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2007/0247 (COD)

Amended proposal for a

DIRECTIVE 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 services, and 2002/20/EC on the authorisation of electronic communications networks and services

(presented by the Commission)

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(Text with EEA relevance)

1. PROCEDURAL STAGES

The proposal — COM(2007) 697 – 2007/0247 (COD) — was adopted by the Commission on 13 November 2007 and was sent to the European Parliament and to the Council on 16 November 2007.

The European Economic and Social Committee adopted its opinion on the proposal from the Commission on 29 May 2008.

The Committee of the Regions adopted its opinion on the Commission's proposal on 18 June 2008.

The European Parliament adopted 126 amendments at first reading on 24 September 2008.

2. OBJECTIVE OF THE PROPOSAL

The objective is to adjust the regulatory framework for e-communications, notably the Framework¹, Authorisation² and Access Directives³, by improving its effectiveness, reducing the administrative resources needed for implementing economic regulation and making access to radio frequencies simpler and more efficient. It is in line with the Commission's Better Regulation Programme, which is designed to ensure that legislative intervention remains proportionate to the political objectives pursued, and forms part of the Commission's overall strategy to strengthen and complete the internal market.

More specifically, the proposal aims to:

¹ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (OJ L 108, 24.4.2002).

² Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (OJ L 108, 24.4.2002).

³ Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (OJ L 108, 24.4.2002).

1. Move towards a more efficient management of spectrum so as to facilitate access to spectrum for operators and to foster innovation.

2. Ensure that, where regulation remains necessary, this is more efficient and simpler both for operators and for national regulatory authorities (NRAs).

3. Make a decisive step towards more consistency in the application of EU rules in order to complete the internal market for electronic communications.

3. OBJECTIVE OF THE AMENDED PROPOSAL

The amended proposal adapts the original proposal on a number of points as suggested by the European Parliament.

4. OBSERVATIONS ON THE AMENDMENTS ADOPTED BY THE EUROPEAN PARLIAMENT

4.1. Amendments accepted by the Commission

The Commission can accept amendments 12, 16, 19, 24, 32, 38, 39, 40, 41, 42, 43, 45, 56, 58, 59, 60, 61, 79, 81, 89, 92, 96, 99, 111, 112, 113, 115, 116, 117, 123 and 124.

4.2. Amendments accepted by the Commission in part or subject to rewording

With regard to the Framework Directive:

Amendments 2, 5, 6, 7, 14/rev, 15, 17, 26, 27, 31, 35, 36, 37, 44, 46, 48, 52, 53/rev, 138 (plenary), 62, 63/rev, 64/rev, 65, 66, 67/rev, 68, 69, 70, 71, 72, 74, 75, 77, 80, 84, 85 and 86 .

- Amendment 2

The Commission can accept the insertion of the words ‘and coordinated’, but rejects deletion of the reference to the Regulation establishing the Authority. It does nevertheless recognise the possibility that the Authority will ultimately have a different name, and therefore has changed references to the Authority and to ‘the BERT’ (the term adopted by the European Parliament at its first reading) to references to ‘[the Body]’ throughout this modified proposal.

Recital 3 of the amending act:

"The EU regulatory framework for electronic communications networks and services should therefore be reformed in order to complete the internal market for electronic communications by strengthening the Community mechanism for regulating operators with significant market power in the key markets. **This is complemented through the establishment by Regulation [.../.../EC] of [date] of the European Parliament and of the Council* of a Body of European Telecoms Regulators (hereinafter referred to as “[the Body]”)**. 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."

* OJ L [...], [...], p. [...]

– Amendment 5

The wording of the amendment is adjusted to reflect the need for appropriate regulatory discretion in decision-making by NRAs, taking into account differences in the competitive conditions within a Member State.

Recital 3c (new) of the amending act:

"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 apply or to lift any regulatory obligations accordingly in markets or geographic areas where there is effective infrastructure competition. This should apply even where geographical areas are not defined as separate markets."

– Amendment 6

The wording of the amendment is slightly modified.

Recital 3d (new) of the amending act:

***"The provision of an appropriate framework for investment in new high-speed networks is a key issue for the coming years in** ~~In order to achieve the goals of the Lisbon Agenda, it is necessary to give appropriate incentives for investment in high-~~ **High-speed networks that will support innovation, the development of in content-rich internet services and strengthen the international competitiveness of the European Union. Such networks have enormous potential to deliver delivering benefits to European 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.**"*

- Amendment 7

Recital 3e must mention the fact that improved access to radio spectrum will allow for the development of wireless networks to help bridge the broadband gap.

Recital 3e (new) of the amending act:

*"In its Communication "Bridging the Broadband Gap" of 20 March 2006, the European Commission acknowledged that there is a territorial divide in the European Union regarding access to high-speed broadband services. **Easier access to radio spectrum will facilitate the development of high-speed broadband services in remote regions. Despite the general increase in broadband connectivity, access in various regions is limited on account of high costs resulting**"*

from low population densities and remoteness. 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~~ cohesion policy or the aims of wider industrial policy."

– Amendment 14/rev

The wording of the amendment is slightly modified in accordance with the policy objective for NRAs to contribute to the development of the internal market.

Recital 11a (new) of the amending act:

"~~National electronic communications markets will continue to differ within the European Union. It is therefore essential that national regulatory authorities and [the Body] the Body of European Regulators in Telecom ("BERT") possess the powers competences and knowledge necessary in order to build a competitive EU "ecosystem" internal market in electronic communications markets and services while at the same time understanding national and regional differences and complying with the principle of subsidiarity.~~"

- Amendment 15

Recital 16 must also mention the fact that electronic communications services serve additional important goals such as social and territorial cohesion.

Recital 16 of the amending act:

"Radio frequencies should be considered a scarce public resource that has an important public and market value. It is in the public interest that spectrum is managed as efficiently and effectively as possible from an economic, social and environmental perspective, taking account of the important role of radio spectrum for electronic communications, the objectives of cultural diversity and media pluralism, and social and territorial cohesion, ~~and that Obstacles obstacles to its efficient use are~~ should therefore be gradually withdrawn."

- Amendment 17

Recital 16b can be accepted to the extent that the Commission recognises the importance of international and regional agreements, in particular agreements negotiated within the International Telecommunications Union (ITU) framework. However, Member States always enter such international agreements subject to their compatibility with Community law. Secondly, the EU policy on spectrum should be developed to the full extent allowed by ITU rules, i.e. as long as no external interference is caused to neighbouring non-EU Member States. EU spectrum policy could be developed in such a way that EU and Member States keep a margin of discretion to organise the use of the spectrum and their spectrum policy. Moreover, the work of the CEPT is recognised as a basis for technical harmonisation under the Radio Spectrum Decision. Therefore, the wording used should reflect such margin of discretion.

Recital 16b (new) of the amending act:

*"The provisions of this Directive relating to spectrum management should ~~be consistent with~~ **take into account, to the extent compatible with Community law,** 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."*

– Amendment 26

The wording of the amendment is slightly modified in line with the proposal on the competences of [the Body].

Recital 29 of the amending act:

*"~~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,~~**In order** to allow citizens of the Member States, including travellers and disabled users, to be able 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.**"*

- Amendment 27

The wording of recital 31 has been modified in order to introduce a distinction between facility sharing in the context of symmetric regulation and in the context asymmetric (SMP) regulation.

The wording of this modification to recital 31, in as far as it refers to risk sharing, takes into account the content of amendment 102 and must be seen in conjunction with the modifications introduced in amendment 101.

Recital 31 of the amending act:

*"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 **infrastructure** 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, the entry into buildings and a 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 ~~of~~ for new fibre-optic access networks. National regulatory authorities should be able to impose on operators with significant market power obligations to provide** **These strengthened powers should not prejudice the wider powers of national regulatory authorities to***

impose additional requirements on operators with significant market power, which may extend to the sharing of dark fibre and the provision of a reference offer for granting fair and non-discriminatory access to facilities, including their ducts."

– Amendment 31

It is necessary to stress the exceptional nature of the remedy, the need to preserve incentives for investment and the overriding objective of preserving consumer welfare.

Recital 43 of the amending act:

"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 exceptional cases, it may be justified as a remedy where there has been persistent failure to achieve effective non-discrimination in several of the market or markets concerned, and where there is little or no prospect of infrastructure competition within a reasonable timeframe after recourse to one or more remedies previously considered to be appropriate. However, it is very important to ensure that its imposition preserves the incentives of the concerned undertaking to invest in its network and that it does not entail any potential negative effects on consumer welfare.** In order to avoid distortions of competition in the internal market, proposals for functional separation should be approved in advance by the Commission."

- Amendment 35

The deletion of the reference to the absence of the need to grant individual rights in certain cases should be rejected, given the priority accorded as a matter of principle to general authorisations compared to individual rights of use. In addition, a reference to spectrum assignment should be added, since assignment, which refers to the actual granting of rights, may be essential for the fulfilment of certain general interest objectives.

Recital 49 of the amending act:

"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 and assignment**, 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."

- Amendment 36

The principles of proportionality and non-discrimination should also be applied in the case of exemption from the obligation to pay fees or charges set for spectrum use.

Recital 50 of the amending act:

"*Any exemption, full or partial*, from the obligation to pay *the* fees or charges set for the use of the spectrum *should be* **proportionate, non-discriminatory, objective and transparent and based on other general interest obligations set out in national law.**"

- Amendment 37

The references to ITU and CEPT activities should be nuanced as these activities do not have the same legal value. On the one hand, the ITU indeed takes decisions that have a legal bearing under international law, while under Community law, the work of CEPT is used as a basis for technical harmonisation under the Radio Spectrum Decision. Moreover, CEPT is not directly involved in selection procedures.

Recital 53 of the amending act:

"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 Radio Spectrum Decision, 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 Community and third countries, taking into account ~~the decisions of the ITU and the CEPT~~ **international agreements adopted within the ITU framework.*** The Commission, assisted by the Communications Committee and taking the utmost account of the opinion of *~~BERT~~ **[the Body]***, 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 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."

– Amendment introduced by the Commission as a consequence of Amendment 47 to the Commission's proposal for a Directive of the European Parliament and of the Council amending Directive 2002/22/EC on universal service and users' rights

relating to electronic communications networks, Directive 2002/58/EC concerning processing of personal data and the protection of privacy in the electronic communications sectors and Regulation (EC) No 2006/2004 on consumer protection cooperation (COM(2007) 698 – 2007/0248 (COD)) ("Citizens' Rights Directive")

This amendment concerns the inclusion of the definition of 'network termination point' in the Framework Directive 2002/21/EC, in the light of its deletion from the Universal Service Directive 2002/22/EC by Amendment 47 to the Citizens' Rights Directive. It is appropriate to include the definition of 'network termination point' directly after the definition of 'public communications network' — where reference is made to it — in the Framework Directive.

Article 1, point 2(ba) (new), of the amending act; Article 2, point (da) (new), of Directive 2002/21/EC:

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

– Amendment 44

The second subparagraph concerns adequate financial and human resources which are required under the Commission's proposal, as are separate budgets, which should be made public. The requirement that resources should cover the ability to participate in [the Body] is acceptable, since regulators should clearly be cooperating with [the Body] in order to achieve the objectives of the regulatory framework.

Article 1, point 3a, of the amending act; Article 3, paragraph 3a (new), of Directive 2002/21/EC:

"(3a) In Article 3, the following paragraph shall be added:

"3a. Member States shall ensure that the goals of ~~BERT~~ [the Body] 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~~ [the Body]. National regulatory authorities shall have separate annual budgets and those budgets shall be made public."

– Amendment 46

The last sentence of the amendment is not acceptable, since the setting of time limits for consideration of national appeals would raise questions regarding Community competence in relation to national court procedures.

Article 1, point 4, sub-point a, of the amending act; Article 4, paragraph 1, first subparagraph, of Directive 2002/21:

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

– Amendment 48

Recourse to [the Body] for its opinion in relation to appeal proceedings would increase its authority and standing, and could contribute to more consistent judicial decisions in the single market. However, such opinions should relate to technical matters only, and not the interpretation of Community law, and this should be clarified in the text.

Article 1, point 4, point aa (new), of the amending act; Article 4, paragraph 2a (new), of Directive 2002/21/EC:

"(aa) the following paragraph shall be is added:

"2a. Appeal bodies shall be entitled to request the opinion of ~~BERT~~ [the Body] on matters related to the sector before reaching a decision in the course of an appeal proceeding."

- Amendment 52

The Commission can accept the Parliament's amendments to Article 7 which strengthen the requirements for transparency and co-operation between the Commission, [the Body] and the national regulatory authorities. It can also accept the amendments consequential upon the separate treatment, in a new Article -7a, of the procedures governing the notification of remedies, provided that the new Article -7a preserves the Commission's prerogatives as guardian of the Treaty and offers an effective mechanism to ensure the consistent application of remedies.

In the context of an overall compromise solution on Article 7 and -7a, guaranteeing effective cooperation between the Commission, [the Body] and national regulatory authorities and allowing the Commission to act where necessary to ensure the consistent application of remedies in the interests of the internal market, the Commission can also accept deletion of the power in paragraph 8 of its original proposal for it to require a national regulatory authority to impose a specific obligation.

Article 1, point 6, of the amending act; Article 7, paragraphs 2 to 10, of Directive 2002/21/EC:

"2. National regulatory authorities shall contribute to the development of the *internal market* by working with the Commission and [the Body] ~~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 ~~[the Body]-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 7a, upon completion of the consultation referred to in Article 6, where a national regulatory authority intends to take a measure which:

(a) falls within the scope of Articles 15 or 16 of this Directive; or Articles 5 or 8 of Directive 2002/19/EC (Access Directive), and

(b) would affect trade between Member States,

it shall make the draft measure accessible to the Commission, ~~[the Body]-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, the [Body]-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, then 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 the [Body] BERT submitted in accordance with Article 5 of Regulation [...../EC] 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~~ [the Body], and the Commission and may, save as otherwise provided ~~except in cases covered by paragraph 4~~ or Article -7a, 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.

10. 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 and Article -7a, 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 ~~[the Body]~~ 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 and/or Article -7a."

- Amendment 53

This amendment sets out an arbitration procedure under which the Commission, [the Body] and NRAs cooperate closely with a view to ensuring the consistent application of obligations imposed following the market analysis and notification procedures required by the regulatory framework. The Commission can support the underlying objective of the amendment, namely that this process of cooperation can help to identify the most appropriate and effective remedies which should be applied upon the finding of dominance in a relevant market, in light of the objectives of Article 8 of the Framework Directive.

The Commission considers that the integration of the collective expertise of the national regulators in the Article 7 procedure (given expression through the opinions on notified measures to be issued by [the Body]) is in line with the Commission's proposal. The Commission also welcomes the fact that the EP procedure would maintain, albeit in circumscribed form, the Commission's proposed power to order the withdrawal of a proposed remedy in the interests of the internal market.

However, the mechanism whereby [the Body] could confirm, in the face of the Commission's serious doubts, that the remedy is appropriate and effective, thereby enabling the NRA concerned to adopt the proposed remedy, requires revision. The Commission can accordingly not accept the wording of this element of the EP's proposed amendment, since it would allow [the Body] to usurp the Commission's role as guardian of the Treaty, in particular as laid down in Article 85 EC.

Likewise, the Commission cannot accept the proposed integration into the Article -7a procedure of draft measures proposing functional separation (under Article 13a of the Access Directive). Such measures, since they can extend beyond individually defined relevant markets and the obligations described in Articles 9 to 13 of the Access Directive, are inherently different from the remedies which are proposed under the latter Articles and which are subject to the Article 7 procedure. It is therefore appropriate that the separate procedure for the authorisation by the Commission of

proposals for functional separation in accordance with Article 8(3) and Article 13a of the Access Directive be maintained.

The Commission's modified text for Article -7a therefore maintains the role of [the Body], as proposed by the Parliament, in issuing opinions on proposed remedies on which the Commission has expressed serious doubts, and maintains the mechanism whereby the Commission can adopt a decision requiring the amendment of such a proposed measure where [the Body] shares its serious doubts. On the other hand, in the event that [the Body] does not share the Commission's serious doubts, it should still be open to the Commission, in order to preserve its prerogatives as guardian of the Treaty, to adopt a decision requiring the amendment or withdrawal of a notified measure imposing a remedy, albeit with the additional safeguards that the Commission's decision should take utmost account of [the Body's] opinion and be subject to prior consultation with the Member States in the Communications Committee.

In order to allow sufficient time for [the Body] to issue a reasoned opinion on a draft measure subject to the Article -7a procedure and for the Commission then to adopt any decision in the light of that opinion (including where appropriate consultation of the Communications Committee), the two month period allowed for these steps to be taken should be extended to three months.

The Commission also considers that it should have the power to require the withdrawal of a draft measure imposing remedies as well as its amendment.

Article 1, point 6 a (new), of the amending act; Article -7a (new) of Directive 2002/21/EC:

"(6a) the following Article ~~shall be~~ is inserted:

"Article -7a

Procedure for the consistent application of remedies

1. Where an intended measure covered by Article 7(3) aims at imposing, amending or withdrawing 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 of one month provided for by Article 7(3), notify the national regulatory authority concerned and [the Body] BERT of the reasons why that it considers that the draft measure would create a barrier to the single market or that why it has serious doubts as to its compatibility with Community law. In such a case, the draft

measure shall not be adopted for a further ~~three~~ 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, [the Body] or by any other national regulatory authority.

~~23.~~ *Within the three ~~two~~-month period referred to in paragraph 1–2, the Commission, [the Body] ~~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.*

3. *Within one month from the beginning of the same ~~three~~ two-month period referred to in paragraph 1, [the Body] ~~BERT~~ shall, ~~acting by an absolute majority,~~ issue in accordance with Article [X] of Regulation [...../EC] ~~adopt an opinion on the question whether confirming the appropriateness and effectiveness of the draft measure would create a barrier to the single market or be incompatible with Community law and in particular the objectives referred to in Article 8,~~ or indicating whether it considers that the draft measure should be amended or withdrawn and (where appropriate) 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.~~

4. *If [the Body] ~~BERT~~ has indicated in its opinion that the draft measure should be amended or withdrawn, the Commission may, taking utmost account of the opinion of [the Body] ~~BERT's~~, adopt a decision before the end of the three month period referred to in paragraph 1, requiring the national regulatory authority concerned to amend or withdraw 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.~~

5. In all other cases the Commission may, taking utmost account of any opinion of [the Body] and in accordance with the procedure referred to in Article 22(2) (advisory committee procedure), adopt a reasoned decision before the end of the three month period referred to in paragraph 1, requiring the national regulatory authority concerned to amend or withdraw the draft measure and providing specific proposals to that end.

6. Only if the Commission has not taken a decision pursuant to paragraphs 4 or 5 by the end of the three month period referred to in paragraph 1 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 [the Body] BERT. The national regulatory authority shall make public how it has taken these comments into account.

~~**75. Within three months of the adoption by the Commission in accordance with the fourth subparagraph of paragraph 3 of a reasoned decision, in accordance with paragraphs 4 or 5, paragraph 3, subparagraph 4 of this Article, requiring a national regulatory authority to amend or withdraw the draft measure, the national regulatory authority concerned shall amend or withdraw the draft measure in accordance with that decision. 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.**~~

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

- Amendment 138 (plenary)

The Commission can accept in principle Amendment 138 (plenary) which serves as a useful restatement of principles applying independently of this provision, and which leaves Member States to ensure that a fair balance is struck between the various fundamental rights protected by the Community legal order, in particular, the right to respect for private life, the right to protection of property, the right to an effective remedy and the right to freedom of expression and information.

- Amendment 62

The amendment provides further guidance for regulatory authorities when carrying out their task under the regulatory framework, including in relation to the development of next generation networks. The implication that regulatory predictability could be achieved through continuity of remedies where those remedies would not otherwise have been selected should, however, be avoided.

Article 1, point 8, sub-point eb (new), of the amending act; Article 8, paragraph 4a (new), of Directive 2002/21/EC:

"(eb) the following paragraph shall be is added:

"4a. 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,~~ by ensuring a consistent regulatory approach over successive review periods;

(b) ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks and services;

(c) safeguarding competition to the benefit of consumers and promoting 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 that the cost of access to facilities takes appropriate account of the risks incurred by ~~appropriate sharing of risk between~~ the 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."

- Amendment 63/rev.

The Commission understands the EP's desire to be more involved in policy decisions regarding the strategic approach to spectrum and is ready to examine the best institutional solution, while leaving the technical harmonisation of spectrum use under the Radio Spectrum Decision separate and untouched.

The creation of an RSPC in the EP's Article 8a cannot be accepted as it would create difficulties in that the RSPC's role would be limited in scope to electronic communications, it would overlap with existing structures carrying out the same tasks, and the creation of another committee is not essential to achieving the EP's main goal in proposing this new Article, as set out in Article 8b(4) — see below .

The proposed Article 8b needs to be reformulated to make the Community dimension clearer.

The text of the proposed Article 8b(2), which mentions Community law principles, should be moved into a recital.

Article 8b(3) needs reformulation to ensure that the Community dimension is maintained. The Parliament's text ignores the already established role of the Commission and shifts responsibilities from the Community to Member States. As the directive only applies to electronic communications, the reference to other policy areas such as transport or research and development should be deleted.

In Article 8b(5), the first part must be deleted as it is for the Commission rather than the Member States to ensure the coordination of EU interests.

As regards the EP's proposed Article 8b(4), the Commission welcomes the involvement of the EP and Council in policy strategy, on condition that it focuses on the strategic direction of EU spectrum policy, but the text of the paragraph has to be reformulated in order not to limit the Commission's right of initiative. Furthermore, the suggested use of codecision measures to set technical parameters (e.g. for the avoidance of harmful interference) risks preventing the Community from taking necessary and timely action, and risks creating confusion as to the ongoing role of the Radio Spectrum Decision.

Article 1, point 8a (new), of the amending act; Article 8 a (new) of Directive 2002/21/EC:

"The following Articles shall be is inserted:

"Article 8a

Radio Spectrum Policy Committee

~~1. A Radio Spectrum Policy Committee (the "RSPC") is hereby created 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 8ba

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

1. Member States shall contribute to the development of the internal market by cooperateing with each other and with the Commission in the strategic planning,

coordination and harmonisation of the use of radio spectrum in the European Union Community. To this end In so doing, they shall take into consideration, inter alia, economic, safety, health, public interest, freedom of expression, cultural, scientific, social and technical aspects of the EUC 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.~~

32. By cooperating with each other and with the Commission, Member States shall ensure contribute to the coordination of radio spectrum policy approaches in the European Union Community and, where appropriate, harmonised conditions with regard to the availability and efficient use of radio spectrum necessary for the establishment and functioning of the internal market in EU policy areas such as electronic communications, transport and research and development.

34 ~~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. The Commission may submit a legislative proposal for establishing a radio spectrum policy programme. The programme shall set out the policy orientations for the strategic planning and harmonisation of the use of radio spectrum in accordance with the provisions of this Directive and the Specific Directives.~~

45. ~~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 the effective coordination of the interests of the European Community in international organisations competent in radio spectrum matters, 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.~~"

**—— Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity (OJ L 91, 7.4.1999, p. 10)."*

Add new recital:

"Radio spectrum policy activities in the European Community should be without prejudice to 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, the provisions of Directive 1999/5/EC* and the right of Member States to organise and use their radio spectrum for the purposes of public order, public security and defence."

*** Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity (OJ L 91, 7.4.1999, p. 10)."**

- Amendment 64/rev

The second subparagraph of Article 9(1) needs reformulation to clarify that it refers to international agreements that are applicable, as action by Member States must be compliant with Community law.

In Article 9(3), the reference to radio network or wireless access is necessary to frame Member States' action and to prevent detailed constraints on network architecture being imposed and unduly limiting the principle of neutrality. The reference to international agreements is more appropriate in Article 9(1) and in the recitals.

Under Article 9(3), second subparagraph, point (a), the term 'the possibility of' should be avoided as there is always a possibility, even very slight, of harmful interference. The proportionality test applicable to national exceptions should allow determination of the intensity of the restriction necessary to avoid harmful interference.

The reference in the new paragraph (ba) to the need to ensure the technical quality of the service should be linked to the need to avoid harmful interference, and should not per se be used to justify an exception to technology neutrality. The same goes for safeguarding the efficient use of spectrum under the new (ca): this is an important aim of spectrum management, but is also linked to interference management parameters.

Under paragraph (c), the link should be made between the maximisation of radio frequency sharing and general authorisations to enable tighter technical conditions to be imposed in bands under general authorisations.

Under paragraph (d), a restriction on technology neutrality should only be allowed for the fulfilment of general interest objectives if such objectives cannot be achieved through restrictions on service neutrality only. This must be justified and proven by the Member State invoking the exception. This should be stated by adding to recital 21 the following words: 'in particular for a general interest objective, where such objective cannot be fulfilled through a restriction to service neutrality'.

In Article 9(4), the first part of the amendment creates legal uncertainty and is rejected. The reference to ITU radio regulations is rejected, as these do not specify

electronic communications services and such a reference would only create an unfounded expectation. The term 'in accordance with' must also be replaced by a reference simply to identification.

All other changes are accepted.

Article 1, point 9, of the amending act; Article 9 of Directive 2002/21/EC:

"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 their obligations under the Treaty and, where applicable, corresponding international agreements, and may take public policy considerations into account as set out below.

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 open to available for electronic communications services ~~in accordance with the ITU Radio Regulations~~.

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

(a) avoid ~~the possibility of~~ harmful interference, **notably to ensure technical quality of service and the efficient use of radio frequencies,**

(b) protect public health against electromagnetic fields,

~~(ba) ensure technical quality of service,~~

(c) ensure maximisation of radio frequency sharing **where the use of frequencies is subject to a general authorisation,**

~~(ca) safeguard the efficient use of radio frequencies,~~

(d) *fulfil a general interest objective* in accordance with paragraph 4.

4. Unless otherwise provided in the second subparagraph or in the measures adopted pursuant to Article 9c, 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~~ as identified in their national frequency allocation plans and with the ITU Radio Regulations. The Member States may, however, provide for proportionate and non-discriminatory restrictions to 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 [date of transposition of this Directive]."*

- Amendment 65

The term 'in line with' would be preferable to 'in accordance with' as Article 9(3) and (4) do not contain assignment procedures.

Article 1, point 10, of the amending act; Article 9a of Directive 2002/21/EC:

"Review of restrictions to existing rights

1. For a period of five years starting on *[date of transposition of this Directive]*, Member States ~~may ensure that~~ allow holders of rights to use radio frequencies which were granted before that date *and which will remain valid for a period of not less than five years after that date* ~~may~~ to 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 till 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 ~~line accordance~~ with **Article 9(3) and (4) of this Directive and in conformity with** 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."

- Amendment 66

The reference to national procedures can be accepted, but not the reference to national frequency allocation plans, in order to avoid undue lack of flexibility. Moreover, tradability in a band cannot be prevented if this has been agreed at EU level.

In Article 9b(2), a second notification can be avoided if the notification of the intent to trade contains the expected date of actual transfer.

Article 1, point 10, of the amending act; Article 9b of Directive 2002/21/EC:

"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 regulatory 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."

- Amendment 67/rev

Under paragraphs (b) and (c), the scope of action by the Commission must remain wide enough to cope with the details of the conditions attached to the procedures, limits and restrictions applicable to transfers or leases as well as to competition, to give the Commission sufficient tools to achieve the completion of the internal market.

Article 1, point 10, of the amending act; Article 9c of Directive 2002/21/EC:

"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~~ **policy programme established pursuant to Article 8b(4);**

(a) *identify* the bands for which usage rights may be transferred or leased between undertakings;

(b) harmonise the conditions attached to such rights;

(c) avoid the distortions of competition that may arise where individual rights are transferred;

~~(d) identify the bands for 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)."

- Amendment 68

The amendment makes clear that Member States are to remove restrictions in national numbering plans and associated rules which may harm citizen, consumer and business interests in the EU. However, 'publicly available electronic communications services' and 'electronic communications services' should be retained to assist comprehension.

Article 1, point 11, sub-point a, of the amending act; Article 10, paragraph 2, of Directive 2002/21/EC:

"2. National regulatory authorities shall ensure that numbering plans and procedures are applied in a manner that gives equal treatment to all providers **of publicly available electronic communications services and more generally to 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 **of electronic communications services and users** as regards the number sequences used to give access to their services."

- Amendment 69

This amendment is acceptable insofar as it clarifies that harmonisation is limited to specific numbers or numbering ranges. The deletion of the reference to the urgency procedure is also acceptable. However, cross-border access to national numbers is dealt with in the Universal Service Directive, and reference to it is therefore not appropriate in this context. Moreover, the reference to the possibility to establish tariff principles should be retained, since this is an important area where further harmonisation may be needed in the interests of the internal market.

Article 1, point 11, point b, of the amending act; Article 10, paragraph 4, of Directive 2002/21/EC:

"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 **establishing tariff principles for specific numbers or numbering ranges and ensuring appropriate cross-border access to national numbering-used for essential services such as directory enquiries**. The implementing measures may grant ~~BERT~~ **[the Body]** 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)."

- Amendment 70

The Commission generally welcomes the additional support given by this amendment to the objective of encouraging appropriate infrastructure competition through proportionate facility sharing. However, with regard to paragraph 1, it would not be proportionate to provide access to all passive network elements (such as dark fibre) unless the undertaking concerned has significant market power, in which case it could be subject to access measures pursuant to Article 12 of the Access Directive. The modifications made by the Commission to recital 27 (in the context of Amendment 27) aim to explain this approach by spelling out that facility sharing may respond to different objectives depending on whether it is applied under symmetric regulation or asymmetric (significant market power) regulation.

In paragraph 2a, while it is necessary to maintain appropriate incentives for the investing operator through appropriate risk sharing, the methodology for sharing the risks involved should be consistent with that already applied by national regulatory authorities under asymmetric regulation in accordance with Article 13 of the Access Directive, whereby the cost of capital employed is adjusted by means of an appropriate risk premium.

Article 1, point 13, of the amending act; Article 12 of Directive 2002/21/EC:

*"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 and cabinets ~~and all other network elements which are not active~~.

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

2a. 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, adjusted for risk where appropriate and shall ensure that there is an adequate sharing of risks between the undertakings concerned.

2b. 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.

2c. 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. These 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.

3. Measures taken by a national regulatory authority in accordance with *this Article* shall be objective, transparent, *non-discriminatory* and proportionate."

- Amendment 71

The amendment provides several useful clarifications. However, the change from 'NRA' to 'competent authority' is unnecessary (cf. Article 3 Framework Directive). It is also important to note that this provision concerns a different type of situation than the privacy breach notification requirements dealt with in Article 4(3) of the ePrivacy Directive 2002/58/EC and that therefore a different set of rules and procedures is needed for the cases handled under this Article. The possibility for additional national measures allows Member States to take account of specific national conditions.

Article 1, point 14, of the amending act; Article 13a of Directive 2002/21/EC:

"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 state of the art, these measures shall ensure a level of security appropriate to the risk presented. In particular, measures shall be taken to

prevent *and* minimise the impact of security incidents on users and on interconnected networks.

2. Member States shall ensure that undertakings providing public communications networks take *appropriate* steps to ensure the integrity of their networks so as to ensure the continuity of supply of services provided over those networks. ~~The competent~~ *National regulatory 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 regulatory 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 regulatory authority concerned shall inform the ~~competent~~ national regulatory authorities in other Member States *and ENISA*. Where disclosure of the breach is in the public interest, the ~~competent~~ national regulatory authority may inform the public.

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

4. The Commission, ~~taking the utmost account of the opinion of~~ *after consulting 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 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**~~

These implementing measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the procedure referred to in Article 22(3). On imperative grounds of urgency, the Commission may use the urgency procedure referred to in Article 22(4).

* — *OJ L 201, 31.7.2002, p. 37.* "

- Amendment 72

The amendment provides a clarification. However, the addition of sustainability criteria is not acceptable as it would weaken the Commission proposal.

Article 1, point 14, of the amending act; Article 13b, paragraph 1, of Directive 2002/21/EC:

"1. Member States shall ensure that ~~the competent~~ national regulatory 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.***".

Amendment 74

The amendment provides a clarification. However, it needs to take account of the fact that in the present provisions 'security' refers to both services and networks, but 'integrity' only concerns networks.

Article 1, point 14, of the amending act; Article 13b, paragraph 2, point a, of Directive 2002/21/EC:

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

- Amendment 75

The amendment reinforces the provision. However, the addition of 'competent' to 'NRA' is unnecessary.

Article 1, point 14, of the amending act; Article 13b, paragraph 3, of Directive 2002/21/EC:

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

- Amendment 77

The Commission can accept the retention of paragraph 3 of Article 14 of the Framework Directive, but does not agree with the changes made to it by this amendment. The modified proposal therefore drops the provision in the amending act deleting this paragraph from the Directive.

Article 1, point 15, sub-point b, of the amending act is deleted.

- Amendment 80

The Commission can accept in principle the modification to Article 16(1) of the Framework Directive in this amendment, but considers the reference to the Recommendation to be redundant, since the obligation for national regulatory authorities to take account of the Recommendation is already more appropriately dealt with in Article 15(3).

Article 1, point 17, sub-point a, of the amending act; Article 16, paragraph 1, of Directive 2002/21/EC:

"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."

- Amendment 84

The Commission can accept the deletion of the reference to the urgency procedure in this amendment, but does not agree that the regulatory procedure with scrutiny should be extended to cover implementing measures referred to in paragraph 1 of Article 17, since such measures are non-binding acts.

Article 1, point 18, sub-point c, of the amending act; Article 17, paragraph 6a, of Directive 2002/21/EC:

"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)."

– Amendment 85

The wording in paragraph 1 of this amendment would allow the Commission to take action only ex post — after a divergence in implementation of regulatory tasks has already created a barrier to the internal market. Furthermore, the Commission needs to be able to issue a recommendation pursuant to this Article, which provides it with a rapid and flexible soft law instrument. Paragraph 2 is therefore retained.

The Commission can accept the deletion of the reference to the urgency procedure in paragraph 3.

The amendment to paragraph 4(c) is rejected since it would give the Commission unduly wide comitology powers, going beyond the consumer issues included in the Universal Service Directive, and thus beyond the scope of the Regulatory Framework, whereas implementation measures to be taken pursuant to Article 19 are restricted to issues covered by the regulatory framework.

The additional wording in paragraph 4(d) is needed for consistency in the terminology used to address this issue.

The deletion of paragraph 5 cannot be accepted: it represents an unnecessary restriction on the tasks of [the Body], the experience of which may be useful in advising the Commission on this issue.

Article 1, point 20, of the amending act; Article 19 of Directive 2002/21/EC:

"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 may create ~~creates~~ a barrier to the internal market, *it* may, taking the utmost account of the opinion of ~~BERT~~ **[the Body]**, if any, issue a recommendation or a decision on the harmonised application of the provisions in this Directive and the Specific Directives in order to further the achievement of the objectives set out in Article 8.

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

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

3. 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).

4. 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 provided to businesses;**

(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*.

5. [The Body] may on its own initiative advise the Commission on whether a measure should be adopted pursuant to paragraph 1."

– Amendment 86

The reference to a 'joint decision' in this amendment must be rejected. NRAs can only adopt binding decisions which apply to their territory. The possibility to adopt common decisions would impinge on the Member States' rights; there would also be concerns as to the competent court for challenging such decisions. However, the NRAs could coordinate and agree on the decisions applying to the undertakings concerned operating in their respective national territory and under their jurisdiction.

Article 1, point 22, of the amending act; Article 21, paragraph 2, first subparagraph, of Directive 2002/21/EC:

"2. Any party may refer the dispute to the national regulatory authorities concerned. The competent national regulatory authorities shall coordinate their efforts, **and**

where appropriate consult ~~within BERT~~ [the Body], in order to bring about a **consistent** resolution of the dispute, ~~as far as possible through the adoption of a joint decision~~, in accordance with **their respective competences under national law and** 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."*

With regard to the Access Directive:

Amendments 91, 95, 98, 100, 101, 103 and 105.

- Amendment 91

The addition of a service-specific reference such as the one suggested in the area of directory services is not appropriate within the EU regulatory framework. The regulatory framework must not make any distinction between services belonging to the same category, in this particular case by singling out directory services provision from the more general category of information society services to which it belongs. Access to subscriber information would potentially raise personal data protection issues; moreover, it is not clear that the repayment of sums between access providers and directory services providers is an access issue.

Article 2, point 1, of the amending act; Article 2, point a, of Directive 2002/19/EC:

"(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."

- Amendment 95

The addition of a service-specific reference such as that suggested in Article 5, paragraph 1, point a, with regard to directory services is not appropriate within the EU regulatory framework. The regulatory framework must not make any distinction between services belonging to the same category, in this particular case by singling out directory services provision from the more general category of information society services to which it belongs.

With respect to the proposed analysis of the different competitive conditions in the Member States when assessing the proportionality of the obligations, the

Commission has doubts about its feasibility, as this task would require a geographic analysis of markets which can be performed only as part of the market definition, a step that is not mandatory under paragraph 1 of Article 5, as the related obligations and conditions are without prejudice to the existence of significant market power. There is thus a significant risk that this proposed provision would create some confusion and legal uncertainty.

Article 2, point 2, of the amending act; Article 5 of Directive 2002/19/EC:

"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."*~~

- Amendment 98

While the addition of the wording ‘including any restrictions on access to services and applications’ brings useful clarification in the context of next generation services, the specific reference to traffic management would be disproportionate.

Article 2, point 6a (new), of the amending act; Article 9, paragraph 1, of Directive 2002/19/EC:

"(6a) Article 9(1) shall be is 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, including any restrictions on access to services and applications, traffic management policies, terms and conditions for supply and use, and prices."

- Amendment 100

In paragraph 1, second sub-paragraph, the wording must remain 'may' as the obligations listed in points (a) to (j) are not all applied in a systematic way but rather selected, all or part of them only, further to the NRA's analysis.

The Commission has a positive view on the provision proposed in paragraph 1, point (fa), as it would encourage investment in infrastructure in a next generation access network environment; however, this obligation duplicates amendment 99 (accepted by the Commission), which modifies Article 9, paragraph 4 of Directive 2002/19/EC as follows: *"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"*.

In paragraph 2, point (c), the Commission's modifications to Amendment 100 reflect the need to ensure, in order to avoid unnecessary fragmentation of the regulatory framework within a Member State and across the EU, that the methodology for sharing the risks involved should be consistent with that already applied by national regulatory authorities under asymmetric (i.e. SMP) regulation on the basis of Article 13 of the Access Directive, under which the cost of capital employed is adjusted by a risk premium.

Article 2, point 8, of the amending act; Article 12 of Directive 2002/19/EC:

"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~~ may 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~~ when imposing pricing obligations pursuant to Article 13*;
- (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)."

- Amendment 101

It is useful to clarify that the costing methodology for regulated access prices should factor in the risks involved in infrastructure investment by means of adjustments (through a risk premium) to the minimum return on capital employed. This effectively implies that a financial contribution is made by access seekers to the risks borne by the investing operator.

The section of text on Article 19 of the Framework Directive is unnecessary as Article 19 would apply in its own terms.

The last section of the amendment, introducing a differentiated regulatory treatment of short term and long term contracts, lacks proportionality and could result in the creation of regulatory barriers to entry with the effect of impeding competition and investment in infrastructure.

Article 2, point 8a (new), of the amending act; Article 13, paragraph 1, of Directive 2002/19/EC:

"(8a) *Article 13(1) shall be replaced by the following:*

"1. A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of interconnection and/or access, in situations where a market analysis indicates that a lack of effective competition means that the operator concerned might sustain prices at an excessively high level, or apply a price squeeze, to the detriment of end-users. When setting an access price, 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, including where relevant a premium to reflect the risks involved, and, without prejudice to Article 19(d) of Directive 2002/21/EC (Framework Directive), 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."

- Amendment 103

In paragraph 1, first sub-paragraph, the word ‘fixed’ must be rejected because it is not technologically neutral.

In paragraph 2, the word ‘request’ must be used instead of ‘proposal’ because it has to be consistent with the wording used in Article 8, paragraph 3, of Directive 2002/19/EC.

In paragraph 2, point (a), the word ‘wholesale’ is rejected because the competition problem could be identified at retail level, even if the regulatory intervention is at wholesale level.

In paragraph 2, point (c) has been included, and paragraph 3 is modified accordingly for clarification purposes.

In paragraph 2, point (ba), the wording has been adjusted in the light of Article 8, paragraph 4, of Directive 2002/19/EC.

Article 2, point 9, of the amending act; Article 13a, paragraphs 1 to 3, of Directive 2002/19/EC:

"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~~ request 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*;

(ab) evidence that there is little or no prospect of infrastructure-based competition within a reasonable timeframe;

(b) 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;

~~(ba) 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 demonstrating that this obligation would satisfy the requirements of Article 8(4) of Directive 2002/19/EC;~~

(c) a draft of the measure being proposed.

3. The ~~national regulatory authority~~ **draft measure** ~~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."

- Amendment 105

The Commission can accept all the changes to Annex II of the Access Directive made by this amendment, as they improve the technological neutrality of the provisions within it, except for the Parliament's deletion of the footnote in part A, paragraph 2 and part B, paragraph 1. This footnote contains an important qualification relating to public security concerns.

Article 2 – point 10 a (new) of the amending act; Annex II of Directive 2002/19/EC:

"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*;

(ba) *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* *."

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

(Remainder of the Annex unchanged)

With regard to the Authorisation Directive:

Amendments 106, 107, 108/rev, 121 and 125.

- Amendment proposed by the Commission as a consequence of Amendment 108/rev

The Commission considers it appropriate to include a definition of 'pan-European wireless electronic communications networks or services' in Article 2 of the

Authorisation Directive as a consequence of the modifications to its proposal resulting from Parliament's Amendment 108/rev.

Article 3, point 1, of the amending act; Article 2, point 2, of Directive 2002/20/EC:

"Article 2(2) is replaced by the following:

"2. The following ~~definition~~ **definitions** shall also apply:

(a) "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;

(aa) "pan-European wireless electronic communications network or service" means a wireless electronic communications network or service with an internal market dimension involving at least three Member States."

- Amendment 106

The amendment aims to facilitate the provision and deployment of services that are delivered without needing any specific infrastructure (e.g. VoIP) on a cross-border basis. However, the requirement to treat all undertakings providing cross-border services to undertakings located in several Member States 'in the same way in all Member States' is too imprecise and too general to be implemented in practice. It is rather an aspiration than a substantive obligation. Furthermore, the reference to 'one simplified' notification is unclear, nor is it clear how this 'simplified' notification would differ from the notification that may be required by the national regulatory authority for the provision of electronic communications networks and services.

Article 3, point 2a (new), of the amending act; Article 3, paragraph 2, subparagraph 1a (new), of Directive 2002/20/EC:

"(2a) In Article 3(2), the following subparagraph shall be is 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.~~"

- Amendment 107

The changes made to Article 5 (2), (3) and (4) generally make the text clearer.

In the fifth amended subparagraph of Article 5(2) starting with 'Where an individual right...', the obligation to review every five years should stand since giving the means to verify does not amount to guaranteeing that it will be done.

The amendments to Article 5(1) are not acceptable as they would weaken or even backtrack compared to the existing legislation, which sets more stringent conditions for the requirement of individual rights to use spectrum. In Article 5(6), the list of

competition measures that Member States may take must remain to confirm the Member States' power of action in these matters.

Article 3, point 3, of the amending act; Article 5 of Directive 2002/20/EC:

"1. Member States shall, **where possible, in particular where the risk of harmful interference is negligible, not make facilitate the usage of radio frequencies subject to the granting of individual rights of use by means of general authorisations. Member States may grant individual rights of use in order to: but shall include the conditions for usage of such radio frequencies in the general authorisation**

~~(a) avoid the possibility of harmful interference;~~

~~(aa) ensure the technical quality of services;~~

~~(ab) ensure the efficient use of spectrum;~~

~~(b) fulfil other objectives of general interest defined in national legislation in accordance with Community law; or~~

~~(ba) 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 an individual rights to use radio frequencies is ~~are~~ granted for ten years or more and may not ~~cannot~~ be transferred or leased between undertakings pursuant to as allowed by Article 9b of *Directive 2002/21/EC* (Framework Directive), every five years and for the first time five years after its issuance, the competent national authority shall ensure that the criteria to grant such ~~individual rights of use apply and are complied with for the duration of the license~~-licence. 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 leaseable 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 radio frequencies, Article 7 shall apply.

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

6. Competent-National regulatory 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 use of radio frequencies. For such purposes, Member States may take appropriate measures such as reducing, withdrawing or forcing the sale of a right to use radio frequencies."

- Amendment 108/rev

The reference in Article 6a(1)(c) and (d) to 'pan-European electronic communications networks or services' in the context of spectrum rights may be acceptable as long as the notion covers any network or service that has an internal market or a significant cross-border dimension, so as to reduce the fragmentation of assignment procedures. It is therefore appropriate to define the term 'pan-European wireless electronic communications networks or services' in Article 2 of the Authorisation Directive, and such a definition is therefore included in this modified proposal.

The deletion of the reference to the urgency comitology procedure can be accepted.

Article 3, point 5, of the amending act; Article 6a of Directive 2002/20/EC:

"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* **on a harmonised basis**;

(b) to identify the numbering ranges to be harmonised at Community level **and/or to harmonise the procedures for the granting of rights of use for numbers within such ranges, the procedures for the selection of undertakings to which such rights are to be granted and/or the conditions specified in Annex II which may be attached to such rights**;

(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~~ **for the provision of pan-European wireless electronic communications networks or services and to lay down, where applicable, procedures for the selection of undertakings to which national individual rights of use for radio frequencies are to be granted for the provision of such networks or services**;

(d) to harmonise the conditions specified in Annex II relating to *the granting to undertakings providing pan-European wireless 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, provide for the possibility for 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."

- Amendment 121

The amendment seeks to strike a balance between transparency on access conditions and disclosure of possible restrictions.

Annex I, point 3, sub-point ga (new), of the amending act; Annex I, part A, point 19a (new), of Directive 2002/20/EC:

"(ga) the following point ~~shall be~~ is added:

"19a Transparency obligations on public communications network providers which may be imposed so as to ensure foster 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, as well as disclosure obligations 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.~~"

- Amendment 125

In order to avoid discriminatory treatment among spectrum users, the obligation to fulfil specific general interest objectives imposed on providers of services should be quantified and subject to non-discrimination.

Annex II of the amending act; Annex II, point 1, sub-point d, of Directive 2002/20/EC:

"(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 the imposition on a non-discriminatory basis of an obligation to fulfil specific general interest objectives;"

4.3. Amendments not accepted by the Commission

Amendments 1, 3, 4, 8, 9, 10, 11, 13, 18, 20, 21, 22, 23, 25, 28, 29, 30, 33, 34, 47, 49, 50, 51, 54, 55, 57, 73/rev, 76, 78, 82, 83, 87, 88, 90, 93, 94, 97, 102, 104, 109, 110, 114, 118, 119, 120 and 122 cannot be accepted by the Commission.

5. AMENDED PROPOSAL

Having regard to Article 250(2) of the EC Treaty, the Commission amends its proposal as indicated above.