

Electronic communications networks and services *I**

European Parliament legislative resolution of 24 September 2008 on the proposal for a directive of the European Parliament and of the Council amending Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and Directive 2002/20/EC on the authorisation of electronic communications networks and services (COM(2007)0697 – C6-0427/2007 – 2007/0247(COD))

(Codecision procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to the European Parliament and the Council (COM(2007)0697),
 - having regard to Article 251(2) and Article 95 of the EC Treaty, pursuant to which the Commission submitted the proposal to Parliament (C6-0427/2007),
 - having regard to Rule 51 of its Rules of Procedure,
 - having regard to the report of the Committee on Industry, Research and Energy and the opinions of the Committee on Economic and Monetary Affairs, the Committee on Internal Market and Consumer Protection, the Committee on Culture and Education, the Committee on Legal Affairs and the Committee on Civil Liberties, Justice and Home Affairs (A6-0321/2008),
1. Approves the Commission proposal as amended;
 2. Calls on the Commission to refer the matter to Parliament again if it intends to amend the proposal substantially or replace it with another text;
 3. Instructs its President to forward its position to the Council and Commission.

P6_TC1-COD(2007)0247

Position of the European Parliament adopted at first reading on 24 September 2008 with a view to the adoption of Directive 2008/.../EC of the European Parliament and of the Council 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 Committee¹,

Having regard to the opinion of the Committee of the Regions²,

Acting in accordance with the procedure laid down in Article 251 of the Treaty³,

Whereas:

- (1) The functioning of the five directives comprising the existing regulatory framework for electronic communications networks and services (Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services⁴ (Framework Directive), Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities⁵ (Access Directive), Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of || electronic communications networks and services⁶ (Authorisation Directive), Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services⁷ (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 sector⁸ (Directive on privacy and electronic communications) (*together referred to as "the Framework Directive and the Specific Directives"*)) is subject to periodic review by the Commission, with a view in particular to determining the need for modification in the light of technological and market developments.
- (2) *A revision of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)⁹ was carried out in 2007 with the intention of ensuring optimal conditions of competitiveness and legal certainty for information technologies and media industries and services in the European Union, as well as respect for cultural and linguistic diversity. In this context, a fair and balanced regulatory framework for electronic communications networks and services constitutes an essential pillar of the EU audiovisual sector.*
- (3) In that regard, the Commission presented its initial findings in its Communication to the Council, the European Parliament, the European Economic and Social

¹ OJ C 224, 30.8.2008, p. 50.

² Opinion of 19 June 2008 (not yet published in the Official Journal).

³ Position of the European Parliament of 24 September 2008.

⁴ OJ L 108, 24.4.2002, p. 33.

⁵ OJ L 108, 24.4.2002, p. 7.

⁶ OJ L 108, 24.4.2002, p. 21.

⁷ OJ L 108, 24.4.2002, p. 51.

⁸ OJ L 201, 31.7.2002, p. 37.

⁹ **OJ L 298, 17.10.1989, p. 23.**

Committee and the Committee of the Regions of 29 June 2006 on the review of the EU regulatory framework for electronic communications networks and services. 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.

- (4) 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. ■ 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.
- (5) *A primary objective of the EU regulatory framework for electronic communications networks and services is to create a sustainable ecosystem for electronic communications based on supply and demand, the former through effective and competitive infrastructure and service markets and the latter through information society developments.*
- (6) *A further objective of the EU regulatory framework for electronic communications networks and services is to progressively reduce ex ante sector specific-rules as competition in markets in electronic communications develops and, ultimately, for electronic communications to be governed by competition law only. While electronic communications markets 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. The necessity of the continuation of ex ante regulation should be reviewed no later than three years from the date of transposition of this Directive.*
- (7) *In order to ensure a proportionate and suitable 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 or geographic areas where there is effective infrastructure competition. This should apply even where geographic areas are not defined as separate markets.*
- (8) *In order to achieve the goals of the Lisbon Agenda it is necessary to give appropriate incentives for investment in high-speed networks that support innovation in content-rich internet services and strengthen the international competitiveness of the European Union. Such networks have enormous potential to deliver benefits to consumers and businesses across the European Union. It is therefore vital to promote sustainable investment in the development of such 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”¹, the Commission acknowledged that there is a territorial divide in the European*

¹ OJ C 151, 29.6.2006, p. 15.

Union regarding access to high-speed broadband services. 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. Commercial incentives to invest in broadband deployment in these areas often turn out to be insufficient. However, technological innovation reduces deployment costs. 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, structural funds or the aims of wider industrial policy.

- (10) Investment in research and development is of vital importance for the development of next generation fibre optics networks and for achieving flexible and efficient radio access, which enhances competition and innovation in applications and services for the benefit of consumers. The challenge is to deliver the next generation of ubiquitous and converged network and service infrastructures for electronic communications, information technology and media.*
- (11) Public policy should play a role in complementing the effective functioning of electronic communications markets, addressing both the supply and demand sides so as to stimulate a virtuous circle where development of better content and services follows from infrastructure deployment, and vice versa. Public intervention should be proportionate, should neither distort competition nor inhibit private investment, should increase incentives to invest and should lower entry barriers. In this respect, public authorities may support the roll-out of future-proof high-capacity infrastructure. In so doing, public support should be given by means of open, transparent and competitive procedures, should not favour any given technology a priori and should provide access to infrastructure on a non-discriminatory basis.*
- (12) The EU regulatory framework for electronic communications networks and services should also promote consumer protection in the electronic communications sector by providing for accurate and comprehensive information by all possible means, by providing for transparency in fees and charges and by providing for high standards in the delivery of services. It should also fully recognise the role of consumer associations in public consultations and ensure that the competent authorities are provided with the powers necessary to prevent bid-rigging and act with the necessary effectiveness to stamp out any instances of fraud.*
- (13) The views of national regulatory authorities and industry stakeholders should be taken into account by the Commission when adopting measures pursuant to this Directive through the use of effective consultation ensuring transparency and proportionality. The Commission should issue detailed consultation documents which explain the different courses of action being considered, and stakeholders should be given a reasonable time in which to respond. Following the consultation, and after having considered the responses, the Commission should give reasons for the decision it takes in a statement which should include a description of how the views of respondents were taken into account.*
- (14) 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 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 conformity¹ as well as consumer equipment used for digital television.

- (15) *Without prejudice to Directive 1999/5/EC, it is necessary to clarify the application of aspects of terminal equipment which concern access for disabled end-users so as to ensure interoperability between terminal equipment and electronic communications networks and services.*
- (16) 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.
- (17) *The activities of national regulatory authorities and of the Commission in the context of the EU regulatory framework for electronic communications networks and services contribute to the fulfilment of broader public policy objectives in the areas of culture, employment, the environment, social cohesion, regional development and town and country planning.*
- (18) *National electronic communications markets will continue to differ within the European Union. It is therefore essential that national regulatory authorities and the Body of European Regulators in Telecom (BERT) possess the powers and knowledge necessary to build a competitive EU ecosystem in electronic communications markets and services while at the same time understanding national and regional differences and complying with the principle of subsidiarity.*
- (19) The independence of the national regulatory authorities should be strengthened in order to ensure a more effective application of the regulatory framework and 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 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 in advance 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 should have their own budget allowing them, in particular, to recruit a sufficient number of qualified staff. In order to ensure transparency, this should be published annually.
- (20) 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 jurisprudence. Given the importance of appeals for the overall working 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.
- (21) In order to *ensure that national regulatory authorities* carry out their regulatory tasks

¹ OJ L 91, 7.4.1999, p. 10.

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, and should also include data to enable 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.

- (22) The national consultation provided for under Article 6 of the Framework Directive should be conducted prior to the Community consultation provided for under Article 7 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.
- (23) 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 **BERT**, which should serve as the exclusive forum for cooperation between national regulatory authorities in the exercise of their responsibilities under the regulatory framework.
- (24) 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 operators are subject to such regulation. However, there is no equivalent mechanism for the remedies to be applied. Monitoring of the market by the Commission and, in particular, the experience of the procedure under Article 7 of the Framework Directive, has shown that inconsistencies in the national regulatory authorities' application of remedies, even under similar market conditions, undermine the internal market in electronic communications, do not ensure a level playing field between operators established in different Member States, and prevent the realisation of consumer benefits from cross-border competition and services. The Commission should be given powers to require national regulatory authorities to withdraw draft measures on the remedies chosen by national regulatory authorities. In order to ensure the consistent application of the regulatory framework in the Community, the Commission should consult **BERT** prior to its decision.
- (25) 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 the Framework Directive so that market players know the duration of the market review and || to increase legal certainty.
- (26) Likewise, in view of the need to avoid a regulatory vacuum in a sector characterised by its fast-moving nature, if adoption of the re-notified draft measure would still create a barrier to the single market or be incompatible with Community law, the Commission, after having consulted **BERT**, should be able to require the national

regulatory authority concerned to impose a specific remedy within a specified time.

- (27) Having regard to the short time limits in the Community consultation mechanism, powers should be conferred on the Commission to adopt implementing measures 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 – or to allow for the introduction of a notification exemption in order to streamline procedures in certain cases.
- (28) 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.
- (29) 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 objectives of cultural diversity and media pluralism***, and that obstacles to its efficient use are gradually withdrawn.
- (30) ***Although spectrum management remains the competence of the Member States, only coordination and, where appropriate, harmonisation at Community level can ensure that spectrum users derive the full benefits of the internal market and that EU interests can be effectively defended world-wide.***
- (31) ***The provisions of this Directive relating to spectrum management 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 and harmonisation of the use of spectrum across the Community and globally.***
- (32) ***In order to contribute to the fulfilment of the objectives laid down in Article 8a of Directive 2002/21/EC (Framework Directive), a spectrum summit should be convened in 2010, driven by Member States and including the European Parliament, the Commission and all stakeholders. The summit should in particular contribute to ensuring greater consistency in EU spectrum policies, providing guidance regarding the switchover from analogue to digital terrestrial television, and freeing spectrum for new electronic communications services once the digital switchover has taken place.***
- (33) ***The switchover from analogue to digital terrestrial television should, as a result of the superior transmission efficiency of digital technology, free up a significant amount of spectrum in the European Union, the so-called "digital dividend". Member States should release their digital dividends as quickly as possible, allowing citizens to benefit from the deployment of new, innovative and competitive services. To this end, obstacles existing at national level for the efficient allocation or reallocation of the digital dividend should be removed, and a more coherent and***

integrated approach to the allocation of the digital dividend in the Community should be pursued.

- (34) Radio frequencies should be managed so as to ensure that harmful interference is avoided. The basic concept of harmful interference should therefore be properly defined *by reference to existing internationally agreed frequency plans* to ensure that regulatory intervention is limited to the extent necessary to prevent such interference.
- (35) The current spectrum management and distribution system is generally based on administrative decisions that are insufficiently flexible to cope with technological and economic evolution, in particular with the rapid development of wireless technology and the increasing demand for bandwidth. The undue fragmentation amongst national policies results in increased costs and lost market opportunities for spectrum users, and slows down innovation, to the detriment of the internal market, consumers and the economy as a whole. Moreover, the conditions for access to, and use of, radio frequencies may vary according to the type of operator, while electronic services provided by these operators increasingly overlap, thereby creating tensions between rights holders, discrepancies in the cost of access to spectrum, and potential distortions in the functioning of the internal market.
- (36) 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.
- (37) Flexibility in spectrum management and access to spectrum should be increased through technology- and service-neutral authorisations to *enable* spectrum users to choose the best technologies and services to apply in **frequency bands available for electronic communications services as identified in national frequency allocation plans and the ITU Radio Regulations** (the ‘principles of technology and service neutrality’). The administrative determination of technologies and services should *apply whenever general interest objectives are at stake*.
- (38) **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 proper sharing of spectrum, in particular where its use is only subject to general authorisations, or **to** comply with *a general interest objective in conformity with Community law*.
- (39) Spectrum users should also be able to choose *freely* the services they wish to offer over the spectrum subject to transitional measures *designed to deal* with previously acquired rights *and the provisions of national frequency allocation plans and the ITU Radio Regulations*. Exceptions to the principle of service neutrality which require the provision of a specific service *in order to take account of national public policy considerations or* to meet clearly defined general interest objectives such as safety of life, the need to promote social, regional and territorial cohesion or *the efficient use of radio frequencies and the effective management of* spectrum *should be permitted where necessary*. Those objectives should include the promotion of *national audiovisual and media policies*, cultural and linguistic diversity and media pluralism as defined in national legislation in conformity with Community law.

Except where necessary to protect safety of life, *or to ensure that these objectives are fulfilled*, exceptions should not result in exclusive use for certain services, but rather *should give them* priority so that other services or technologies may coexist in the same band insofar as possible. In order that the holder of the authorisation may choose freely the most efficient means to carry the content of services provided over radio frequencies, the content should not be regulated in the authorisation to use radio frequencies.

(40) 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, ***national audiovisual and media policies*** and media pluralism in accordance with their own national law.

(41) 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.

(42) In the interests of flexibility and efficiency, national regulatory authorities should, in bands which will be identified on a harmonised basis, also allow spectrum users to freely transfer or lease their usage rights to third parties, which 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.

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(43) For internal market purposes it may also be necessary to harmonise at Community level the identification of tradable frequency bands, the conditions for tradability or the transition to tradable rights in specific bands, a minimum format for tradable rights, requirements to ensure the central availability, accessibility, and reliability of information necessary for spectrum trading, and requirements to protect competition and to prevent spectrum hoarding. The Commission should therefore be given powers to adopt implementing measures for that harmonisation. Such implementing measures should take due account of whether individual rights of use have been granted on a commercial or non-commercial basis.

(44) 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 *onerous* 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 general interest objectives, the situation of the holders of such rights should not be improved to the detriment of their new competitors beyond what is necessary to achieve such general interest objectives. Any spectrum that has become unnecessary for the achievement of public interest objectives should be recovered and re-assigned in accordance with the Authorisation Directive.

(45) In order to promote the functioning of the internal market, and to support the development of cross-border services, the Commission should be ***able to consult BERT*** regarding numbering. Furthermore, to *enable* citizens of the Member States,

including travellers and disabled users, || to reach certain services by using the same recognisable numbers at similar prices in all Member States, the powers of the Commission to adopt technical implementing measures should also cover, where necessary, the applicable tariff principle or mechanism, *as well as the establishment of a single EU front-up call number ensuring user-friendly access to those services.*

- (46) 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.
- (47) It is necessary to strengthen the powers of the Member States vis-à-vis holders of rights of way to ensure the entry or roll out of 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. National regulatory authorities should be able to impose, on a case-by-case basis, the sharing of *network elements and associated facilities such as* ducts, masts and antennas, entry into buildings and better coordination of civil works. Improving facility sharing can significantly improve competition and lower the overall financial and environmental cost *for undertakings* of deploying electronic communications infrastructure, *in particular new fibre optic access networks. National regulatory authorities should be able to impose on operators with significant market power obligations to provide a reference offer for granting fair and non-discriminatory access to their ducts.*
- (48) 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 *error*, 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)*¹ should contribute to *an* enhanced level of security of electronic communications by, among other things, providing expertise and advice, and promoting the exchange of best practice. Both *ENISA* and the national regulatory authorities should have the necessary means to perform their duties, including powers to obtain sufficient information to be able 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

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

measures.

- (49) 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 the technical implementing measures adopted pursuant to the Framework Directive. In order to perform their duties, they should have the power to investigate and to impose penalties in cases of non-compliance.
- (50) Experience in the implementation of the regulatory framework indicates that the market into which significant market power is being leveraged is not the source of the problem but rather the object of its effect. Therefore, the significant market power enjoyed on one market should be addressed by national regulatory authorities at source and not on adjacent markets where its effects are felt.
- (51) In the case of markets that are identified as trans-national, the market review procedure should be simplified and rendered more effective by enabling the Commission, taking into account the opinion of **BERT**, to designate the undertaking(s) with significant market power and to impose one or more specific obligations, thereby allowing regulatory issues with trans-national characteristics to be addressed directly at Community level.
- (52) 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 timeframe. The timeframe should take account of whether the particular market has previously been subject to market analysis and duly notified. Failure of 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 in time. The Commission should therefore be able to ask **BERT** to assist in the tasks of the national regulatory authority concerned, in particular to issue an opinion including a draft measure, the analysis of the relevant market and the appropriate obligations that the Commission could then impose.
- (53) Due to || a high level of technological innovation and highly dynamic markets in the electronic communications sector there is a need to be able to adapt regulation rapidly in a coordinated and harmonised way at European level, as experience shows that divergence among the national regulatory authorities in the implementation of the regulatory framework may create a barrier to the development of the internal market. Therefore, power should be conferred on the Commission to adopt implementing measures in areas such as the regulatory treatment of new services, numbering, naming and addressing, consumer issues including e-Accessibility, and regulatory accounting measures.
- (54) One important task assigned to **BERT** is to issue opinions in relation to cross-border disputes where appropriate. National regulatory authorities should therefore take account of any opinions of **BERT** in such cases.
- (55) Experience in the implementation of the 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 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 the Framework Directive to deal with breaches of obligations under the Framework and Specific Directives should therefore ensure the application of consistent and coherent principles to enforcement and penalties for the whole regulatory framework.

- (56) ***Both investment and competition should be encouraged in order to safeguard consumer choice.***
- (57) The existing regulatory framework included 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.
- (58) Annex I to the Framework Directive identified the list of markets to be included in the Recommendation on relevant product and service markets which may warrant ex ante regulation. This Annex should be repealed since its purpose of serving as a basis for drawing up the initial version of the Recommendation¹ has been fulfilled.
- (59) Annex II to the Framework Directive listed the criteria to be used by the national regulatory authorities when assessing joint dominance in accordance with the second subparagraph of Article 14(2) of that Directive. *That Annex* may be misleading for national regulatory authorities conducting market analysis. Furthermore, the concept of joint dominance also depends on the case law of the Court of Justice of the European Communities. Annex II should therefore be amended.
- (60) 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 vertically integrated operator's own downstream divisions. Functional separation ***may have*** the capacity to improve competition in several relevant markets by significantly reducing the incentive for discrimination and by making it easier for compliance with non-discrimination obligations to be verified and enforced. █ In order to avoid distortions of competition in the internal market, proposals for functional separation should be approved in advance by the Commission.
- (61) The implementation of functional separation should not prevent appropriate coordination mechanisms between █ different separate business entities in order to ensure that the economic and management supervision rights of the parent company are protected.
- (62) ***Continuing integration of the internal market in electronic communications networks and services requires better coordination in the application of the ex ante regulation provided for by the EU regulatory framework for electronic***

¹ Commission Recommendation of 11 February 2003 on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services (OJ L 114, 8.5.2003, p. 45).

communications networks and services.

- (63) Where a vertically integrated undertaking chooses to *transfer* a substantial part or all of its local access network assets to a separate legal entity under different ownership or by establishing a separate business entity for dealing with access products, the national regulatory authority should assess the effect of the intended transaction on all existing regulatory obligations imposed on the vertically integrated operator in order to ensure the compatibility of any new arrangements with Directive 2002/19/EC (Access Directive) and Directive 2002/22/EC (Universal Service Directive). The national regulatory authority concerned should undertake a new analysis of the markets in which the segregated entity operates, and impose, maintain, amend or withdraw obligations accordingly. To this end, the national regulatory authority should be able to request information from the undertaking.
- (64) 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, ***or in order to promote efficiency and sustainable competition and to ensure the maximum benefit for end-users***, it is however necessary to ensure that such obligations are imposed in conformity with the regulatory framework and in particular its notification procedures.
- (65) The Commission has the power 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 market and technological developments. This is also the case for the minimum list of items in Annex II that must be made public to meet the obligation of transparency.
- (66) ***The Commission should submit a proposal to the European Parliament and to the Council for the adoption of those harmonisation measures for the implementation of Community electronic communications policy which go beyond technical implementing measures.***
- (67) Facilitating access to radio frequencies 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 using 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 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 assignment and allocation decisions, together with the increased possibility to transfer rights between undertakings, should increase the freedom and means to deliver electronic communications and audiovisual media 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*** spectrum ***allocation*** where this ***appears*** essential *in order* to meet a ***specific*** general interest objective set out in national law. Procedures associated with the pursuit of general interest objectives should in all circumstances be transparent, objective,

proportionate and non-discriminatory.

- (69) ***Any exemption, full or partial***, from the obligation to pay ***the*** fees or charges set for the use of || spectrum ***should be objective and transparent and based on other general interest obligations set out in national law***.
- (70) 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, Member States should first carry out a review, including a public consultation, taking into account market, coverage and technological developments. In view of spectrum scarcity, individual rights granted to undertakings should be regularly reviewed. In carrying out this review, Member States 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.
- (71) National regulatory authorities should have the power to ensure effective use of spectrum and numbers and, where spectrum or numbering resources are left unused, to take action to prevent anti-competitive hoarding, which can hinder new market entry.
- (72) Removing legal and administrative barriers to a general authorisation or rights of use for spectrum or numbers with European implications should favour technology and service development and contribute to improving competition. While the coordination of technical conditions for the availability and efficient use of radio frequencies is organised pursuant to the *Decision No 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision)*¹, it may also be necessary, in order to achieve internal market objectives, to coordinate or harmonise the selection procedures and conditions applicable to rights and authorisations in certain bands, to rights of use for numbers and to general authorisations. This applies in particular to electronic communications services that by their nature have an internal market dimension or cross-border potential, such as satellite services, the development of which would be hampered by discrepancies in spectrum assignment between Member States ***or between the European Union and third countries, taking into account the decisions of the ITU and the CEPT***. The Commission, assisted by the Communications Committee and taking the utmost account of the opinion of ***BERT***, should therefore be able to adopt technical implementing measures to achieve such objectives. Implementing measures adopted by the Commission may require Member States to make available rights of use for spectrum and/or numbers throughout their territory and where necessary *to* withdraw any other existing national rights of use. In such cases, Member States should not grant any new right of use for the relevant spectrum band or number range under national procedures.
- (73) Technological and market developments have made it possible to deploy electronic communications services extending across the geographical frontiers of Member States. Article 16 of the Authorisation Directive required the Commission to review the functioning of the national authorisation systems and the development of cross-border service provision within the Community. The provisions of Article 8 of the Authorisation Directive concerning the harmonised assignment of radio frequencies

¹ OJ L 108, 24.4.2002, p. 1.

have proved to be ineffective in coping with the needs of an undertaking wishing to provide services on a cross-Community basis and should therefore be amended.

- (74) While the granting of authorisations and the monitoring of compliance with usage conditions should remain the responsibility of each Member State, Member States should refrain from imposing any further conditions, criteria or procedures that would restrict, alter or delay the correct implementation of a harmonised or coordinated selection or authorisation procedure. Where justified to facilitate their implementation, such coordination or harmonisation measures could include transitional derogations or, in the case of spectrum, transitional spectrum sharing mechanisms that would exempt a Member State from the application of such measures, provided that this would not create undue differences in the competitive or regulatory situations between Member States.
- (75) 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 penalties and/or administrative sanctions in the event of breaches of those terms and conditions.
- (76) 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.
- (77) Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop¹ has proved to be effective in the initial stage of market opening. The 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.
- (78) Measures necessary for the implementation of the Framework, Access and Authorisation Directives 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 Commission².
- (79) In particular, the Commission *should be empowered* to adopt implementing measures in relation to notifications under Article 7 of the 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 transnational markets; the implementation of || standards; *and* the harmonised application of the provisions of

¹ OJ L 336, 30.12.2000, p. 4.

² OJ L 184, 17.7.1999, p. 23. ||

the regulatory framework. Power should also be conferred to adopt implementing measures to update Annexes I and II to the Access Directive to market and technological developments and for adopting implementing measures to harmonise the authorisation rules, procedures and conditions for the authorisation of electronic communications networks and services. Since those measures are of general scope and are designed to *amend non-essential elements of those Directives by supplementing them with* new non-essential elements, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC. ***Given that the conduct of the regulatory procedure with scrutiny within the normal time-limits could, in certain exceptional situations, impede the timely adoption of implementing measures, the European Parliament, the Council and the Commission should act speedily in order to ensure the timely adoption of those measures,***

HAVE ADOPTED THIS DIRECTIVE:

Article 1

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

Directive 2002/21/EC *shall be* amended as follows:

(1) Article 1(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 and encourage the use of electronic communications by less favoured users.*** It lays down tasks of national regulatory authorities and establishes a set of procedures to ensure the harmonised application of the regulatory framework throughout the Community."

(2) Article 2 *shall be* amended as follows:

(a) Point (b) *shall be* replaced by the following:

"(b) "transnational markets" means markets covering the Community or a substantial part thereof located in more than one Member State."

(b) 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, including network elements which are not active;"

(c) Point (e) *shall be* replaced by the following:

"(e) "associated facilities" means those facilities 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 number or address translation systems, conditional access systems and electronic

programme guides, as well as physical infrastructure such as *entries to buildings, building wiring, towers and other supporting constructions, ducts, conduits, masts, antennae, manholes and cabinets and all other network elements which are not active;*"

(d) 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)*

* *OJ L 201, 31.7.2002, p. 37*"

(e) The following points (q), (r), and (s) *shall be* added:

"(q) "allocation" means the designation of a given frequency band or number range for use by one or more types of services, where appropriate, under specified conditions;

(r) "assignment" means the authorisation given by a national regulatory authority to a legal or natural person to use a radio frequency or radio frequency channel, or a number (or block(s) of numbers);

(s) "harmful interference" means interference which endangers the functioning of a radionavigation service or of other safety services or which otherwise seriously degrades, obstructs or repeatedly interrupts a radiocommunications service operating in accordance with the applicable *international, Community or national regulations.*"

(3) Article 3(3) *shall be* replaced by the following:

"3. Member States shall ensure that national regulatory authorities exercise their powers independently, impartially, transparently *and in a timely manner*. National regulatory authorities shall not seek or take instructions from any other body in relation to the day-to-day performance of the tasks assigned to them under national law implementing Community law. Only appeal bodies *established* in accordance with Article 4 or national courts 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 his/her replacement may be dismissed only if he no longer fulfils the conditions required for the performance of his duties laid down in advance in national law, or if he has been guilty of serious misconduct. The decision to dismiss the head of the national regulatory authority shall contain a statement of reasons and be made public at the time of dismissal.

Member States shall ensure that national regulatory authorities have adequate financial and human resources to carry out the tasks assigned to them and that

they have separate annual budgets. The budgets shall be made public.

- 3a. *Member States shall ensure that the goals of the Body of European Regulators in Telecom ("BERT") of promoting greater regulatory coordination and coherence are actively supported by the national regulatory authorities.*

Member States shall ensure that national regulatory authorities have adequate financial and human resources to carry out the tasks assigned to them and to enable them to actively participate in and contribute to BERT. National regulatory authorities shall have separate annual budgets and those budgets shall be made public.

- 3b. *Member States shall ensure that national regulatory authorities take utmost account of common positions issued by BERT when adopting their own decisions for their home markets."*

(4) Article 4 shall be amended as follows:

- (a) Paragraph 1 is 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 *which* 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, that there is an effective appeal mechanism *and that proceedings before the appeal body are not unduly lengthy. Member States shall set time limits for consideration of such appeals.*

Pending the outcome of any appeal, the decision of the national regulatory authority shall stand, unless interim measures are granted. Interim measures may be granted, *in accordance with the relevant national legislation*, if there is an urgent need to suspend the effect of the decision in order to prevent serious and irreparable damage to the party applying for those measures and the balance of interests so requires."

- (b) *The following paragraphs shall be added:*

- "3. *Appeal bodies shall be entitled to request the opinion of BERT before reaching a decision in the course of an appeal proceeding."*

4. Member States shall collect information on the subject of appeals, the number of requests for appeal, the duration of the appeal proceedings, the number of decisions to grant interim measures taken in accordance with paragraph 1 and the reasons for such decisions. Member States shall make available such information to the Commission and **BERT** on an annual basis."

(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. ■ These undertakings shall provide such information promptly on request and to 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 comply with Community and national law on business confidentiality.*"

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

"Article 6

Consultation and transparency mechanism

Except in cases falling within Articles 7(10), 20, or 21, and unless otherwise provided in the implementing measures adopted pursuant to Article 9c, 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. *In the event of unwarranted dissemination of confidential information, the national regulatory authorities shall ensure that they adopt appropriate measures as soon as possible, at the request of the undertakings concerned.*

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 *to the extent that* 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 the Commission and **BERT 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 **BERT** 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 implementing provisions 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, 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, **BERT** 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, **BERT** and other national regulatory authorities thereof. National regulatory authorities, **BERT** 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.

- 5. Within the two month period referred to in paragraph 4, the Commission may take a decision requiring the national regulatory authority concerned to withdraw the draft measure. The Commission shall take the utmost account of the opinion of **BERT** submitted in accordance with Article 5 of Regulation (EC) No .../2008 of the European Parliament and of the Council of ... *[establishing the Body of European Regulators in Telecom (BERT)]**, before issuing a decision. The decision shall be accompanied by a detailed and objective analysis of why the Commission considers that the draft measure should not be adopted together with specific proposals for amending the draft measure.
- 6. Within three months of the Commission issuing 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. If 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 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, **BERT** and the Commission and may, except in cases covered by paragraph 4, adopt the resulting draft measure and, where it does so, shall communicate it to the Commission. Any

other national body exercising functions under this Directive or the Specific Directives shall also take the utmost account of the comments of the Commission.

8. In exceptional circumstances, where a national regulatory authority considers that there is an urgent need to act, by way of derogation from the procedure set out in paragraphs 3 and 4, in order to safeguard competition and protect the interests of users, 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 authorities and **BERT**. 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.

* *OJ L ...*"

(7) *The following Articles shall be inserted:*

"Article 7a

Procedure for the consistent application of remedies

1. *Where a national regulatory authority intends to adopt a measure to impose, amend or withdraw an obligation on an operator in application of Article 16 in conjunction with Articles 5 and 9 to 13a of Directive 2002/19/EC (Access Directive), and Article 17 of Directive 2002/22/EC (Universal Service Directive) the Commission and the national regulatory authorities of the other Member States shall have a period of one month from the date of notification of the draft measure in which to make comments to the national regulatory authority concerned .*
2. *If the draft measure concerns the imposition, amendment or withdrawal of an obligation other than the obligation laid down in Article 13a of Directive 2002/19/EC (Access Directive), the Commission may, within the same period, notify the national regulatory authority concerned and BERT of the reasons why it considers that the draft measure would create a barrier to the single market or why it has serious doubts as to its compatibility with Community law. In such case, the draft measure shall not be adopted for a further two 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 or by any other national regulatory authority.

3. *Within the two-month period referred to in paragraph 2, the Commission, BERT and the national regulatory authority concerned shall cooperate closely with the objective of identifying 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.*

Within the same two-month period, BERT shall, acting by an absolute majority, adopt an opinion confirming the appropriateness and effectiveness

of the draft measure or indicating that the draft measure should be amended and providing specific proposals to that end. This opinion shall be reasoned and made public.

If BERT has confirmed the appropriateness and effectiveness of the draft measure, the national regulatory authority concerned may adopt the draft measure, taking utmost account of any comments made by the Commission and BERT. The national regulatory authority shall make public how it has taken these comments into account.

If BERT has indicated that the draft measure should be amended, the Commission may, taking utmost account of the opinion of BERT, adopt a decision requiring the national regulatory authority concerned to amend the draft measure and providing reasons and specific proposals to that end.

4. *If the draft measure concerns the imposition, amendment or withdrawal of the obligation laid down in Article 13a of Directive 2002/19/EC (Access Directive), the draft measure shall not be adopted for a further two-month period starting at the end of the one-month period referred to in paragraph 1.*

Within the two-month period referred to in the first subparagraph, the Commission, BERT and the national regulatory authority concerned shall cooperate closely with the objective of determining whether the proposed draft measure complies with the provisions of Article 13a of Directive 2002/19/EC (Access Directive), and, in particular, whether it is the most appropriate and effective measure. To that end, due account shall be taken of the views of market participants and of the need to ensure the development of consistent regulatory practice. At the reasoned request of BERT or the Commission, this two-month period shall be extended by up to a further two months.

Within the maximum period set out in the second subparagraph, BERT shall, acting by an absolute majority, adopt an opinion confirming the appropriateness and effectiveness of the draft measure or indicating that the draft measure should not be adopted. This opinion shall be reasoned and made public.

Only if the Commission and BERT have confirmed the appropriateness and effectiveness of the draft measure, the national regulatory authority concerned may adopt the draft measure, taking utmost account of any comments made by the Commission and BERT. The national regulatory authority shall make public how it has taken these comments into account.

5. *Within three months of the adoption by the Commission in accordance with the fourth subparagraph of paragraph 3 of a reasoned decision requiring a national regulatory authority to amend the draft measure, the national regulatory authority concerned shall amend or withdraw the draft measure. If the draft measure is to be amended, the national regulatory authority shall undertake a public consultation in accordance with the consultation and transparency procedure referred to in Article 6, and re-notify the amended draft measure to the Commission in accordance with Article 7.*
6. *The national regulatory authority may withdraw the proposed draft measure at any stage of the procedure.*

Implementing provisions

- || The Commission, ***taking utmost account of the opinion of BERT***, may lay down ***recommendations and/or guidelines*** in relation to Article 7 that define the form, content and level of details 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.

|| "

(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 ***or unless otherwise required in order to fulfil the objectives laid down in paragraphs 2 to 4***, 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), (b) ***and (c)*** *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, ***and that providers are compensated for any additional net cost that they can show that they incurred as a result of the imposition of such public service obligations***;

(b) ensuring that there is no distortion or restriction of competition in the electronic communications sector, in particular for the delivery of ***and access to content and services across all networks***;

(c) ***encouraging and facilitating efficient market-driven investment in infrastructure, and promoting innovation; and***"

(c) *paragraph 3 shall be amended as follows:*

(i) *point (c) shall be deleted;*

(ii) point (d) *shall be* replaced by the following:

"(d) working with the Commission and ***BERT*** so as to ensure the development of consistent regulatory practice and the consistent application of this Directive and the Specific Directives."

(d) || *paragraph 4 shall be amended as follows:*

(i) 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;"

(ii) points (g) *and* (h) shall be added:

"(g) applying the principle that end-users should be able to access and distribute any lawful content and use any lawful applications and/or services of their choice *and for this purpose contributing to the promotion of lawful content in accordance with Article 33 of Directive 2002/22/EC (Universal Service Directive)*).

(h) *applying the principle that no restriction may be imposed on the fundamental rights and freedoms of end-users without a prior ruling of the judicial authorities, notably in accordance with Article 11 of the Charter of Fundamental Rights of the European Union on freedom of expression and information, except when public security is threatened, in which case the ruling may be subsequent."*

(e) *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 through the continuity of remedies over several market reviews as appropriate;*

(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 infrastructure-based competition wherever possible;*

(d) *promoting market driven investment and innovation in new and enhanced infrastructures including by encouraging sharing of investment and by ensuring appropriate sharing of risk between investors and those undertakings enjoying access to the new facilities;*

(e) *taking due account of the variety of conditions relating to competition and consumers that exist in the different 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 Articles shall be inserted:*

"Article 8a

Radio Spectrum Policy Committee

1. *A Radio Spectrum Policy Committee (RSPC) is hereby established in order to contribute to the fulfilment of the objectives set out in paragraphs 1, 3 and*

5 of Article 8b.

The RSPC shall provide advice to the European Parliament, the Council and the Commission on radio spectrum policy issues.

The RSPC shall be composed of high-level representatives from the competent national authorities responsible for radio spectrum policy in each Member State. Each Member State shall have one vote and the Commission shall not vote.

- 2. At the request of the European Parliament, the Council or the Commission or on its own initiative, the RSPC, acting by an absolute majority, shall adopt opinions.*
- 3. The RSPC shall submit an annual activity report to the European Parliament and to the Council.*

Article 8b

Strategic planning and coordination of radio spectrum policy in the European Union

- 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 Union. To this end, they shall take into consideration, inter alia, economic, safety, health, public interest, freedom of expression, cultural, scientific, social and technical aspects of the EU policies as well as the various interests of radio spectrum user communities with the aim of optimising the use of radio spectrum and of avoiding harmful interference*
- 2. Radio spectrum policy activities in the European Union shall be without prejudice to:*
 - (a) measures taken at Community or national level, in compliance with Community law, to pursue general interest objectives, in particular with regard to content regulation and audio-visual and media policies;*
 - (b) the provisions of Directive 1999/5/EC; and*
 - (c) the right of Member States to organise and use their radio spectrum for the purposes of public order, public security and defence.*
- 3. Member States shall ensure the coordination of radio spectrum policy approaches in the European Union 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 EU policy areas such as electronic communications, transport and research and development.*
- 4. The Commission, taking due account of the opinion of the RSPC, may submit a legislative proposal for establishing a radio spectrum action programme with regard to the strategic planning and harmonisation of the use of radio spectrum in the European Union or other legislative measures*

with the aim of optimising the use of radio spectrum and of avoiding harmful interference.

5. *Member States shall ensure the effective coordination of the interests of the European Union in international organisations competent in radio spectrum matters. Whenever necessary for ensuring such effective coordination, the Commission, taking due account of the opinion of the RSPC, may propose to the European Parliament and the Council common policy objectives, including, if necessary, a negotiation mandate."*

(10) Article 9 shall be replaced by the following:

"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 *communications* services in their territory in accordance with **Articles 8 and 8b**. They shall ensure that the allocation and assignment of such radio frequencies by national regulatory authorities are based on objective, transparent, non discriminatory and proportionate criteria. *In so doing, they shall act in accordance with international agreements 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 Articles 8b and 9c of this Directive and* Decision No 676/2002/EC (Radio Spectrum Decision).
3. Unless otherwise provided in the second subparagraph or in the measures adopted pursuant to Article 9c, Member States shall, ensure that all types of **■** technology *used for electronic communications services* may be used in the radio frequency bands *available for* electronic communications services *in accordance with the ITU Radio Regulations.*

Member States may, however, provide for proportionate and non-discriminatory restrictions on the types of **■** technology used *for electronic communications services* where this is necessary to:

- (a) avoid *the possibility of* harmful interference,
- (b) protect public health against electromagnetic fields,
- (c) *ensure technical quality of service,*
- (d) ensure maximisation of radio frequency sharing **■** ,
- (e) *safeguard the efficient use of radio frequencies,*
- (f) *fulfil 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 *available for electronic communications services in accordance with their national frequency allocation plans and with the ITU Radio Regulations*. Member States may, however, provide for proportionate and non discriminatory restrictions on the types of electronic communications services to be provided.

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 in national legislation* in conformity with Community law, such as safety of life, the promotion of social, regional or territorial cohesion, the avoidance of inefficient use of radio frequencies or **■** the promotion of *cultural and media policy objectives such as* cultural and linguistic diversity and media pluralism.

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.

5. Member States shall regularly review the necessity of the restrictions *and measures* referred to in paragraphs 3 and 4 *and shall make the results of these reviews public*.
6. Paragraphs 3 and 4 shall apply to *the* allocation and assignment of radio frequencies *from ...**

* *The date of transposition of this Directive."*

(11) The following Articles 9a, 9b, and 9c shall be inserted:

"Article 9a

Review of restrictions to existing rights

1. For a period of five years starting on ...*, Member States *may* ensure that 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* may submit an application to the competent national **■** authority for a reassessment of the restrictions to 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 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 5 year period, whichever is the earlier date.

2. Where the right holder mentioned in paragraph 1 is a provider of radio or television broadcast content services, and the right to use radio frequencies has

been granted for the fulfilment of a specific general interest objective, ***including the delivery of broadcasting services, the right to use*** the part of the radio frequencies which is necessary for the fulfilment of *that* objective ***shall remain unchanged***. The part of the radio frequencies which becomes unnecessary for the fulfilment of that objective **■** shall be subject to a new assignment procedure in ***accordance with Article 9(3) and (4) of this Directive and Article 7(2) of the Authorisation Directive***.

3. 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 assignments and allocations of radio frequencies which existed at the date of entry into force of this Directive.
4. In applying this Article, Member States shall take appropriate measures to guarantee fair competition.

Article 9b

Transfer of Individual Rights to Use radio frequencies

1. Member States shall ensure that undertakings may transfer or lease to other undertakings individual rights to use radio frequencies in the bands for which this is provided in the implementing measures adopted pursuant to Article 9c, ***provided that such transfer or lease is in accordance with national procedures and national frequency allocation plans***.

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***.

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 to the ***competent*** national **■** authority responsible for ***granting individual rights to use radio frequencies***, and ***that it*** is made public. Where radio frequency use has been harmonised through the application of ***Article 9c and*** the Radio Spectrum Decision or other Community measures, any such transfer shall comply with such harmonised use.

Article 9c

Radio Frequency Management Harmonisation Measures

In order to contribute to the development of the internal market, for the achievement of the principles of ***Articles 8b, 9, 9a and 9b***, the Commission may adopt appropriate ***technical*** implementing measures to:

- (a) ***apply the radio spectrum action programme established pursuant to Article 8b(4);***
- (b) ***identify*** the bands for which usage rights may be transferred or leased between undertakings;
- (c) harmonise the conditions attached to such rights **■** ;<BRK>**■**

- (d) *identify the bands to which* the principle of *service* neutrality *applies*.

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). ■

* *The date of transposition of this Directive."*

- (12) Article 10 *shall be* amended as follows:

- (a) Paragraph 2 *shall be* replaced by the following:

"2. National regulatory authorities shall ensure that numbering plans and procedures are applied in a manner that gives equal treatment to all providers *and users of numbers across the European Union*. In particular, Member States shall ensure that an undertaking assigned a range of numbers does not discriminate against other providers *and users* 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 harmonisation *of specific numbers or numbering ranges* within the Community where that promotes the functioning of the internal market or supports the development of pan-European services. The Commission may take appropriate technical implementing measures on this matter, which may include *ensuring cross-border access to national numbering used for essential services such as directory enquiries*. The implementing measures may grant *BERT* specific responsibilities in the application of those measures.

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

- (13) In Article 11(1), the words ‘acts on the basis of transparent and publicly available procedures, applied without discrimination and without delay, and’ *shall be* replaced by the following:

"acts on the basis of simple, transparent and publicly available procedures, applied without discrimination and without delay, and in any event makes its decision within four months of the application, and"

- (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 entries to buildings, **building wiring**, masts, antennae, **towers and other supporting constructions**, ducts, **conduits**, manholes, **■ cabinets and all other network elements which are not active**.

2. Member States may require the holders of the rights referred to in paragraph 1 to share facilities or property (including physical co-location) or to 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 only after an appropriate period of public consultation during which all interested parties *are* 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 regulatory authorities have the powers to require, after an appropriate period of public consultation during which all interested parties are given the opportunity to state their views, the holders of the rights referred to in paragraph 1 to share facilities or property, including by means of physical co-location, in order to encourage efficient investment in infrastructure and the promotion of innovation. Such sharing or coordination arrangements may include rules for apportioning the costs of facility or property sharing and shall ensure that there is an adequate sharing of risks between the undertakings concerned.*
4. *Member States shall ensure that national regulatory authorities establish a detailed inventory of the nature, availability and geographical location of the facilities referred to in paragraph 1 based on information provided by the holders of the rights referred to in that paragraph, and that they make that inventory available to interested parties.*
5. *Member States shall ensure that the competent authorities establish appropriate coordination procedures, in cooperation with national regulatory authorities, with respect to the public works referred to in paragraph 2 and to other appropriate public facilities or property. Those procedures 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.*
6. Measures taken by a national regulatory authority in accordance with *this Article* shall be objective, transparent, **non-discriminatory** and proportionate."

(15) The following Chapter IIIa *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 safeguard the security of their networks or services. Having regard to the *latest technological developments*, 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 on interconnected networks.
2. Member States shall ensure that undertakings providing public communications networks take **appropriate** steps to *guarantee* the integrity of their networks so as to ensure the continuity of supply of services provided over those networks. ***The competent national authorities shall consult with electronic communications services providers prior to adopting specific measures for the security and integrity of electronic communications networks.***
3. Member States shall ensure that undertakings providing public communications networks or publicly available electronic communications services notify the **competent** national authority of **a** breach of security or **loss of** integrity that had a significant impact on the operation of networks or services.

Where appropriate, the **competent** national authority concerned shall inform the **competent** national authorities in other Member States **and the European Network and Information Security Agency (ENISA)**. Where disclosure of the breach is in the public interest, the **competent** national authority may inform the public.

Once a year, the **competent** national authority shall submit a summary report to the Commission on notifications received and 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 *notifications*. ***The adoption of such technical implementing measures shall not prevent Member States from adopting additional requirements in order to pursue the objectives set out in paragraphs 1 and 2.***

Technical implementing measures relating to notifications shall comply with the provisions of Directive 2002/58/EC.

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

1. Member States shall ensure that *the competent* national authorities have the power to issue binding instructions to undertakings providing public communications networks or publicly available electronic communications services in order to implement *the provisions of Article 13a. These binding instructions shall be proportionate and economically and technically sustainable and shall be implemented within a reasonable timeframe.*
2. Member States shall ensure that *the competent* national authorities have the power to require undertakings providing public communications networks or publicly available electronic communications services to:
 - (a) provide *the* information needed to assess the security *and integrity* of their services and networks, including documented security policies; and
 - (b) instruct a qualified independent body to carry out a security audit and make the results thereof available to the national regulatory authority.
3. Member States shall ensure that *the competent* national authorities have all the powers necessary to investigate cases of non-compliance *and their effects on the security and integrity of the networks.*
4. These provisions shall be without prejudice to Article 3 of this Directive."

(16) *Article 14(3) shall be replaced by the following:*

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

(17) Article 15 *shall be* amended as follows:

- (a) The heading *shall be* replaced by the following:

"Procedure for identification and definition of markets"
- (b) In paragraph 1, the first subparagraph *shall be* replaced by the following:
 - "1. After public consultation and consultation with **BERT**, the Commission shall adopt a Recommendation on Relevant Product and Service Markets (hereinafter "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) *the following paragraph shall be inserted:*

"2a. By...*, the Commission shall publish guidelines for national regulatory authorities as regards decisions aimed at imposing, amending or withdrawing obligations on undertakings with significant market power.

*** The date of the entry into force of Directive 2008/.../EC of the European Parliament and of the Council of ... [amending Directive 2002/21/EC]."**

(d) 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."

(e) Paragraph 4 *shall be* replaced by the following:

"4. The Commission may, taking the utmost account of the opinion of **BERT** submitted in accordance with Article 7 of Regulation (EC) No .../2008 [establishing the Body of European Regulators in Telecom (BERT)], adopt a Decision identifying transnational markets.

This Decision, 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) ■ ."

(18) Article 16 *shall be* amended as follows:

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

"1. National regulatory authorities shall carry out an analysis of the relevant markets, **taking account of the markets** listed 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, 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 5 and 6 *shall be* replaced by the following:

"5. In the case of transnational markets identified in the Decision referred to in Article 15(4), the Commission shall request **BERT** to conduct the market analysis taking the utmost account of the Guidelines and deliver an opinion on any imposition, maintenance, amendment or withdrawal of regulatory obligations as referred to in paragraph 2 of this Article.

The Commission, taking the utmost account of the opinion of **BERT**, may issue a decision designating one or more undertakings as having significant market power on that market, and imposing one or more specific obligations under Articles 9 to 13a of Directive 2002/19/EC (Access Directive) and Article 17 of Directive 2002/22/EC (Universal Service Directive). In so doing, the Commission shall pursue the policy objectives set out in Article 8.

6. Measures taken according to the provisions of paragraphs 3 and 4 of this Article 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:
 - (a) within two years of a previous notification of a draft measure relating to that market;
 - (b) for markets not previously notified to the Commission, within one year of the adoption of a revised Recommendation on relevant markets, or;
 - (c) for Member States that have newly joined the Union, within one year of their accession."
- (c) The following paragraph 7 *shall be* inserted:
 - "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 Article 16(6), the Commission may request **BERT** to issue an opinion, including a draft measure, on the analysis of the specific market and the specific obligations to be imposed. **BERT** shall carry out a public consultation on the draft measure concerned.

■ "

(19) Article 17 *shall be* amended as follows:

- (a) *in paragraph 1, in the first sentence the term "Article 22(2)" shall be replaced by the term "Article 22(3)" and in the second sentence the words "acting in accordance with the procedure referred to in Article 22(2)" shall be replaced by the words "|| take appropriate implementing measures and".*
- (b) *in paragraph 2, subparagraph 3 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) or the International Electrotechnical Commission (IEC)."
- (c) 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 "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".

(d) The following paragraph 6a *shall be* inserted:

"6a. The implementing measures *referred to in paragraphs 1, 4 and 6*, 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). █ "

(20) Article 18 *shall be* amended as follows:

(a) In paragraph 1, the following point (c) is added:

"(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 to Articles 6 and 8 of Directive 2002/20/EC (Authorisation Directive), where the Commission finds that divergences in the implementation by national regulatory authorities of the regulatory tasks specified in this Directive and the Specific Directives *creates* a barrier to the internal market, *it* may, taking the utmost account of the opinion of *BERT*, if any, issue █ 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. 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). █

3. Measures adopted pursuant to paragraph 1 may include the identification of a harmonised or coordinated approach *to deal* with the following issues:

(a) *the consistent* implementation of regulatory approaches, including *the* regulatory treatment of new services, *sub-national markets and cross-border business electronic communications services*;

(b) *numbering*, naming and addressing issues, including number ranges, portability of numbers and identifiers, number and address translation systems, and access to 112 emergency services;

(c) *consumer* issues *not covered by Directive 2002/22/EC (Universal Service Directive)*, including *in particular* access to electronic communications services and equipment by disabled end-users;

(d) *regulatory* accounting, *including the calculation of investment risk*.

█ "

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

- "1. In the event of a dispute between service providers arising in connection with existing obligations imposed under this Directive or the Specific Directives where one of the parties is an undertaking providing electronic communications networks or services in a Member State, 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 timeframe 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, 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 *within BERT* in order to bring about a resolution of the dispute, *as far as possible through the adoption of a joint decision*, in accordance with the objectives set out in Article 8. *Any obligations imposed on undertakings by the national regulatory authorities as part of the resolution of a dispute shall comply with the provisions of this Directive and the Specific Directives.*

Any national regulatory authority which has competence in such a dispute may request **BERT** to issue a recommendation pursuant to Article 18 of Regulation (EC) No .../2008 [*establishing the Body of European Regulators in Telecom (BERT)*] 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 **BERT**, any national regulatory authority with competence in any aspect of the dispute shall await **BERT**'s recommendation pursuant to Article 18 of Regulation (EC) No .../2008 [*establishing the Body of European Regulators in Telecom (BERT)*] before taking action to resolve the dispute, without prejudice to the possibility for national regulatory authorities to take 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 recommendation issued by **BERT** in accordance with Article 18 of Regulation (EC) No .../2008 [*establishing the Body of European Regulators in Telecom (BERT)*].

3. Member States may make provision for the competent national regulatory authorities jointly to decline to resolve a dispute where other mechanisms,

including mediation, exist and would better contribute to resolution of 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, if the dispute has not been brought before the courts by the party ***whose rights have been violated*** and if either party requests it, the national regulatory authorities shall coordinate their efforts in order to bring about a resolution of the dispute, ***as far as possible through the adoption of a joint decision***, in accordance with the provisions set out in Article 8 and taking the utmost account of any recommendation issued by **BERT** in accordance with Article 18 of Regulation (EC) No .../2008 [*establishing the Body of European Regulators in Telecom (BERT)*].

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

(24) The following Article 21a *shall be* inserted:

"Article 21a
Penalties

Member States shall lay down the rules on penalties applicable to infringements of the 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 ...* at the latest and shall notify it without delay of any subsequent amendment affecting them."

(25) Article 22 *shall be* amended as follows:

(a) ***the following paragraph shall be inserted:***

"1a. By way of derogation from paragraph 1, for the adoption of measures pursuant to Article 9c, the Commission shall be assisted by the Radio Spectrum Committee established under Article 3(1) of Decision No 676/2002/EC."

(b) 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."

(c) Paragraph 4 *shall be* replaced by the following:

"4. Where reference is made to this paragraph, Article 5a(1), (2), (4) and (6), and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof."

(26) Article 27 *shall be* deleted.

* *The time-limit for the implementation of Directive 2008/.../EC [amending Directive 2002/21/EC].*

- (27) *Annex I shall be deleted and Annex II shall be amended in accordance with the Annex to this Directive. :*

Article 2

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

Directive 2002/19/EC *shall be* 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 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 number translation or systems offering equivalent functionality; ***access to necessary subscriber information and to mechanisms for paying back sums invoiced to end-users to the providers of directory services;*** 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 negotiate interconnection with each other for the purpose of providing publicly available electronic communications services ***or delivering broadcast content or information society 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. ***However the terms and conditions of interconnection shall not introduce unjustified barriers to interoperability.***"

- (3) Article 5 *shall be* amended as follows:

(a) *Paragraphs 1 and 2 are 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 interoperability of services, exercising their responsibility in a way that promotes efficiency, sustainable competition, investment and innovation, and gives the maximum benefit to end-users.

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

(a) to the extent that is necessary to ensure end-to-end connectivity or fair and reasonable access to third-party services such as directory services, obligations on undertakings that control access to end-users, including in justified cases the obligation to interconnect their networks where this is not already the case or to make their services interoperable including through mechanisms for paying back to service providers sums invoiced to end-users, on fair, transparent and reasonable terms.

(b) to the extent that is necessary to ensure accessibility for end-users to digital radio and television broadcasting services specified by the Member State, obligations on operators to provide access to the other facilities referred to in Annex I, Part II on fair, reasonable and non-discriminatory terms.

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

When assessing the proportionality of the obligations and conditions to be imposed, national regulatory authorities shall take into account the different competitive conditions existing in the different areas within their Member States."

(b) Paragraphs 3 and 4 *shall be* deleted.

(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). ■

In preparing the provisions referred to in this paragraph, the Commission may be assisted by the Body of European Regulators in Telecom ("BERT")."

(5) Article 7 *shall be* deleted.

(6) Article 8 *shall be* amended as follows:

(a) In paragraph 1, "Articles 9 to 13" *shall be* replaced by "Articles 9 to 13a"

(b) *Paragraph 2 shall be replaced by the following:*

"2. Where an operator is designated as having significant market power on a specific market as a result of a market analysis carried out in accordance with Article 16 of Directive 2002/21/EC (Framework Directive), national regulatory authorities shall, as appropriate, impose the obligations set out in Articles 9 to 13 of this Directive in accordance with the procedure laid down in Article 7a of Directive 2002/21/EC (Framework Directive)."

(c) Paragraph 3 *shall be* amended as follows:

(i) *the first subparagraph shall be* amended as follows:

- *in the first indent, "Articles 5(1), 5(2) and 6" shall be replaced by "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*" 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)***

* OJ L 24, 30.1.1998, p. 1.

** OJ L 201, 31.7.2002, p. 37. || "

(ii) *the following sentence shall be included as the second sentence of the second subparagraph :*

*"The Commission shall take the utmost account of the opinion of **BERT** submitted in accordance with Article 4(3)(m) of Regulation (EC) No .../2008 [establishing the Body of European Regulators in Telecom (BERT)]."*

(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, restrictions on access to services and applications, traffic management policies, terms and conditions for supply and use, and prices."

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

"4. Notwithstanding paragraph 3, where an operator has been found, in accordance with Article 14 of Directive 2002/21/EC (Framework Directive), to have significant market power in a relevant market relating to local access at a fixed location, 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:*

"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). On imperative grounds of urgency, the Commission may use the urgency procedure referred to in Article 14(4). In implementing the provisions of this paragraph, the Commission may be assisted by **BERT**."

(8) *Article 12 shall be replaced by the following:*

"Article 12

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

1. *A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations on operators to meet reasonable requests for access to, and use of, specific network elements and associated facilities, inter alia in situations where the national regulatory authority considers that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest.*

Operators shall be required inter alia:

- (a) *to give third parties access to specified network elements and/or facilities, including unbundled access to the local loop;*
- (b) *to negotiate in good faith with undertakings requesting access;*
- (c) *not to withdraw access to facilities already granted;*
- (d) *to provide specified services on a wholesale basis for resale by third parties;*
- (e) *to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services;*
- (f) *to provide co-location or other forms of facility sharing, including the sharing of ducts, buildings or entry to buildings, antennae towers and other supporting constructions, masts, manholes, cabinets and other network elements which are not active;*
- (fa) *to provide third parties with a reference offer for the granting of access to ducts;*
- (g) *to provide specified services needed to ensure interoperability of end-to-end services to users, including facilities for intelligent network*

services or roaming on mobile networks;

- (h) to provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services;*
- (i) to interconnect networks or network facilities;*
- (j) to provide access to associated services such as identity, location and presence capability."*

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

2. *When national regulatory authorities are considering whether to impose the obligations referred in paragraph 1, and in particular when assessing whether such obligations would be 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 access involved, including the viability of other upstream access products such as access to ducts;*
- (b) the feasibility of providing the access proposed, in relation to the capacity available;*
- (c) the initial investment by the facility owner, bearing in mind any public investment made and the risks involved in making the investment, including an appropriate risk-sharing among those undertakings enjoying access to these new facilities;*
- (d) the need to safeguard competition in the long term, in particular infrastructure-based competition;*
- (e) where appropriate, any relevant intellectual property rights;*
- (f) the provision of pan-European services.*

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

- (9) *Article 13 shall be amended as follows:*

- (a) paragraph 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 might sustain prices at an excessively high level, or apply a price squeeze, to the detriment of end-users. 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 and, without prejudice to Article 19(3)(d) of Directive 2002/21/EC, take into account the risks involved and the appropriate sharing of risk between investors and those undertakings enjoying access to the new facilities, including differentiated short-term and long-term risk-sharing arrangements."

(b) the following paragraph shall be added:

"5. National regulatory authorities shall ensure that access price regulation for long-term risk-sharing contracts is in line with the long-term incremental cost of an efficient operator, taking into account the operator's calculated rate of penetration of new markets and the risk premium included in access prices for short-term contracts. Risk premium shall be phased out as market penetration increases. Margin squeeze tests shall not be applied to short-term contracts when a risk premium is charged."

(10) The following Articles 13a and 13b *shall be inserted:*

"Article 13a

Functional separation

1. A national regulatory authority may, in accordance with the provisions of Article 8, and in particular the second subparagraph of Article 8(3), impose, *as an exceptional measure*, an obligation on vertically integrated undertakings to place activities related to the wholesale provision of *fixed* access products in an independently operating business unit.

That business unit shall supply access products and services to all undertakings, including other business units within the parent company, on the same timescales, terms and conditions, including with regard 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 that the imposition *and enforcement over a reasonable period, taking due account of regulatory best practice*, of appropriate obligations amongst those identified in *Articles 9 to 13*, to achieve effective competition following a coordinated analysis of the relevant markets in accordance with the market analysis procedure set out in Article 16 of Directive 2002/21/EC (Framework Directive), has failed and would fail on a persistent basis to achieve effective competition and that there are important and persisting *competition problems and market*

failures identified in several of *the wholesale* product markets *analysed*;

- (b) *evidence that there is little or no prospect of infrastructure-based competition within a reasonable period*;
- (c) an analysis of the expected impact on the regulatory authority, the undertaking, *in particular its workforce* and its incentives to invest in its network, and other stakeholders, including in particular *analysis of* the expected impact on infrastructure competition and any potential *consequential* effects on consumers;
- (d) *an analysis of the reasons justifying that this obligation would be the most efficient means to enforce remedies aimed at addressing the competition problems/market failures identified.*

■

3. The *national regulatory authority shall include in its proposal a draft of the proposed* measure, *which* shall include the following elements:
 - (a) the precise nature and level of separation ■ ;
 - (b) identification of the assets of the separate business entity, and the products or services to be supplied by this 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 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 9–13 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 paragraph 3 of Article 8.

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 if they intend to transfer their local access network assets or a substantial part of them 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.
2. The national regulatory authority shall assess the effect of the intended transaction on existing regulatory obligations under Directive 2002/21/EC (Framework Directive).

For that purpose, the national regulatory authority shall conduct a coordinated analysis of the different markets related to the access network in accordance with the procedure set out in Article 16 of Directive 2002/21/EC (Framework Directive).

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

3. The legally and/or operationally separate business entity may be subject to any of the obligations identified in Articles 9-13 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 paragraph 3 of Article 8."

(11) *In Article 14, 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."

■

(12) *Annex II is amended in accordance with the Annex to this Directive.*

Article 3

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

Directive 2002/20/EC *shall be* 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."

(2) || Article 3(2) *shall be amended as follows:* ‘

(a) Articles 5, 6 and 7’ *shall be replaced by ‘Articles 5, 6, 6a and 7.’;*

(b) the following subparagraph shall be added:

"Undertakings providing cross-border electronic communications services to undertakings located in several Member States shall be treated in the same way in all Member States and shall be subject to no more than one simplified 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*** usage of || radio frequencies ***by means of*** general ***authorisations***. ***Member States may*** grant individual rights ***of use*** in order to:
 - (a) avoid ***the possibility*** of harmful interference;
 - (b) ***ensure the technical quality of services;***
 - (c) ***ensure the efficient use of spectrum;***
 - (d) fulfil other objectives of general interest ***defined in national legislation in accordance with Community law; or***
 - (e) ***comply with a measure adopted pursuant to Article 6a.***
2. || Member States shall grant ***individual*** rights ***of use***, upon request, to any undertaking ||, subject to the provisions of Articles 6, 6a, 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, such rights of use 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). The procedures **may, exceptionally, not be** open in cases where the granting of individual rights of use for radio frequencies to the providers of radio or television broadcast content services can be shown to be essential to meet a particular obligation defined **and justified** in advance by the Member State which is necessary to achieve a general interest objective 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 provisions 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 amortisation of investment.**

Where individual rights to use radio frequencies **are** granted for ten years or more and **cannot** 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 license.** 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 of time**, or shall be made freely transferable or *capable of being leased* between undertakings.

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 for 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 radiofrequencies, 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 also ensure competition is not distorted as a result of any transfer or accumulation of *rights of usage of 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 Annex I. 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, "Articles 16, 17, 18 and 19 of Directive 2002/22/EC (Universal Service Directive)" *shall be* replaced by "Article 17 of Directive 2002/22/EC (Universal Service Directive)".

(c) In paragraph 3, the word "Annex" *shall be* replaced by "Annex I".

(5) The following Article 6a ■ *shall be* inserted:

"Article 6a

Harmonisation measures

1. **Without** prejudice to **Article 5(1) and (2)** of this Directive **and Articles 8b and 9 of Directive 2002/21/EC (Framework Directive)**, the Commission may adopt implementing measures:

- (a) to identify radio frequency bands, the use of which is to be made subject to general *authorisation*■ ;
- (b) to identify the numbering ranges to be harmonised at Community level;
- (c) to harmonise procedures for the granting ***to undertakings providing pan-European electronic communications networks or services*** of general authorisations or individual rights of use for radio frequencies or numbers;
- (d) to harmonise the conditions specified in Annex II relating to ***the granting to undertakings providing pan-European electronic communications networks or services of*** general authorisations or individual rights of use for radio frequencies or numbers.

■

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 14a(3) ■ .

2. The measures referred to in paragraph 1 may, where appropriate, *allow* the Member States to make a reasoned request for a partial exemption and/or a temporary derogation from those measures.

The Commission shall assess the justification for the request, taking into account the specific situation in the Member State, and may grant a partial exemption or temporary derogation or both provided this does not unduly defer the implementation of the implementing measures referred to in paragraph 1 or create undue differences in the competitive or regulatory situations between Member States.

■ "

- (6) 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:

- "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 therefore;"

- (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 "Article 9" *shall be* replaced by "Article 9b".

■

- (7) 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*
- (b) *orders to cease 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).*"

- (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 obligations imposed under Article 11(1)(a) or (b) of this Directive or 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. *Notwithstanding* the provisions of paragraphs 2, 3 and 5, where the relevant authority has evidence of a breach of the conditions of the general authorisation 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 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."

(e) the following paragraph shall be inserted:

"6a. In accordance with their national law, Member States shall ensure that measures taken by the national authorities pursuant to paragraphs 5 and 6 are subject to judicial review."

(8) *Article 11(1) shall be amended as follows:*

(a) In points (a) and (b) || the word "Annex" *shall be replaced by "Annex I":*

(b) In the first subparagraph, the following point shall be added:

"(g) encouraging the efficient use and ensuring the effective management of radio frequencies.";

(9) *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. 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 relevant national provisions regarding compensation for withdrawal of rights."

(10) *The following Article 14a shall be inserted:*

"Article 14a

Committee

1. The Commission shall be assisted by the Communications Committee.
2. ***By way of derogation from paragraph 1, for the adoption of measures***

pursuant to Article 6a (1), points (a), (c) and (d), the Commission shall be assisted by the Radio Spectrum Committee established under Article 3(1) of Decision No 676/2002/EC.

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

I "

(11) 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."

(12) 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 authorisations already in existence on 31 December 2009 into conformity with Articles 5, 6, 7, and Annex I of this Directive by [31 December 2010] at the latest.
2. Where application of paragraph 1 results in a reduction of the rights or an extension of the obligations under authorisations already in existence, Member States may extend the validity of those rights and obligations till [30 September 2011] 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 therefore."

(13) The Annex *shall be* amended as set out in *the Annex* to this Directive.

(14) A new Annex II, the text of which is set out in *the Annex* to this Directive, *shall be* added.

Article 4 **Review procedure**

1. *The Commission shall periodically review the functioning of this Directive and of Directives 2002/21/EC (Framework Directive), 2002/19/EC (Access Directive) and 2002/20/EC (Authorisation Directive) and report to the European Parliament and to the Council no later than three years after the date of application referred to in Article 6(1). In its report, the Commission shall assess whether, in the light of developments in the market and with regard to both competition and consumer protection there is 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 they should be amended or repealed. For this purpose, the Commission may request information from the national regulatory authorities and BERT,*

which shall be supplied without undue delay.

2. *If the Commission finds that the provisions referred to in paragraph 1 need to be amended or repealed it shall submit a proposal to the European Parliament and the Council without undue delay.*

Article 5

Repeal

Regulation (EC) No 2887/2000 is repealed.

Article 6

Transposition

1. Member States shall adopt and publish by [...] at the latest the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

They shall apply those provisions from [...].

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

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 7

Entry into force

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

Article 8

Addressees

This Directive is addressed to the Member States.

Done at ||,

For the European Parliament
The President

For the Council
The President

ANNEX

1. *Annex II to Directive 2002/21/EC 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 Article 14(2), second subparagraph

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. Without prejudice to the case law of the Court of Justice of the European Communities on joint dominance, this is likely to be the case where the market is concentrated and exhibits a number of appropriate characteristics of which the following may be the most relevant in the context of electronic communications:

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

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

2. *In Annex II to Directive 2002/19/EC, the title, definitions, part A and part B, point 1 shall be replaced by the following:*

"Annex II

Minimum list of items to be included in a reference offer for wholesale network infrastructure access, including shared or fully unbundled access at a fixed location, to be published by operators with significant market power (SMP)

For the purposes of this Annex the following definitions apply:

- (a) "local sub-loop" means a partial local loop connecting the network termination point to a concentration point or a specified intermediate access point in the fixed public electronic communications network;*
- (b) "unbundled access to the local loop" means full unbundled access to the local loop and shared access to the local loop; it does not entail a change in ownership of the local loop;*
- (c) "full unbundled access to the local loop" means the provision to a*

beneficiary of access to the local loop or local sub-loop of the SMP operator allowing the use of the full capacity of the network infrastructure;

- (d) *"shared access to the local loop" means the provision to a beneficiary of access to the local loop or local sub-loop of the SMP operator allowing the use of a specified part of the capacity of the network infrastructure such as part of the frequency or an equivalent;*

A. Conditions for unbundled access

- 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 and local sub-loops;**
 - (b) shared access at appropriate points in the network permitting equivalent functionality to unbundled access in circumstances where such access is not technically or economically feasible;**
 - (c) duct access enabling installation of access and backhaul networks.**
- 2. Information concerning the locations of physical access sites including street cabinets and distribution frames, availability of local loops and sub-loops, ducts and backhaul in specific parts of the access network and availability within ducts;**
- 3. Technical conditions related to access and use of local loops and sub-loops and ducts, including the technical characteristics of the twisted pair, optical fibre or an equivalent, and of the cable distributors, ducts and associated facilities;**
- 4. Ordering and provisioning procedures, usage restrictions.**

B. Co-location services

- 1. Information on the SMP operator's existing relevant sites or equipment locations and planned updates thereto."**

3. The Annex to Directive 2002/20/EC (Authorisation Directive) *shall be* amended as follows:

- (1) The heading "Annex" *shall be* replaced by the heading "Annex I".
- (2) The first paragraph *shall be* 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)."

- (3) Part A *shall be* amended as follows:

- (a) Point 4 *shall be* replaced by the following:

"4. Accessibility of numbers from the national numbering ***plans of Member States*** to end users, numbers from ETNS and UIFN, and conditions in conformity with Directive 2002/22/EC (Universal Service Directive)."

- (b) Point 7 *shall be* 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 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)*

* *OJ L 201, 31.7.2002, p. 37..*"

(c) Point 8 *shall be* 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 points 11 and 16, 'Directive 97/66/EC' *shall be* replaced by 'Directive 2002/58/EC'.

(e) The following point 11a *shall be 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) In point 12 the terms "and broadcasts to the general public" *shall be* deleted.

■

(g) *the following point shall be added*:

"19. Transparency obligations on public communications network providers to ensure end-to-end connectivity, including unrestricted access to content, services and applications, in conformity with the objectives and principles set out in Article 8 of Directive 2002/21/EC, disclosure regarding restrictions on access to services and applications and regarding traffic management policies and, where necessary and proportionate, access by national regulatory authorities to such information needed to verify the accuracy of such disclosure."

(4) Part B *shall be* amended as follows:

(a) Point 1 *shall be* 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 requirements."

(b) Point 2 *shall be* deleted.

■

(c) Point 7 *shall be* replaced by the following:

"7. Voluntary commitments which the undertaking obtaining the right of use has made in the course of a competitive or comparative selection procedure. **If**

such a commitment corresponds de facto to one or more of the obligations listed in Articles 9 to 13a of Directive 2002/19/EC (Access Directive), that commitment shall be considered as having expired by 1 January 2010 at the latest."

(d) The following point 9 is added:

"9. Obligations specific to an experimental use of radio frequencies."

(5) ***Part C shall be amended as follows:***

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

"1. Designations 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 to specific number ranges for the purposes of ensuring consumer protection in accordance with Article 8(4)(b) of Directive 2002/21/EC (Framework Directive)."

(b) point 8 shall be replaced by the following:

"8. Voluntary commitments which the undertaking obtaining the usage right has made in the course of a competitive or comparative selection procedure."

4. The following Annex II *shall be* added to Directive 2002/20/EC (Authorisation Directive):

"ANNEX II

Conditions which may be harmonised in accordance with point (d) of Article 6a, paragraph 1

(1) Conditions attached to rights of use for radio frequencies:

- (a) the duration of the rights of use of the radio frequencies;
- (b) the territorial scope of the rights;
- (c) the possibility to transfer the right to other radio frequencies users, as well as the conditions and procedures relating thereto;
- (d) the method of determining usage fees for the right, ***without prejudice to systems defined by Member States where the obligation to pay usage fees is replaced by an obligation to fulfil specific general interest objectives;***
- (e) the number of rights of use to be granted to each undertaking;
- (f) conditions listed in Part B of Annex I.

(2) Conditions attached to rights of use for numbers:

- (g) the duration of the rights of use of the number(s) concerned;
- (h) the territory within which they are valid;

- (i) any specific services or uses for which the numbers are to be reserved;
- (j) the transfer and portability of the rights of use;
- (k) the method of determining usage fees (if any) for the rights of use for the numbers;
- (l) conditions listed in Part C of Annex I."