operator when setting the price of access to the unbundled fibre loop. In principle, this risk should be reflected in a premium included in the cost of capital for the relevant investment as set out in Annex I.

26. NRAs should also assess pricing schemes proposed by the SMP operator to diversify the risk of investment. NRAs should agree to such schemes only where they are satisfied that the SMP operator has provided all relevant information related to the investment, and only if such schemes do not have discriminatory or exclusionary effect. Criteria for assessing such pricing schemes are set out in Annex I.

27. In such cases NRAs should ensure that a sufficient margin remains between wholesale and retail prices to allow for market entry by an efficient competitor. NRAs should thus verify the SMP operator’s pricing behaviour by applying a properly specified margin-squeeze test over an appropriate timeframe. NRAs should specify in advance the methodology they will follow for identifying the impu-

28. Where the conditions of competition in the area covered by the joint deployment of FTTH networks based on multiple fibre lines by several co-investors are substantially different, i.e. such as to justify the definition of a separate geographic market, NRAs should examine, in the course of their market analysis, whether, in the light of the level of infrastructure competition resulting from the co-investment, a finding of SMP is warranted with regard to that market. In this context, NRAs should in particular examine whether each co-investor enjoys strictly equivalent and cost-oriented access to the joint infrastructure and whether the co-investors are effectively competing on the downstream market. They should also examine whether the co-investors install sufficient duct capacity for third parties to use and grant cost-oriented access to such capacity.

Access obligations in the case of FTTN

29. NRAs should impose an obligation of unbundled access to the copper sub-loop. A copper sub-loop unbundling remedy should be supplemented by backhaul measures, including fibre and Ethernet backhaul where appropriate, and by ancillary remedies ensuring its effectiveness and viability, such as non-discriminatory access to facilities for co-location, or in their absence, equivalent co-location. The reference offer should be in place as soon as possible and in any case not later than 6 months after an NRA has imposed the obligation to grant access.

30. When NRAs impose copper sub-loop unbundling, the SMP operator should be required to complement the existing LLU reference offer with all necessary items. The price of access to all items should be cost-oriented in accordance with Annex I.

Wholesale broadband access (Market 5)

31. Where SMP is found on Market 5, wholesale broadband access remedies should be maintained or amended for existing services and their chain substitutes. NRAs should consider wholesale broadband access over VDSL as a chain substitute to existing wholesale broadband access over copper-only loops.

32. NRAs should oblige the SMP operator to make new wholesale broadband access products available in principle at least 6 months before the SMP operator or its retail subsidiary markets its own corresponding NGA retail services, unless there are other effective safeguards to guarantee non-discrimination.

(1) See in particular recital 19.
33. NRAs should mandate the provision of different wholesale products that best reflect in terms of bandwidth and quality the technological capabilities inherent in the NGA infrastructure so as to enable alternative operators to compete effectively, including for business grade services.

34. NRAs should cooperate with each other in order to define appropriate technical specifications for wholesale broadband access products provided over NGAs and provide information to international standards bodies in order to facilitate the development of relevant industry standards.

35. NRAs should in principle impose cost orientation on mandated wholesale broadband access products in accordance with Annex I, taking into account differences in bandwidth and quality of the various wholesale offers.

36. NRAs should analyse whether an obligation of cost orientation on mandated wholesale broadband access is necessary to achieve effective competition in case functional separation or other forms of separation have proved effectively to guarantee equivalence of access. In the absence of cost orientation NRAs should monitor the SMP operator's pricing behaviour by applying a properly specified margin-squeeze test.

37. Where NRAs consider that, in a given geographic area, there is effective access to the unbundled fibre loop of the SMP operator's network and that such access is likely to result in effective competition on the downstream level, NRAs should consider removing the obligation of wholesale bitstream access in the area concerned.

38. In examining whether SMP is present NRAs should, in the case of co-investment, be guided by the principles set out in paragraph 28.

Migration

39. Existing SMP obligations in relation to Markets 4 and 5 should continue and should not be undone by changes to the existing network architecture and technology, unless agreement is reached on an appropriate migration path between the SMP operator and operators currently enjoying access to the SMP operator's network. In the absence of such agreement, NRAs should ensure that alternative operators are informed no less than 5 years, where appropriate taking into account national circumstances, before any de-commissioning of points of interconnection such as the local loop exchange. This period may be less than 5 years if fully equivalent access is provided at the point of interconnection.

40. NRAs should put in place a transparent framework for the migration from copper to fibre-based networks. NRAs should ensure that the systems and procedures put in place by the SMP operator, including operating support systems, are designed so as to facilitate the switching of alternative providers to NGA-based access products.

41. NRAs should use their powers under Article 5 of Directive 2002/21/EC to obtain information from the SMP operator concerning any network modification plans that are likely to affect the competitive conditions in a given market or sub-market. Where the SMP operator envisages to replace part of its existing copper access network with fibre and plans to de-commission currently used points of interconnection, NRAs should under Article 9(1) of Directive 2002/19/EC ensure that undertakings enjoying access to the SMP operator's network receive all necessary information in timely fashion to adjust their own networks and network extension plans accordingly. NRAs should define the format and level of detail of such information, and ensure that strict confidentiality of the information disclosed is respected.

42. This Recommendation is addressed to the Member States.

Done at Brussels, 20 September 2010.

For the Commission
Neelie KROES
Vice-President
ANNEX I

Pricing principles and risk

1. COMMON PRINCIPLES FOR THE PRICING OF NGA ACCESS

Under Article 8(2) of Directive 2002/21/EC, NRAs are to promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services, inter alia, by encouraging efficient investment in infrastructure. In determining the cost base used for cost-orientation obligations, pursuant to Article 13(1) of Directive 2002/19/EC, NRAs should consider whether duplication of the relevant NGA access infrastructure is economically feasible and efficient. Where this is not the case, the overriding aim is to create a genuine level playing field between the downstream arm of the SMP operator and alternative network operators. A consistent regulatory approach may therefore imply that NRAs use different cost bases for the calculation of cost-oriented prices for replicable and non-replicable assets, or at least adjust the parameters underpinning their cost methodologies in the latter case.

In cases where investment into NGAs depends for its profitability on uncertain factors such as assumptions of significantly higher ARPU’s or increased market shares, NRAs should assess whether the cost of capital reflects the higher risk of investment relative to investment into current networks based on copper. Additional mechanisms serving to allocate the investment risk between investors and access seekers and to foster market penetration could also be used, such as long-term access pricing or volume discounts. Such pricing mechanisms should be reviewed by the NRA in accordance with the criteria set out in sections 7 and 8 below.

In order to enforce cost-orientation obligations, NRAs should impose accounting separation pursuant to Article 11 of Directive 2002/19/EC. Separated accounts for the NGA infrastructure and/or service elements to which access is mandated should be set up in such a manner that the NRA can (i) identify the cost of all relevant assets for the determination of access prices (including depreciation and valuation changes) and (ii) monitor effectively whether the SMP operator grants access under the same conditions and prices to other market participants as to its own downstream arm. Such monitoring should include the performance of margin-squeeze tests. Costs should be allocated on the basis of objective criteria amongst the various wholesale and retail products which rely on such inputs, to avoid double counting.

NRAs should estimate the incremental costs required to provide access to the facilities concerned. Such costs relate to the ordering and provisioning of access to civil engineering infrastructure or fibre; operating and maintenance costs for IT systems; and operating costs associated with wholesale product management. These costs should be allocated on a proportionate basis between all undertakings enjoying access, including the downstream arm of the SMP operator.

2. PRICING OF ACCESS TO CIVIL ENGINEERING INFRASTRUCTURE

Access to existing civil engineering infrastructure of the SMP operator on Market 4 should be mandated at cost-oriented prices. NRAs should regulate access prices to civil engineering infrastructure consistently with the methodology used for pricing access to the unbundled local copper loop. NRAs should ensure that access prices reflect the costs effectively borne by the SMP operator. NRAs should in particular take into account actual lifetimes of the relevant infrastructure and possible deployment economies of the SMP operator. Access prices should capture the proper value of the infrastructure concerned, including its depreciation.

When setting the price for access to civil engineering infrastructure, NRAs should not consider the risk profile to be different from that of copper infrastructure, except where the SMP operator had to incur specific civil engineering costs — beyond the normal maintenance costs — to deploy an NGA network.

3. PRICING OF ACCESS TO THE TERMINATING SEGMENT IN THE CASE OF FTTH

NRAs should set prices for access to the distribution point consistently with the methodology used for pricing access to the unbundled local copper loop. NRAs should ensure that access prices reflect the costs effectively borne by the SMP operator, including, where appropriate, a higher risk premium to reflect any additional and quantifiable risk incurred by the SMP operator.
4. PRICING OF ACCESS TO FIBRE AT THE MPOP IN THE CASE OF FTTH (UNBUNDLED FIBRE LOOP)

When setting access prices to the unbundled fibre loop, NRAs should include a higher risk premium to reflect any additional and quantifiable investment risk incurred by the SMP operator. The risk premium should be estimated in accordance with the methodology set out in section 6 below. Additional price flexibility could be granted in accordance with sections 7 and 8 below.

Under the principle of non-discrimination, the price charged to the SMP operator's downstream arm should be the same as the price charged to third parties.

5. PRICING OF ACCESS TO THE COPPER SUB-LOOP IN THE CASE OF FTTN

NRAs should impose cost-based access to all items necessary to allow sub-loop unbundling, including backhaul measures and ancillary remedies, such as non-discriminatory access to facilities for co-location, or in their absence, equivalent co-location.

Regulated access prices should not be higher than the cost incurred by an efficient operator. For this purpose, NRAs may consider to evaluate these costs using bottom-up modelling or benchmarks, where available.

When setting the price for access to the copper sub-loop, NRAs should not consider the risk profile to be different from that of existing copper infrastructure.

6. CRITERIA FOR SETTING THE RISK PREMIUM

Investment risk should be rewarded by means of a risk premium incorporated in the cost of capital. The return on capital allowed ex ante for investment into NGA networks should strike a balance between on the one hand providing adequate incentives for undertakings to invest (implying a sufficiently high rate of return) and promoting allocative efficiency, sustainable competition and maximum consumer benefits on the other (implying a rate of return that is not excessive). To do so, NRAs should, where justified, include over the pay-back period of the investment a supplement reflecting the risk of the investment in the WACC calculation currently performed for setting the price of access to the unbundled copper loop. The calibration of revenue streams for calculating the WACC should take into account all dimensions of capital employed, including appropriate labour costs, building costs, anticipated efficiency gains and the terminal asset value, in accordance with recital 20 of Directive 2002/19/EC.

NRAs should estimate investment risk, inter alia, by taking into account the following factors of uncertainty: (i) uncertainty relating to retail and wholesale demand; (ii) uncertainty relating to the costs of deployment, civil engineering works and managerial execution; (iii) uncertainty relating to technological progress; (iv) uncertainty relating to market dynamics and the evolving competitive situation, such as the degree of infrastructure-based and/or cable competition; and (v) macroeconomic uncertainty. These factors may change over time, in particular due to the progressive increase of retail and wholesale demand met. NRAs should therefore review the situation at regular intervals and adjust the risk premium over time, considering variations in the above factors.

Criteria such as the existence of economies of scale (especially if the investment is undertaken in urban areas only), high retail market shares, control of essential infrastructures, OPEX savings, proceeds from the sale of real estate as well as privileged access to equity and debt markets are likely to mitigate the risk of NGA investment for the SMP operator. These aspects should also be periodically reassessed by NRAs when reviewing the risk premium.

The above considerations apply in particular to investment into FTTH. Investment into FTTN, on the other hand, which is a partial upgrade of an existing access network (such as for example VDSL), normally has a significantly lower risk profile than investment into FTTH, at least in densely populated areas. In particular, there is less uncertainty involved about the demand for bandwidth to be delivered via FTTN/VDSL, and overall capital requirements are lower. Therefore, while regulated prices for WBA based on FTTN/VDSL should take account of any investment risk involved, such risk should not be presumed to be of a similar magnitude as the risk attaching to FTTH based wholesale access products. When setting risk premia for WBA based on FTTN/VDSL, NRAs should give due consideration to these factors, and should not in principle approve the pricing schemes set out in sections 7 and 8 below. NRAs should publicly consult on their methodology to determine the risk premium.
7. CRITERIA TO ASSESS LONG-TERM ACCESS PRICING IN CASE OF FTTH

Access prices adjusted for risk based on long-term access may vary as a function of time over which access commitments are made. Long-term access contracts would be priced at a lower level per access line than short term access contracts. Long-term access prices should only reflect the reduction of risk for the investor and therefore cannot be lower than the cost-oriented price to which no higher risk premium reflecting the systematic risk of the investment is added. Under long-term contracts, entrants would acquire full control of physical assets, also offering them the possibility to engage in secondary trading. Short-term contracts would be available without long commitments and thus normally be priced higher per access line, with access prices reflecting the potential value attaching to the flexibility of such form of access which benefits the access seeker.

Long-term access pricing may however be abused by the SMP operator over time to sell its retail services at prices lower than those for its regulated wholesale services (since it would charge its own downstream retail arm low long-term commitment prices), thereby in effect foreclosing the market. Furthermore, alternative providers with smaller customer bases and unclear business perspectives face higher levels of risk. They might be unable to commit to purchasing over a long period. They might thus have to stagger their investment and purchase regulated access at a later stage.

For these reasons, long-term access pricing would be acceptable only if NRAs ensure that the following conditions are met:

(a) long-term commitment prices only reflect the reduction of risk for the investor; and

(b) over an appropriate timeframe there is a sufficient margin between wholesale and retail prices to allow for market entry by an efficient competitor in the downstream market.

8. CRITERIA TO ASSESS VOLUME DISCOUNTS IN CASE OF FTTH

Access prices adjusted for risk based on volume discounts reflect the fact that investment risk decreases with the total number of fibre loops already sold in a given area. Investment risk is closely tied to the number of fibre loops which remain unused. The higher the share of used fibre loops, the lower the risk. Access prices could therefore vary in accordance with the volume purchased. A single level of discount should be authorised, available at a uniform price per line to all qualifying operators. NRAs should identify the volume of lines which should be purchased to get access to such volume discount, taking into account the estimated minimum operating scale necessary for an access seeker efficiently to compete in the market and the need to maintain a market structure with a sufficient number of qualifying operators to ensure effective competition. The volume discount should only reflect the reduction of risk for the investor and therefore cannot result in access prices which are lower than the cost-oriented price to which no higher risk premium reflecting the systematic risk of the investment is added. Considering that the risk premium should normally decrease following the overall increase of retail and wholesale demand met, the volume discount should also decrease accordingly and may no longer be justified once retail and wholesale demand are met at high levels.

A volume discount should only be accepted by NRAs provided the following conditions are met:

(a) a single level volume discount is calculated per area as appropriately sized by the NRA taking account of national circumstances and network architecture, and applies equally to all access seekers which, in the area concerned, are willing to purchase at least the volume of lines giving access to the discount; and

(b) the volume discount only reflects the reduction of risk for the investor; and

(c) over an appropriate timeframe there is a sufficient margin between wholesale and retail prices to allow for market entry by an efficient competitor.
ANNEX II

Application of the principle of equivalence for access to the civil engineering infrastructure of the SMP operator for the purpose of rolling out NGA networks

1. PRINCIPLE OF EQUIVALENCE

Access to civil engineering infrastructure of the SMP operator can represent an important input for the deployment of NGA networks. In order to create a level playing field among entrants and the SMP operator, it is important that such access is provided on a strictly equivalent basis. NRAs should require the SMP operator to provide access to its civil engineering infrastructure under the same conditions to internal and to third-party access seekers. In particular the SMP operator should share all necessary information pertaining to infrastructure characteristics, and apply the same procedures for access ordering and provisioning. Reference offers and service level agreements are instrumental to ensuring a proper application of the principle of equivalence. Conversely, it is important that any asymmetric knowledge the SMP operator possesses of the rollout plans of third-party access seekers is not used by the SMP operator to gain undue commercial advantage.

2. INFORMATION ON THE CIVIL ENGINEERING INFRASTRUCTURE AND THE DISTRIBUTION POINTS

The SMP operator should provide third-party access seekers with the same level of information on its civil engineering infrastructure and distribution points as is available internally. This information should cover the organisation of the civil engineering infrastructure as well as the technical characteristics of the different elements of which the infrastructure consists. Where available, the geographical location of these elements, including ducts, poles and other physical assets (e.g. maintenance chambers) should be provided, as well as the available space in ducts. The geographical location of distribution points and a list of connected buildings should also be provided.

The SMP operator should specify all intervention rules and technical conditions relating to access and use of its civil engineering infrastructure and distribution points, and of the different elements the infrastructure consists of. The same rules and conditions should apply to third-party access seekers as to internal access seekers.

The SMP operator should provide the tools for ensuring proper information access, such as easily accessible directories, data bases or web portals. Information should be regularly updated, so as to take account of the infrastructure's evolution and development and of further information collected, in particular on the occasion of fibre deployment projects by the SMP operator or other access seekers.

3. ORDERING AND PROVISIONING OF ACCESS

The SMP operator should implement the procedures and tools necessary for ensuring efficient access and use of its civil engineering infrastructure and distribution points, and the different elements the infrastructure consists of. In particular, the SMP operator should provide third-party access seekers with end-to-end ordering, provisioning and fault management systems equivalent to those provided to internal access seekers. This should include measures aimed at de-congestioning currently used ducts.

Requests for information, access and use of the civil engineering infrastructure, the distribution points and the different elements the infrastructure consists of by third-party access seekers should be processed within the same delays as equivalent requests by internal access seekers. The same level of visibility on the progress of the requests should also be provided, and negative answers should be objectively justified.

The information systems of the SMP operator should keep track records of the handling of requests which should be available to the NRA.

4. SERVICE LEVEL INDICATORS

In order to ensure that access and use of the civil engineering infrastructure of the SMP operator is provided on an equivalent basis, service level indicators should be defined and calculated for both internal and third-party access seekers. Service level indicators should measure the responsiveness of the SMP operator to perform those actions necessary to provide access to its civil engineering infrastructure. Target service levels should be agreed with access seekers.

Service level indicators should include delays for replying to requests for information on availability of elements of infrastructure, including ducts, poles, other physical assets (e.g. manholes), or distribution points; delays for replying to a request for feasibility to use elements of infrastructure; a measure of responsiveness to handle requests for access and use of elements of infrastructure; a measure of responsiveness for fault resolution processes.
The calculation of the service level indicators should be performed at regular, fixed intervals and submitted to third-party access seekers. The NRA should control that service levels delivered to third-party access seekers are equivalent to those delivered internally by the SMP operator. The SMP operator should commit to adequate compensation in case of failure to comply with target service levels agreed with third-party access seekers.

5. REFERENCE OFFER

The different items required to provide equivalent access to the civil engineering infrastructure of the SMP operator should be published in a reference offer, if a request for such an offer has been made by an access seeker. At a minimum, the reference offer should contain the relevant procedures and tools for retrieving civil engineering asset information; describe the access and usage conditions to the different elements which make up the civil engineering infrastructure; describe the procedures and tools for access ordering, provisioning and fault management; and fix target service levels and the penalties for breach of those service levels. Internal access provision should be based on the same terms and conditions as contained in the reference offer provided to third-party access seekers.

6. MONITORING BY THE NRA

NRAs should ensure that the principle of equivalence is effectively applied. For this purpose they should make sure that upon request, a reference offer for access to civil engineering infrastructure is provided to third party access seekers in due time. Also in addition to service level reports, NRAs should ensure that SMP operators keep track of all elements necessary to monitor compliance with the equivalence of access requirement. This information should allow NRAs to run regular controls, verifying that the required level of information is provided to third-party access seekers by the SMP operator and that the procedures for access ordering and provisioning are correctly applied.

In addition, NRAs should ensure that a fast-track ex-post procedure is available to settle disputes.

7. ASYMMETRY OF INFORMATION

The incumbent has prior knowledge of third-party access seekers’ deployment plans. To prevent such information from being used to gain undue competitive advantage, the SMP operator in charge of operating the civil engineering infrastructure should not share such information with its downstream retail arm.

NRAs at a minimum should ensure that those persons involved in the retail arm activities of the SMP operator may not participate in company structures of the SMP operator responsible, directly or indirectly, for managing access to civil engineering infrastructure.
I

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

REGULATIONS

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:


(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.

(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.


(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.


(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.


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.

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, from the Commission, or from any other public or private entity.
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 183 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 BEREC.

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 BEREC 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.

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.

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.

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


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

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 Com-
munity 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