

Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (Text with EEA relevance)

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

of 25 November 2009

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

(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<sup>(1)</sup>,

Having regard to the Opinion of the Committee of the Regions<sup>(2)</sup>,

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

Whereas:

- (1) The functioning of the five directives comprising the existing EU regulatory framework for electronic communications networks and services (Directive 2002/21/EC (Framework Directive)<sup>(4)</sup>, Directive 2002/19/EC (Access Directive)<sup>(5)</sup>, Directive 2002/20/EC (Authorisation Directive)<sup>(6)</sup>, 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)<sup>(7)</sup>, and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)<sup>(8)</sup> (together referred to as 'the Framework Directive and the Specific Directives') is subject to periodic review by the Commission, with a view in particular to determining the need for modification in the light of technological and market developments.

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- (2) In that regard, the Commission presented its initial findings in its Communication of 29 June 2006 on the review of the EU regulatory framework for electronic communications networks and services. On the basis of these initial findings, a public consultation was held, which identified the continued lack of an internal market for electronic communications as the most important aspect needing to be addressed. In particular, regulatory fragmentation and inconsistencies between the activities of the national regulatory authorities were found to jeopardise not only the competitiveness of the sector, but also the substantial consumer benefits from cross-border competition.
- (3) The EU regulatory framework for electronic communications networks and services should therefore be reformed in order to complete the internal market for electronic communications by strengthening the Community mechanism for regulating operators with significant market power in the key markets. This is complemented by Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office<sup>(9)</sup>. The reform also includes the definition of an efficient and coordinated spectrum management strategy in order to achieve a single European information space and the reinforcement of provisions for users with disabilities in order to obtain an inclusive information society.
- (4) Recognising that the Internet is essential for education and for the practical exercise of freedom of expression and access to information, any restriction imposed on the exercise of these fundamental rights should be in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms. Concerning these issues, the Commission should undertake a wide public consultation.
- (5) The aim is progressively to reduce *ex-ante* sector specific rules as competition in the markets develops and, ultimately, for electronic communications to be governed by competition law only. Considering that the markets for electronic communications have shown strong competitive dynamics in recent years, it is essential that *ex-ante* regulatory obligations only be imposed where there is no effective and sustainable competition.
- (6) In carrying out its reviews of the functioning of the Framework Directive and the Specific Directives, the Commission should assess whether, in the light of developments in the market and with regard to both competition and consumer protection, there is a continued need for the provisions on sector specific *ex-ante* regulation laid down in Articles 8 to 13a of Directive 2002/19/EC (Access Directive) and Article 17 of Directive 2002/22/EC (Universal Service Directive) or whether those provisions should be amended or repealed.
- (7) In order to ensure a proportionate and adaptable approach to varying competitive conditions, national regulatory authorities should be able to define markets on a sub-national basis and to lift regulatory obligations in markets and/or geographic areas where there is effective infrastructure competition.
- (8) In order to achieve the goals of the Lisbon Agenda, it is necessary to give appropriate incentives for investment in new high-speed networks that will support innovation in content-rich Internet services and strengthen the international competitiveness of

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the European Union. Such networks have enormous potential to deliver benefits to consumers and businesses across the European Union. It is therefore vital to promote sustainable investment in the development of these new networks, while safeguarding competition and boosting consumer choice through regulatory predictability and consistency.

- (9) In its Communication of 20 March 2006 entitled ‘Bridging the Broadband Gap’, the Commission acknowledged that there is a territorial divide in the European Union regarding access to high-speed broadband services. Easier access to radio spectrum facilitates the development of high-speed broadband services in remote regions. Despite the general increase in broadband connectivity, access in various regions is limited on account of high costs resulting from low population densities and remoteness. In order to ensure investment in new technologies in underdeveloped regions, electronic communications regulation should be consistent with other policies, such as State aid policy, cohesion policy or the aims of wider industrial policy.
- (10) Public investment in networks should be made in accordance with the principle of non-discrimination. To this end, public support should be given by means of open, transparent and competitive procedures.
- (11) In order to allow national regulatory authorities to meet the objectives set out in the Framework Directive and the Specific Directives, in particular concerning end-to-end interoperability, the scope of the Framework Directive should be extended to cover certain aspects of radio equipment and telecommunications terminal equipment as defined in Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity<sup>(10)</sup> and consumer equipment used for digital television, in order to facilitate access for disabled users.
- (12) Certain definitions should be clarified or changed to take account of market and technological developments and to eliminate ambiguities identified in implementing the regulatory framework.
- (13) The independence of the national regulatory authorities should be strengthened in order to ensure a more effective application of the regulatory framework and to increase their authority and the predictability of their decisions. To this end, express provision should be made in national law to ensure that, in the exercise of its tasks, a national regulatory authority responsible for *ex-ante* market regulation or for resolution of disputes between undertakings is protected against external intervention or political pressure liable to jeopardise its independent assessment of matters coming before it. Such outside influence makes a national legislative body unsuited to act as a national regulatory authority under the regulatory framework. For that purpose, rules should be laid down at the outset regarding the grounds for the dismissal of the head of the national regulatory authority in order to remove any reasonable doubt as to the neutrality of that body and its imperviousness to external factors. It is important that national regulatory authorities responsible for *ex-ante* market regulation should have their own budget allowing them, in particular, to recruit a sufficient number of qualified staff. In order to ensure transparency, this budget should be published annually.

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- (14) In order to ensure legal certainty for market players, appeal bodies should carry out their functions effectively; in particular, appeals proceedings should not be unduly lengthy. Interim measures suspending the effect of the decision of a national regulatory authority should be granted only in urgent cases in order to prevent serious and irreparable damage to the party applying for those measures and if the balance of interests so requires.
- (15) There has been a wide divergence in the manner in which appeal bodies have applied interim measures to suspend the decisions of the national regulatory authorities. In order to achieve greater consistency of approach common standards should be applied in line with Community case-law. Appeal bodies should also be entitled to request available information published by BEREC. Given the importance of appeals for the overall operation of the regulatory framework, a mechanism should be set up for collecting information on appeals and decisions to suspend decisions taken by the regulatory authorities in all the Member States and for the reporting of that information to the Commission.
- (16) In order to ensure that national regulatory authorities carry out their regulatory tasks in an effective manner, the data which they gather should include accounting data on the retail markets that are associated with wholesale markets where an operator has significant market power and as such are regulated by the national regulatory authority. The data should also include data which enables the national regulatory authority to assess the possible impact of planned upgrades or changes to network topology on the development of competition or on wholesale products made available to other parties.
- (17) The national consultation provided for under Article 6 of Directive 2002/21/EC (Framework Directive) should be conducted prior to the Community consultation provided for under Articles 7 and 7a of that Directive, in order to allow the views of interested parties to be reflected in the Community consultation. This would also avoid the need for a second Community consultation in the event of changes to a planned measure as a result of the national consultation.
- (18) The discretion of national regulatory authorities needs to be reconciled with the development of consistent regulatory practices and the consistent application of the regulatory framework in order to contribute effectively to the development and completion of the internal market. National regulatory authorities should therefore support the internal market activities of the Commission and those of BEREC.
- (19) The Community mechanism allowing the Commission to require national regulatory authorities to withdraw planned measures concerning market definition and the designation of operators having significant market power has contributed significantly to a consistent approach in identifying the circumstances in which *ex-ante* regulation may be applied and those in which the operators are subject to such regulation. Monitoring of the market by the Commission and, in particular, the experience of the procedure under Article 7 of Directive 2002/21/EC (Framework Directive), has shown that inconsistencies in the national regulatory authorities' application of remedies, even under similar market conditions, could undermine the internal market in electronic communications. [<sup>XI</sup>Therefore the Commission may participate in ensuring a higher

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level of consistency in the application of remedies by adopting recommendations on draft measures proposed by national regulatory authorities. In order to benefit from the expertise of national regulatory authorities on the market analysis, the Commission should consult BEREC prior to adoption of its decisions and/or recommendations.]

- (20) It is important that the regulatory framework is implemented in a timely manner. When the Commission has taken a decision requiring a national regulatory authority to withdraw a planned measure, national regulatory authorities should submit a revised measure to the Commission. A deadline should be laid down for the notification of the revised measure to the Commission under Article 7 of Directive 2002/21/EC (Framework Directive) in order to allow market players to know the duration of the market review and in order to increase legal certainty.
- (21) Having regard to the short time limits in the Community consultation mechanism, powers should be conferred on the Commission to adopt recommendations and/or guidelines to simplify the procedures for exchanging information between the Commission and national regulatory authorities, for example in cases concerning stable markets, or involving only minor changes to previously notified measures. Powers should also be conferred on the Commission in order to allow for the introduction of a notification exemption so as to streamline procedures in certain cases.
- (22) In line with the objectives of the Charter of Fundamental Rights of the European Union and the United Nations Convention on the Rights of Persons with Disabilities, the regulatory framework should ensure that all users, including disabled end-users, the elderly, and users with special social needs, have easy access to affordable high quality services. Declaration 22 annexed to the final Act of Amsterdam provides that the institutions of the Community shall take account of the needs of persons with a disability in drawing up measures under Article 95 of the Treaty.
- (23) A competitive market provides users with a wide choice of content, applications and services. National regulatory authorities should promote users' ability to access and distribute information and to run applications and services.
- (24) Radio frequencies should be considered a scarce public resource that has an important public and market value. It is in the public interest that spectrum is managed as efficiently and effectively as possible from an economic, social and environmental perspective, taking account of the important role of radio spectrum for electronic communications, of the objectives of cultural diversity and media pluralism, and of social and territorial cohesion. Obstacles to its efficient use should therefore be gradually withdrawn.
- (25) Radio spectrum policy activities in the Community should be without prejudice to measures taken at Community or national level, in accordance with Community law, to pursue general interest objectives, in particular with regard to content regulation and audiovisual and media policies, and the right of Member States to organise and use their radio spectrum for the purposes of public order, public security and defence.
- (26) Taking into account the different situation in Member States, the switchover from analogue to digital terrestrial television would, as a result of the superior transmission

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efficiency of digital technology, increase the availability of valuable spectrum in the Community (known as the ‘digital dividend’).

- (27) Before a specific harmonisation measure under Decision No 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision)<sup>(11)</sup> is proposed, the Commission should carry out an impact assessment on the costs and benefits of the proposed measure, such as the realisation of economies of scale and the interoperability of services for the benefit of consumers, the impact on efficiency of spectrum use, or the demand for harmonised use in the different parts of the European Union.
- (28) Although spectrum management remains within the competence of the Member States, strategic planning, coordination and, where appropriate, harmonisation at Community level can help ensure that spectrum users derive the full benefits of the internal market and that EU interests can be effectively defended globally. For these purposes, where appropriate, legislative multiannual radio spectrum policy programmes should be established to set out the policy orientations and objectives for the strategic planning and harmonisation of the use of radio spectrum in the Community. These policy orientations and objectives may refer to the availability and efficient use of radio spectrum necessary for the establishment and functioning of the internal market and may also refer, in appropriate cases, to the harmonisation of procedures for the granting of general authorisations or individual rights of use for radio frequencies where necessary to overcome barriers to the internal market. These policy orientations and objectives should be in accordance with this Directive and the Specific Directives.
- (29) The Commission has indicated its intention to amend, before the entry into force of this Directive, Commission Decision 2002/622/EC of 26 July 2002 establishing a Radio Spectrum Policy Group<sup>(12)</sup> in order to provide a mechanism for the European Parliament and the Council to request opinions or reports, either orally or in writing, from the Radio Spectrum Policy Group (RSPG) on spectrum policy relating to electronic communications, and in order for RSPG to advise the Commission on the proposed content of the radio spectrum policy programmes.
- (30) The spectrum management provisions of this Directive should be consistent with the work of international and regional organisations dealing with radio spectrum management, such as the International Telecommunications Union (ITU) and the European Conference of Postal and Telecommunications Administrations (CEPT), so as to ensure the efficient management of and harmonisation of the use of spectrum across the Community and between the Member States and other members of the ITU.
- (31) Radio frequencies should be managed so as to ensure that harmful interference is avoided. This basic concept of harmful interference should therefore be properly defined to ensure that regulatory intervention is limited to the extent necessary to prevent such interference.
- (32) The current spectrum management and distribution system is generally based on administrative decisions that are insufficiently flexible to cope with technological and economic evolution, in particular with the rapid development of wireless technology

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and the increasing demand for bandwidth. The undue fragmentation amongst national policies results in increased costs and lost market opportunities for spectrum users, and slows down innovation, to the detriment of the internal market, consumers and the economy as a whole. Moreover, the conditions for access to, and use of, radio frequencies may vary according to the type of operator, while electronic services provided by these operators increasingly overlap, thereby creating tensions between rights holders, discrepancies in the cost of access to spectrum, and potential distortions in the functioning of the internal market.

- (33) National borders are increasingly irrelevant in determining optimal radio spectrum use. Fragmentation of the management of access to spectrum rights limits investment and innovation and does not allow operators and equipment manufacturers to realise economies of scale, thereby hindering the development of an internal market for electronic communications networks and services using radio spectrum.
- (34) Flexibility in spectrum management and access to spectrum should be increased through technology and service-neutral authorisations to allow spectrum users to choose the best technologies and services to apply in frequency bands declared available for electronic communications services in the relevant national frequency allocation plans in accordance with Community law (the ‘principles of technology and service neutrality’). The administrative determination of technologies and services should apply when general interest objectives are at stake and should be clearly justified and subject to regular periodic review.
- (35) Restrictions on the principle of technology neutrality should be appropriate and justified by the need to avoid harmful interference, for example by imposing emission masks and power levels, to ensure the protection of public health by limiting public exposure to electromagnetic fields, to ensure the proper functioning of services through an adequate level of technical quality of service, while not necessarily precluding the possibility of using more than one service in the same frequency band, to ensure proper sharing of spectrum, in particular where its use is only subject to general authorisations, to safeguard efficient use of spectrum, or to fulfil a general interest objective in conformity with Community law.
- (36) Spectrum users should also be able to freely choose the services they wish to offer over the spectrum subject to transitional measures to deal with previously acquired rights. On the other hand, measures should be allowed which require the provision of a specific service to meet clearly defined general interest objectives such as safety of life, the need to promote social, regional and territorial cohesion, or the avoidance of the inefficient use of spectrum to be permitted where necessary and proportionate. Those objectives should include the promotion of cultural and linguistic diversity and media pluralism as defined by Member States in conformity with Community law. Except where necessary to protect safety of life or, exceptionally, to fulfil other general interest objectives as defined by Member States in accordance with Community law, exceptions should not result in certain services having exclusive use, but should rather grant them priority so that, in so far as possible, other services or technologies may coexist in the same band.

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



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

- (44) Reliable and secure communication of information over electronic communications networks is increasingly central to the whole economy and society in general. System complexity, technical failure or human mistake, accidents or attacks may all have consequences for the functioning and availability of the physical infrastructures that deliver important services to EU citizens, including e-Government services. National regulatory authorities should therefore ensure that the integrity and security of public communications networks are maintained. The European Network and Information Security Agency (ENISA)<sup>(13)</sup> should contribute to the enhanced level of security of electronic communications by, among other things, providing expertise and advice, and promoting the exchange of best practices. Both ENISA and the national regulatory authorities should have the necessary means to perform their duties, including powers to obtain sufficient information in order to assess the level of security of networks or services as well as comprehensive and reliable data about actual security incidents that have had a significant impact on the operation of networks or services. Bearing in mind that the successful application of adequate security is not a one-off exercise but a continuous process of implementation, review and updating, the providers of electronic communications networks and services should be required to take measures to safeguard their integrity and security in accordance with the assessed risks, taking into account the state of the art of such measures.
- (45) Member States should allow an appropriate period of public consultation before the adoption of specific measures to ensure that undertakings providing public communications networks or publicly available electronic communications services take the necessary technical and organisational measures to appropriately manage risk to security of networks and services or to ensure the integrity of their networks.
- (46) Where there is a need to agree on a common set of security requirements, power should be conferred on the Commission to adopt technical implementing measures to achieve an adequate level of security of electronic communications networks and services in the internal market. ENISA should contribute to the harmonisation of

appropriate technical and organisational security measures by providing expert advice. National regulatory authorities should have the power to issue binding instructions relating to technical implementing measures adopted pursuant to Directive 2002/21/EC (Framework Directive). In order to perform their duties, they should have the power to investigate cases of non-compliance and to impose penalties.

- (47) For the purposes of ensuring that there is no distortion or restriction of competition in the electronic communications markets, national regulatory authorities should be able to impose remedies aimed at preventing leverage of significant market power from one market to another closely related market. It should be clear that the undertaking which has significant market power on the first market may be designated as having significant market power on the second market only if the links between the two markets are such as to allow the market power held in the first market to be leveraged into the second market and if the second market is susceptible to *ex-ante* regulation in accordance with the criteria defined in the Recommendation on relevant product and service markets<sup>(14)</sup>.
- (48) In order to provide market players with certainty as to regulatory conditions, a time limit for market reviews is necessary. It is important to conduct a market analysis on a regular basis and within a reasonable and appropriate time-frame. The time-frame should take account of whether the particular market has previously been subject to market analysis and duly notified. Failure by a national regulatory authority to analyse a market within the time limit may jeopardise the internal market, and normal infringement proceedings may not produce their desired effect on time. Alternatively, the national regulatory authority concerned should be able to request the assistance of BEREC to complete the market analysis. For instance, this assistance could take the form of a specific task force composed of representatives of other national regulatory authorities.
- (49) Due to the high level of technological innovation and highly dynamic markets in the electronic communications sector, there is a need to adapt regulation rapidly in a coordinated and harmonised way at Community level, as experience has shown that divergence among the national regulatory authorities in the implementation of the EU regulatory framework may create a barrier to the development of the internal market.
- (50) One important task assigned to BEREC is to adopt opinions in relation to cross-border disputes where appropriate. National regulatory authorities should therefore take account of any opinions of BEREC in such cases.
- (51) Experience in the implementation of the EU regulatory framework indicates that existing provisions empowering national regulatory authorities to impose fines have failed to provide an adequate incentive to comply with regulatory requirements. Adequate enforcement powers can contribute to the timely implementation of the EU regulatory framework and therefore foster regulatory certainty, which is an important driver for investment. The lack of effective powers in the event of non-compliance applies across the regulatory framework. The introduction of a new provision in Directive 2002/21/EC (Framework Directive) to deal with breaches of obligations under the Framework Directive and Specific Directives should therefore ensure the application of consistent and coherent principles to enforcement and penalties for the whole EU regulatory framework.

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- (52) The existing EU regulatory framework includes certain provisions to facilitate the transition from the old regulatory framework of 1998 to the new 2002 framework. This transition has been completed in all Member States and these measures should be repealed as they are now redundant.
- (53) Both efficient investment and competition should be encouraged in tandem, in order to increase economic growth, innovation and consumer choice.
- (54) Competition can best be fostered through an economically efficient level of investment in new and existing infrastructure, complemented by regulation, wherever necessary, to achieve effective competition in retail services. An efficient level of infrastructure-based competition is the extent of infrastructure duplication at which investors can reasonably be expected to make a fair return based on reasonable expectations about the evolution of market shares.
- (55) National regulatory authorities should, when imposing obligations for access to new and enhanced infrastructures, ensure that access conditions reflect the circumstances underlying the investment decision, taking into account, inter alia, the roll-out costs, the expected rate of take up of the new products and services and the expected retail price levels. Moreover, in order to provide planning certainty to investors, national regulatory authorities should be able to set, if applicable, terms and conditions for access which are consistent over appropriate review periods. Such terms and conditions may include pricing arrangements which depend on volumes or length of contract in accordance with Community law and provided they have no discriminatory effect. Any access conditions imposed should respect the need to preserve effective competition in services to consumers and businesses.
- (56) When assessing the proportionality of the obligations and conditions to be imposed, national regulatory authorities should take into account the different competitive conditions existing in the different areas within their Member States.
- (57) When imposing remedies to control prices, national regulatory authorities should seek to allow a fair return for the investor on a particular new investment project. In particular, there may be risks associated with investment projects specific to new access networks which support products for which demand is uncertain at the time the investment is made.
- (58) Any Commission decision under Article 19(1) of Directive 2002/21/EC (Framework Directive) should be limited to regulatory principles, approaches and methodologies. For the avoidance of doubt, it should not prescribe detail which will normally need to reflect national circumstances, and it should not prohibit alternative approaches which can reasonably be expected to have equivalent effect. Such a decision should be proportionate and should not have an effect on decisions taken by national regulatory authorities that do not create a barrier to the internal market.
- (59) Annex I to Directive 2002/21/EC (Framework Directive) identified the list of markets to be included in the Recommendation on relevant product and service markets which may warrant *ex-ante* regulation. This Annex should be repealed since its purpose of

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serving as a basis for drawing up the initial version of the Recommendation on Relevant Product and Service Markets has been fulfilled.

- (60) It may not be economically viable for new entrants to duplicate the incumbent's local access network in part or in its entirety within a reasonable period of time. In this context, mandating unbundled access to the local loop or sub-loop of operators enjoying significant market power may facilitate market entry and increase competition in retail broadband access markets. In circumstances where unbundled access to local loop or sub-loop is not technically or economically feasible, relevant obligations for the provision of non-physical or virtual network access offering equivalent functionality may apply.
- (61) The purpose of functional separation, whereby the vertically integrated operator is required to establish operationally separate business entities, is to ensure the provision of fully equivalent access products to all downstream operators, including the operator's own vertically integrated downstream divisions. Functional separation has the capacity to improve competition in several relevant markets by significantly reducing the incentive for discrimination and by making it easier to verify and enforce compliance with non-discrimination obligations. In exceptional cases, functional separation may be justified as a remedy where there has been persistent failure to achieve effective non-discrimination in several of the markets concerned, and where there is little or no prospect of infrastructure competition within a reasonable time-frame after recourse to one or more remedies previously considered to be appropriate. However, it is very important to ensure that its imposition preserves the incentives of the concerned undertaking to invest in its network and that it does not entail any potential negative effects on consumer welfare. Its imposition requires a coordinated analysis of different relevant markets related to the access network, in accordance with the market analysis procedure set out in Article 16 of Directive 2002/21/EC (Framework Directive). When undertaking the market analysis and designing the details of this remedy, national regulatory authorities should pay particular attention to the products to be managed by the separate business entities, taking into account the extent of network roll-out and the degree of technological progress, which may affect the substitutability of fixed and wireless services. In order to avoid distortions of competition in the internal market, proposals for functional separation should be approved in advance by the Commission.
- (62) The implementation of functional separation should not prevent appropriate coordination mechanisms between the different separate business entities in order to ensure that the economic and management supervision rights of the parent company are protected.
- (63) Continued integration of the internal market for electronic communications networks and services requires better coordination in the application of the *ex-ante* regulation provided for under the EU regulatory framework for electronic communications.
- (64) Where a vertically integrated undertaking chooses to transfer a substantial part or all of its local access network assets to a separate legal entity under different ownership or by establishing a separate business entity for dealing with access products, the national regulatory authority should assess the effect of the intended transaction on

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all existing regulatory obligations imposed on the vertically integrated operator in order to ensure the compatibility of any new arrangements with Directive 2002/19/EC (Access Directive) and Directive 2002/22/EC (Universal Service Directive). The national regulatory authority concerned should undertake a new analysis of the markets in which the segregated entity operates, and impose, maintain, amend or withdraw obligations accordingly. To this end, the national regulatory authority should be able to request information from the undertaking.

- (65) While it is appropriate in some circumstances for a national regulatory authority to impose obligations on operators that do not have significant market power in order to achieve goals such as end-to-end connectivity or interoperability of services, it is however necessary to ensure that such obligations are imposed in conformity with the EU regulatory framework and, in particular, its notification procedures.
- [<sup>X1</sup>(66) The Commission should be empowered to adopt implementing measures with a view to adapting the conditions for access to digital television and radio services set out in Annex I to Directive 2002/19/EC (Access Directive) to market and technological developments. This is also the case for the minimum list of items in Annex II to Directive 2002/19/EC (Access Directive) that must be made public to meet the obligation of transparency.]
- (67) Facilitating access to radio frequency resources for market players will contribute to removing the barriers to market entry. Moreover, technological progress is reducing the risk of harmful interference in certain frequency bands and therefore reducing the need for individual rights of use. Conditions for the use of spectrum to provide electronic communication services should therefore normally be laid down in general authorisations unless individual rights are necessary, considering the use of the spectrum, to protect against harmful interference, to ensure technical quality of service, to safeguard efficient use of the spectrum or to meet a specific general interest objective. Decisions on the need for individual rights should be made in a transparent and proportionate manner.
- (68) The introduction of the requirements of service and technology neutrality in granting rights of use, together with the increased possibility to transfer rights between undertakings, should increase the freedom and means to deliver electronic communications services to the public, thereby also facilitating the achievement of general interest objectives. However, certain general interest obligations imposed on broadcasters for the delivery of audiovisual media services may require the use of specific criteria for the granting of rights of use when it appears to be essential to meet a specific general interest objective set out by Member States in conformity with Community law. Procedures associated with the pursuit of general interest objectives should in all circumstances be transparent, objective, proportionate and non-discriminatory.
- (69) Considering its restrictive impact on free access to radio frequencies, the validity of an individual right of use that is not tradable should be limited in time. Where rights of use contain provision for renewing their validity, competent national authorities should first carry out a review, including a public consultation, taking into account market, coverage

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and technological developments. In view of spectrum scarcity, individual rights granted to undertakings should be regularly reviewed. In carrying out this review, competent national authorities should balance the interests of the rights holders with the need to foster the introduction of spectrum trading as well as the more flexible use of spectrum through general authorisations where possible.

- (70) Minor amendments to rights and obligations are those amendments which are mainly administrative, do not change the substantial nature of the general authorisations and the individual rights of use and thus cannot cause any comparative advantage to the other undertakings.
- (71) Competent national authorities should have the power to ensure effective use of spectrum and, where spectrum resources are left unused, to take action to prevent anti-competitive hoarding, which can hinder new market entry.
- (72) National regulatory authorities should be able to take effective action to monitor and secure compliance with the terms and conditions of the general authorisation or of rights of use, including the power to impose effective financial or administrative penalties in the event of breaches of those terms and conditions.
- (73) The conditions that may be attached to authorisations should cover specific conditions governing accessibility for users with disabilities and the need of public authorities and emergency services to communicate between themselves and with the general public before, during and after major disasters. Also, considering the importance of technical innovation, Member States should be able to issue authorisations to use spectrum for experimental purposes, subject to specific restrictions and conditions strictly justified by the experimental nature of such rights.
- (74) Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop<sup>(15)</sup> has proved to be effective in the initial stage of market opening. Directive 2002/21/EC (Framework Directive) calls upon the Commission to monitor the transition from the regulatory framework of 1998 to the 2002 framework and to bring forward proposals to repeal that Regulation at an appropriate time. Under the 2002 framework, national regulatory authorities have a duty to analyse the market for wholesale unbundled access to metallic loops and sub-loops for the purpose of providing broadband and voice services as defined in the Recommendation on Relevant Product and Service Markets. Since all Member States have analysed this market at least once and the appropriate obligations based on the 2002 framework are in place, Regulation (EC) No 2887/2000 has become unnecessary and should therefore be repealed.
- (75) Measures necessary for the implementation of Directive 2002/21/EC (Framework Directive), Directive 2002/19/EC (Access Directive) and Directive 2002/20/EC (Authorisation Directive) should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission<sup>(16)</sup>.
- (76) In particular, the Commission should be empowered to adopt Recommendations and/or implementing measures in relation to the notifications under Article 7 of Directive

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

HAVE ADOPTED THIS DIRECTIVE:

**Editorial Information**

**X1** Substituted by [Corrigendum to Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services \(Official Journal of the European Union L 337 of 18 December 2009\)](#).

*Article 1*

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

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

- 1) Article 1 shall be amended as follows:
  - (a) paragraph 1 shall be replaced by the following:
    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.;
  - (b) the following paragraph shall be inserted:
    - 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

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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.;

2) Article 2 shall be amended as follows:

- (a) point (a) shall be replaced by the following:
  - (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) point (b) shall be replaced by the following:
  - (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) point (d) shall be replaced by the following:
  - (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;;
- (d) the following point shall be inserted:
  - “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) point (e) shall be replaced by the following:
  - (e) “associated facilities” means those associated services, physical infrastructures and other facilities or elements associated with



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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;;

- (f) the following point shall be inserted:
  - “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;;
- (g) point (l) shall be replaced by the following:
  - (l) “Specific Directives” means Directive 2002/20/EC (Authorisation Directive), Directive 2002/19/EC (Access Directive), Directive 2002/22/EC (Universal Service Directive) and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)<sup>(17)</sup>;;
- (h) the following points shall be added:
  - (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.;

3) Article 3 shall be amended as follows:

- (a) paragraph 3 shall be replaced by the following:
  - 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.;
- (b) [<sup>XI</sup> the following paragraphs shall be inserted:

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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)<sup>(18)</sup>.

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) Article 4 shall be amended as follows:

(a) paragraph 1 shall be replaced by the following:

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.;

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(b) the following paragraph shall be added:

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

5) Article 5(1) shall be replaced by the following:

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.;

6) Articles 6 and 7 shall be replaced by the following:

#### *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

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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.;

7) the following Articles shall be inserted:

#### *Article 7a*

#### **Procedure for the consistent application of remedies**

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

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

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

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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.

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- 2 The measures referred to in paragraph 1 shall be adopted in accordance with the advisory procedure referred to in Article 22(2).;
- 8) Article 8 shall be amended as follows:
- (a) in paragraph 1, the second subparagraph shall be replaced by the following:

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.;
  - (b) in paragraph 2, points (a) and (b) shall be replaced by the following:
    - (a) ensuring that users, including disabled users, elderly users, and users with special social needs derive maximum benefit in terms of choice, price, and quality;
    - (b) ensuring that there is no distortion or restriction of competition in the electronic communications sector, including the transmission of content;;
  - (c) in paragraph 2, point (c) shall be deleted;
  - (d) in paragraph 3, point (c) shall be deleted;
  - (e) in paragraph 3, point (d) shall be replaced by the following:
    - (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.;
  - (f) in paragraph 4, point (e) shall be replaced by the following:
    - (e) addressing the needs of specific social groups, in particular disabled users, elderly users and users with special social needs;;
  - (g) in paragraph 4, the following point shall be added:
    - (g) promoting the ability of end-users to access and distribute information or run applications and services of their choice;;
  - (h) the following paragraph shall be added:

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;

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- 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.;
- 9) the following Article shall be inserted:

*Article 8a*

**Strategic planning and coordination of radio spectrum policy**

- 1 Member States shall cooperate with each other and with the Commission in the strategic planning, coordination and harmonisation of the use of radio spectrum in the European Community. To this end, they shall take into consideration, inter alia, the economic, safety, health, public interest, freedom of expression, cultural, scientific, social and technical aspects of EU policies as well as the various interests of radio spectrum user communities with the aim of optimising the use of radio spectrum and avoiding harmful interference.
- 2 By cooperating with each other and with the Commission, Member States shall promote the coordination of radio spectrum policy approaches in the European Community and, where appropriate, harmonised conditions with regard to the availability and efficient use of radio spectrum necessary for the establishment and functioning of the internal market in electronic communications.
- 3 The Commission, taking utmost account of the opinion of the Radio Spectrum Policy Group (RSPG), established by Commission Decision 2002/622/EC of 26 July 2002 establishing a Radio Spectrum Policy Group<sup>(19)</sup>, may submit legislative proposals to the European Parliament and the Council for establishing multiannual radio spectrum policy programmes. Such programmes shall set out the policy orientations and objectives for the strategic planning and harmonisation of the use of radio spectrum in accordance with the provisions of this Directive and the Specific Directives.
- 4 Where necessary to ensure the effective coordination of the interests of the European Community in international organisations competent in radio spectrum matters, the Commission, taking utmost account of the opinion of the RSPG, may propose common policy objectives to the European Parliament and the Council.;
- 10) Article 9 shall be replaced by the following:



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## 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;

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- 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.;

11) the following Articles shall be inserted:

#### *Article 9a*

#### **Review of restrictions on existing rights**

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

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

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

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

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

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- 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).;

- 12) Article 10 shall be amended as follows:

(a) paragraphs 1 and 2 shall be replaced by the following:

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.

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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.;

(b) paragraph 4 shall be replaced by the following:

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).;

13) Article 11 shall be amended as follows:

(a) paragraph 1, second subparagraph, first indent shall be replaced by the following:

— 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;

(b) paragraph 2 shall be replaced by the following:

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.;

14) Article 12 shall be replaced by the following:

#### *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.;
- 15) the following chapter shall be inserted:

## 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

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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.;
- 16)                in Article 14, paragraph 3 shall be replaced by the following:
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.;
- 17)                Article 15 shall be amended as follows:
- (a)                the heading shall be replaced by the following:
- Procedure for the identification and definition of markets;**
- (b)                in paragraph 1, the first subparagraph shall be replaced by the following:
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.;
- (c)                paragraph 3 shall be replaced by the following:
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.;
- (d)                paragraph 4 shall be replaced by the following:
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).;
- 18)                Article 16 shall be amended as follows:
- (a)                paragraphs 1 and 2 shall be replaced by the following:

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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.;

(b) paragraphs 4, 5 and 6 shall be replaced by the following:

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.;

(c) the following paragraph shall be added:

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.;

19) Article 17 shall be amended as follows:

(a) in the first sentence of paragraph 1, the word ‘standards’ shall be replaced by ‘non-compulsory standards’;

(b) the third subparagraph of paragraph 2 shall be replaced by the following:

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).;

(c) paragraphs 4 and 5 shall be replaced by the following:

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

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

(d) in paragraph 6, the words ‘acting in accordance with the procedure referred to in Article 22(3), remove them from this list of standards and/or specifications referred to in paragraph 1’ shall be replaced by the words ‘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’;

(e) the following paragraph shall be inserted:

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

20) Article 18 shall be amended as follows:

(a) in paragraph 1, the following point (c) shall be added:

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- (c) providers of digital TV services and equipment to cooperate in the provision of interoperable TV services for disabled end-users.;
  - (b) paragraph 3 shall be deleted;
- 21) Article 19 shall be replaced by the following:

*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.;

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22) Article 20(1) shall be replaced by the following:

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.;

23) Article 21 shall be replaced by the following:

#### *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.

- [<sup>X13</sup> 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

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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.;

24) the following Article shall be inserted:

#### *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.;

25) Article 22 shall be amended as follows:

(a) paragraph 3 shall be replaced by the following:

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.;

(b) paragraph 4 shall be deleted;

26) Article 27 shall be deleted;

27) Annex I shall be deleted;

28) Annex II shall be replaced by the following:

#### 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.

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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..

#### **Editorial Information**

- X1** Substituted by [Corrigendum to Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services \(Official Journal of the European Union L 337 of 18 December 2009\)](#).

### *Article 2*

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

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

- 1) Article 2 shall be amended as follows:
  - (a) point (a) shall be replaced by the following:
    - (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) point (e) shall be replaced by the following:
    - (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.;
- 2) Article 4(1) shall be replaced by the following:
  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

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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.;

3) Article 5 shall be amended as follows:

(a) paragraph 1 shall be amended as follows:

(i) the first subparagraph shall be replaced by the following:

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.;

(ii) the following point shall be inserted:

(ab) [<sup>X1</sup>in justified cases and to the extent that is necessary, obligations on undertakings that control access to end-users to make their services interoperable;]

(b) paragraph 2 shall be replaced by the following:

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).;

(c) paragraph 3 shall be deleted;

(d) paragraph 4 shall be replaced by the following:

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).;

4) Article 6(2) shall be replaced by the following:

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).;

5) Article 7 shall be deleted;

6) Article 8 shall be amended as follows:

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- (a) in paragraph 1, the words ‘Articles 9 to 13’ shall be replaced by the words ‘Articles 9 to 13a’;
  - (b) paragraph 3 shall be amended as follows:
    - (i) the first subparagraph shall be amended as follows:
      - in the first indent, the words ‘Articles 5(1), 5(2) and 6’ shall be replaced by the words ‘Articles 5(1) and 6’,
      - in the second indent, ‘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<sup>(20)</sup>’ shall be replaced by ‘Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)<sup>(21)</sup>’.
    - (ii) the second subparagraph shall be replaced by the following:

In exceptional circumstances, when a national regulatory authority intends to impose on operators with significant market power obligations for access or interconnection other than those set out in Articles 9 to 13 in this Directive, it shall submit this request to the Commission. The Commission shall take utmost account of the opinion of the Body of European Regulators for Electronic Communications (BEREC)<sup>(22)</sup>. The Commission, acting in accordance with Article 14(2), shall take a decision authorising or preventing the national regulatory authority from taking such measures.;
- 7) Article 9 shall be amended as follows:
- (a) paragraph 1 shall be replaced by the following:
    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.;
  - (b) paragraph 4 shall be replaced by the following:
    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.;
  - (c) paragraph 5 shall be replaced by the following:

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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.;

8) Article 12 shall be amended as follows:

- (a) in paragraph 1, point (a) shall be replaced by the following:
  - (a) [<sup>X1</sup>to give third parties access to specified network elements and/or facilities, including access to network elements which are not active and/or unbundled access to the local loop, to, inter alia, allow carrier selection and/or pre-selection and/or subscriber line resale offers;]
- (b) in paragraph 1, point (f) shall be replaced by the following:
  - (f) to provide co-location or other forms of associated facilities sharing;;
- (c) in paragraph 1, the following point shall be added:
  - (j) to provide access to associated services such as identity, location and presence service.;
- (d) in paragraph 2, the introductory phrase and point (a) shall be replaced by the following:
 

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;;
- (e) in paragraph 2, points (c) and (d) shall be replaced by the following:
  - (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;;
- (f) the following paragraph 3 shall be added:
 

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



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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).;

9) Article 13(1) shall be replaced by the following:

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.;

10) the following Articles shall be inserted:

#### *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;
- [<sup>X1</sup>c an analysis of the expected impact on the regulatory authority, on the undertaking, in particular on the workforce of the separated undertaking and on the electronic communications sector as a whole, and on incentives to invest in a sector as a whole, particularly with regard to the need to ensure social and territorial cohesion, and on other stakeholders including, in particular, the expected impact on competition and any potential consequential effects on consumers;]

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- d an analysis of the reasons justifying that this obligation would be the most efficient means to enforce remedies aimed at addressing the competition problems/markets failures identified.
- 3 The draft measure shall include the following elements:
- a the precise nature and level of separation, specifying in particular the legal status of the separate business entity;
  - b an identification of the assets of the separate business entity, and the products or services to be supplied by that entity;
  - c the governance arrangements to ensure the independence of the staff employed by the separate business entity, and the corresponding incentive structure;
  - d rules for ensuring compliance with the obligations;
  - e rules for ensuring transparency of operational procedures, in particular towards other stakeholders;
  - f a monitoring programme to ensure compliance, including the publication of an annual report.
- 4 Following the Commission's decision on the draft measure taken in accordance with Article 8(3), the national regulatory authority shall conduct a coordinated analysis of the different markets related to the access network in accordance with the procedure set out in Article 16 of Directive 2002/21/EC (Framework Directive). On the basis of its assessment, the national regulatory authority shall impose, maintain, amend or withdraw obligations, in accordance with Articles 6 and 7 of Directive 2002/21/EC (Framework Directive).
- 5 An undertaking on which functional separation has been imposed may be subject to any of the obligations identified in Articles 9 to 13 in any specific market where it has been designated as having significant market power in accordance with Article 16 of Directive 2002/21/EC (Framework Directive), or any other obligations authorised by the Commission pursuant to Article 8(3).

#### *Article 13b*

#### **Voluntary separation by a vertically integrated undertaking**

- 1 Undertakings which have been designated as having significant market power in one or several relevant markets in accordance with Article 16 of Directive 2002/21/EC (Framework Directive) shall inform the national regulatory authority in advance and in a timely manner, in order to allow the national regulatory authority to assess the effect of the intended transaction, when they intend to transfer their local access network assets or a substantial part thereof to a separate legal entity under different ownership, or to establish a separate business entity in order to provide to all retail providers, including its own retail divisions, fully equivalent access products.
- Undertakings shall also inform the national regulatory authority of any change of that intent as well as the final outcome of the process of separation.
- 2 The national regulatory authority shall assess the effect of the intended transaction on existing regulatory obligations under Directive 2002/21/EC (Framework Directive).

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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).;
- 11) Article 14 shall be amended as follows:
- (a) paragraph 3 shall be replaced by the following:
    - 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.;
  - (b) paragraph 4 shall be deleted;
- 12) Annex II shall be amended as follows:
- (a) the title shall be replaced by the following:

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);
  - (b) definition (a) shall be replaced by the following:
    - (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;
  - (c) definition (c) shall be replaced by the following:
    - (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) definition (d) shall be replaced by the following:
    - (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;
  - (e) in part A, points 1, 2 and 3 shall be replaced by the following:

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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;
- (f) in part B, point 1 shall be replaced by the following:
1. Information on the SMP operator's existing relevant sites or equipment locations and planned update thereof<sup>(23)</sup> ..

#### **Editorial Information**

**X1** Substituted by [Corrigendum to Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services \(Official Journal of the European Union L 337 of 18 December 2009\)](#).

### *Article 3*

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

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

- 1) Article 2(2) shall be replaced by the following:
2. The following definition shall also apply:
 

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

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- 2) In Article 3(2), the following subparagraph shall be added:
- Undertakings providing cross-border electronic communications services to undertakings located in several Member States shall not be required to submit more than one notification per Member State concerned.
- 3) Article 5 shall be replaced by the following:

#### *Article 5*

### **Rights of use for radio frequencies and numbers**

- 1 Member States shall facilitate the use of radio frequencies under general authorisations. Where necessary, Member States may grant individual rights of use in order to:
- avoid harmful interference,
  - ensure technical quality of service,
  - safeguard efficient use of spectrum, or
  - fulfil other objectives of general interest as defined by Member States in conformity with Community law.

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

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

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

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

Where individual rights to use radio frequencies are granted for 10 years or more and such rights may not be transferred or leased between undertakings pursuant to Article 9b of Directive 2002/21/EC (Framework Directive) the competent national authority shall ensure that the criteria to grant individual rights of use apply and are complied with for the duration of the licence, in particular upon a justified request of

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the holder of the right. If those criteria are no longer applicable, the individual right of use shall be changed into a general authorisation for the use of radio frequencies, subject to prior notice and after a reasonable period, or shall be made transferable or leaseable between undertakings in accordance with Article 9b of Directive 2002/21/EC (Framework Directive).

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

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

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

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

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

4) Article 6 shall be amended as follows:

(a) paragraph 1 shall be replaced by the following:

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

(b) in paragraph 2, the words ‘Articles 16, 17, 18 and 19 of Directive 2002/22/EC (Universal Service Directive)’ shall be replaced by the words ‘Article 17 of Directive 2002/22/EC (Universal Service Directive)’;

5) Article 7 shall be amended as follows:

(a) paragraph 1 shall be amended as follows:

(i) the introductory phrase shall be replaced by the following:

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1. Where a Member State is considering whether to limit the number of rights of use to be granted for radio frequencies or whether to extend the duration of existing rights other than in accordance with the terms specified in such rights, it shall inter alia;
  - (ii) point (c) shall be replaced by the following:
    - (c) publish any decision to limit the granting of rights of use or the renewal of rights of use, stating the reasons therefor;;
  - (b) paragraph 3 shall be replaced by the following:
    3. Where the granting of rights of use for radio frequencies needs to be limited, Member States shall grant such rights on the basis of selection criteria which must be objective, transparent, non-discriminatory and proportionate. Any such selection criteria must give due weight to the achievement of the objectives of Article 8 of Directive 2002/21/EC (Framework Directive) and of the requirements of Article 9 of that Directive.;
  - (c) in paragraph 5, the words ‘Article 9’ shall be replaced by the words ‘Article 9b’;
- 6) Article 10 shall be amended as follows:
  - (a) paragraph 1, 2 and 3 shall be replaced by the following:
    1. National regulatory authorities shall monitor and supervise compliance with the conditions of the general authorisation or of rights of use and with the specific obligations referred to in Article 6(2), in accordance with Article 11.

National regulatory authorities shall have the power to require undertakings providing electronic communications networks or services covered by the general authorisation or enjoying rights of use for radio frequencies or numbers to provide all information necessary to verify compliance with the conditions of the general authorisation or of rights of use or with the specific obligations referred to in Article 6(2), in accordance with Article 11.
    2. Where a national regulatory authority finds that an undertaking does not comply with one or more of the conditions of the general authorisation or of rights of use, or with the specific obligations referred to in Article 6(2), it shall notify the undertaking of those findings and give the undertaking the opportunity to state its views, within a reasonable time limit.
    3. The relevant authority shall have the power to require the cessation of the breach referred to in paragraph 2 either immediately or within a reasonable time limit and shall take appropriate and proportionate measures aimed at ensuring compliance.

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

      - a dissuasive financial penalties where appropriate, which may include periodic penalties having retroactive effect; and

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- b orders to cease or delay provision of a service or bundle of services which, if continued, would result in significant harm to competition, pending compliance with access obligations imposed following a market analysis carried out in accordance with Article 16 of Directive 2002/21/EC (Framework Directive).

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

- (b) paragraph 4 shall be replaced by the following:

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

- (c) paragraph 5 shall be replaced by the following:

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

- (d) paragraph 6 shall be replaced by the following:

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

- 7) Article 11, paragraph 1 shall be amended as follows:

- (a) point (a) shall be replaced by the following:

- (a) systematic or case-by-case verification of compliance with conditions 1 and 2 of Part A, conditions 2 and 6 of Part B and



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conditions 2 and 7 of Part C of the Annex and of compliance with obligations as referred to in Article 6(2);;

- (b) the following points shall be added:
  - (g) safeguarding the efficient use and ensuring the effective management of radio frequencies;
  - (h) evaluating future network or service developments that could have an impact on wholesale services made available to competitors.;
- (c) the second subparagraph shall be replaced by the following:

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

- 8) Article 14 shall be replaced by the following:

*Article 14*

**Amendment of rights and obligations**

- 1 Member States shall ensure that the rights, conditions and procedures concerning general authorisations and rights of use or rights to install facilities may only be amended in objectively justified cases and in a proportionate manner, taking into consideration, where appropriate, the specific conditions applicable to transferable rights of use for radio frequencies. Except where proposed amendments are minor and have been agreed with the holder of the rights or general authorisation, notice shall be given in an appropriate manner of the intention to make such amendments and interested parties, including users and consumers, shall be allowed a sufficient period of time to express their views on the proposed amendments, which shall be no less than four weeks except in exceptional circumstances.
- 2 Member States shall not restrict or withdraw rights to install facilities or rights of use for radio frequencies before expiry of the period for which they were granted except where justified and where applicable in conformity with the Annex and relevant national provisions regarding compensation for withdrawal of rights.;
- 9) Article 15(1) shall be replaced by the following:
  - 1. Member States shall ensure that all relevant information on rights, conditions, procedures, charges, fees and decisions concerning general authorisations, rights of use and rights to install facilities is published and kept up to date in an appropriate manner so as to provide easy access to that information for all interested parties.;
- 10) in Article 17 paragraphs 1 and 2 shall be replaced by the following:
  - 1. Without prejudice to Article 9a of Directive 2002/21/EC (Framework Directive), Member States shall bring general authorisations and individual rights of use already in existence on 31 December 2009 into conformity with Articles 5, 6, 7, and the Annex of this Directive 19 December 2011 at the latest.
  - 2. Where application of paragraph 1 results in a reduction of the rights or an extension of the general authorisations and individual rights of use already in

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existence, Member States may extend the validity of those authorisations and rights until 30 September 2012 at the latest, provided that the rights of other undertakings under Community law are not affected thereby. Member States shall notify such extensions to the Commission and state the reasons therefor.;

- 11) the Annex shall be amended as set out in the Annex to this Directive.

#### *Article 4*

### **Repeal**

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

#### *Article 5*

### **Transposition**

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

They shall apply those measures from 26 May 2011.

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

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

#### *Article 6*

### **Entry into force**

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

#### *Article 7*

### **Addressees**

This Directive is addressed to the Member States.

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## ANNEX

The Annex to Directive 2002/20/EC (Authorisation Directive) is amended as follows:

1. The first paragraph is replaced by the following heading:

The conditions listed in this Annex provide the maximum list of conditions which may be attached to general authorisations (Part A), rights to use radio frequencies (Part B) and rights to use numbers (Part C) as referred to in Article 6(1) and Article 11(1)(a), within the limits allowed under Articles 5, 6, 7, 8 and 9 of Directive 2002/21/EC (the Framework Directive).;
2. Part A is amended as follows:
  - (a) point 4 is replaced by the following:
    4. Accessibility by end users of numbers from the national numbering plan, numbers from the European Telephone Numbering Space, the Universal International Freephone Numbers, and, where technically and economically feasible, from numbering plans of other Member States, and conditions in conformity with Directive 2002/22/EC (Universal Service Directive).;
  - (b) point 7 is replaced by the following:
    7. Personal data and privacy protection specific to the electronic communications sector in conformity with Directive 2002/58/EC of the European Parliament and of the Council (Directive on privacy and electronic communications)<sup>(24)</sup>
  - (c) point 8 is replaced by the following:
    8. Consumer protection rules specific to the electronic communications sector, including conditions in conformity with Directive 2002/22/EC (Universal Service Directive), and conditions on accessibility for users with disabilities in accordance with Article 7 of that Directive.;
  - (d) in point 11, the words ‘Directive 97/66/EC’ are replaced by the words ‘Directive 2002/58/EC’;
  - (e) the following point is inserted:
    - 11a. Terms of use for communications from public authorities to the general public for warning the public of imminent threats and for mitigating the consequences of major catastrophes.;
  - (f) point 12 is replaced by the following:
    12. Terms of use during major disasters or national emergencies to ensure communications between emergency services and authorities.;
  - (g) point 16 is replaced by the following:
    16. Security of public networks against unauthorised access according to Directive 2002/58/EC (Directive on Privacy and electronic communications).;

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- (h) The following point is added:
  - 19. Transparency obligations on public communications network providers providing electronic communications services available to the public to ensure end-to-end connectivity, in conformity with the objectives and principles set out in Article 8 of Directive 2002/21/EC (Framework Directive), disclosure regarding any conditions limiting access to and/or use of services and applications where such conditions are allowed by Member States in conformity with Community law, and, where necessary and proportionate, access by national regulatory authorities to such information needed to verify the accuracy of such disclosure.;
- 3. part B is amended as follows:
  - (a) point 1 is replaced by the following:
    - 1. Obligation to provide a service or to use a type of technology for which the rights of use for the frequency has been granted, including, where appropriate, coverage and quality requirements.;
  - (b) point 2 is replaced with the following:
    - 2. Effective and efficient use of frequencies in conformity with Directive 2002/21/EC (Framework Directive).;
  - (c) the following point is added:
    - 9. Obligations specific to an experimental use of radio frequencies.;
- 4. in part C, point 1 is replaced by the following:
  - 1. Designation of service for which the number shall be used, including any requirements linked to the provision of that service and, for the avoidance of doubt, tariff principles and maximum prices that can apply in the specific number range for the purposes of ensuring consumer protection in accordance with Article 8(4)(b) of Directive 2002/21/EC (Framework Directive)..

#### COMMISSION DECLARATION ON NET NEUTRALITY

The Commission attaches high importance to preserving the open and neutral character of the Internet, taking full account of the will of the co-legislators now to enshrine net neutrality as a policy objective and regulatory principle to be promoted by national regulatory authorities<sup>(25)</sup>, alongside the strengthening of related transparency requirements<sup>(26)</sup> and the creation of safeguard powers for national regulatory authorities to prevent the degradation of services and the hindering or slowing down of traffic over public networks<sup>(27)</sup>. The Commission will monitor closely the implementation of these provisions in the Member States, introducing a particular focus on how the ‘net freedoms’ of European citizens are being safeguarded in its annual Progress Report to the European Parliament and the Council. In the meantime, the Commission will monitor the impact of market and technological developments on ‘net freedoms’ reporting to the European Parliament and Council before the end of 2010 on whether additional guidance is required, and will invoke its existing competition law powers to deal with any anti-competitive practices that may emerge.

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- (1) [OJ C 224, 30.8.2008, p. 50.](#)
- (2) [OJ C 257, 9.10.2008, p. 51.](#)
- (3) Opinion of the European Parliament of 24 September 2008 (not yet published in the Official Journal), Council Common Position of 16 February 2009 ([OJ C 103 E, 5.5.2009, p. 1](#)), Position of the European Parliament of 6 May 2009, Council Decision of 20 November 2009 and Legislative Resolution of the European Parliament of 24 November 2009.
- (4) [OJ L 108, 24.4.2002, p. 33.](#)
- (5) [OJ L 108, 24.4.2002, p. 7.](#)
- (6) [OJ L 108, 24.4.2002, p. 21.](#)
- (7) [OJ L 108, 24.4.2002, p. 51.](#)
- (8) [OJ L 201, 31.7.2002, p. 37.](#)
- (9) See page 1 of this Official Journal.
- (10) [OJ L 91, 7.4.1999, p. 10.](#)
- (11) [OJ L 108, 24.4.2002, p. 1.](#)
- (12) [OJ L 198, 27.7.2002, p. 49.](#)
- (13) Regulation (EC) No 460/2004 of the European Parliament and of the Council ([OJ L 77, 13.3.2004, p. 1](#)).
- (14) [<sup>X1</sup>Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services ([OJ L 344, 28.12.2007, p. 65](#)).]
- (15) [OJ L 336, 30.12.2000, p. 4.](#)
- (16) [OJ L 184, 17.7.1999, p. 23.](#)
- (17) [OJ L 201, 31.7.2002, p. 37.](#)’;
- (18) 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.’;
- (19) [OJ L 198, 27.7.2002, p. 49.](#)’;
- (20) [OJ L 24, 30.1.1998, p. 1.](#)
- (21) [OJ L 201, 31.7.2002, p. 37.](#)’;
- (22) 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.’;
- (23) Availability of this information may be restricted to interested parties only, in order to avoid public security concerns.’.
- (24) [OJ L 201, 31.7.2002, p. 37.](#)’;
- (25) Article 8(4)(g) Framework Directive.
- (26) Articles 20(1)(b) and 21(3)(c) and (d) of the Universal Service Directive.
- (27) Article 22(3) of the Universal Service Directive.

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#### **Editorial Information**

- X1** Substituted by [Corrigendum to Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of](#)

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**Status:** EU Directives are being published on this site to aid cross referencing from UK legislation. After IP completion day (31 December 2020 11pm) no further amendments will be applied to this version.

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electronic communications networks and services (Official Journal of the European Union L 337 of 18 December 2009).