



**COUNCIL OF  
THE EUROPEAN UNION**

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from : COREPER

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Nos. Cion prop. : 15379/07 TELECOM 150 MI 297 COMPET 391 CONSOM 132 CODEC 1294  
15424/08 TELECOM 187 MI 429 COMPET 458 CONSOM 171 CODEC 1510

No prev. doc. 14827/08 TELECOM 168 MI 405 COMPET 423 CONSOM 161 CODEC 1451

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Subject : Review of the EU regulatory framework for electronic communications networks and services:  
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  
- Political agreement

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**I. INTRODUCTION**

1. The European Commission adopted a proposal for a Better Regulation Directive on 13 November 2007. This proposal forms part of the so-called *review package* of the EU regulatory framework for electronic communications, comprising two proposals for amending Directives (the so-called Better Regulation Directive amending the current Framework, Authorisation and Access Directives and the so-called Citizen's Rights Directive amending the Universal Service and Privacy Directives) and a proposal for a Regulation (establishing a European Electronic Communications Market Authority).

2. With its proposal for a Better Regulation Directive, the Commission aims to adjust the regulatory framework for electronic communications by improving its effectiveness, reducing the administrative resources needed for implementing economic regulation (the market analysis procedure) and making access to radio frequencies simpler and more efficient.
3. A first examination of the proposal by the Working Party on Telecommunications and the Information Society took place under the Slovenian Presidency. On 12 June 2008, the Council held a public exchange of views on the review of the EU regulatory framework for electronic communications networks and services and took note of the presidency's progress reports on the work carried out so far in its preparatory bodies.
4. During the current French Presidency, the proposal was examined in further detail, both on the basis of a Presidency compromise text put together under the Slovenian Presidency and in relation to the European Parliament amendments adopted in its First Reading opinion on 24 September 2008.
5. The Commission adopted its amended proposal, following the first reading of the European Parliament, on 6 November 2008 (doc. 15424/08).
6. The European Economic and Social Committee (EESC) adopted its Opinion on 29 May 2008 and the Committee of the Regions (CoR) on 19 June 2008.

## **II. OUTCOME OF THE COREPER PROCEEDINGS**

1. The text of the Presidency compromise proposal concerning the Access Directive is annexed. This text, which reflects the results from the last WP and Coreper discussions, provides a consolidated version of the proposal for an amending Directive on the basis of the current Directive 2002/19/EC and includes all its provisions (from Article I to Annex II), even those for which no modifications were suggested.

2. The Coreper has reached a broad consensus on the essential features of the Commission proposal and has taken due account of the European Parliament's First Reading Opinion.

**a. Specific issues for further consideration**

**References to investments in next generation networks:**

Article 13 of the Access Directive already stipulates that " national regulatory authorities shall take into account the investment made by the operator, and allow him a reasonable rate of return on adequate capital employed, taking into account the risks involved." Following discussions in the WP and COREPER this wording was refined to include a reference to next generation networks. However, some delegations are of the view that this reference should be strengthened to provide a clearer political signal to foster the deployment of next generation networks.

**Functional separation:**

Article 13a of the Presidency text was discussed at length, in particular regarding whether or not functional separation should be added as a remedy, whether or not functional separation could only be imposed "as an exceptional measure" and whether functional separation should be imposed where infrastructure-based competition is lacking. A further issue concerns the procedure for imposing functional separation, including the respective roles and responsibilities of the Commission and the NRAs.

**b. Remaining reservations**

Linguistic reservations on the text are maintained by all delegations and the Commission has reserved its overall position on the Presidency compromise proposal.

Individual reservations have been made on the following specific provisions:

- Rights and obligations for undertakings (Article 4(1)) (footnote 1)
- Obligations of access to, and use of, specific network facilities (Article 12(2c)) (footnote 3)
- the reference to investment in next generation networks (Article 13(1)) (footnote 4)
- functional separation (Article 13a) (footnotes 2, 5, 6, 7, 8, 9 and 10)

### **III. THE TASK FOR COUNCIL**

The Council is therefore invited to examine the questions still under discussion in order to adopt a political agreement. The text should be sent to legal-linguists for finalisation in view of the adoption of Council's common position.

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## **PRESIDENCY COMPROMISE PROPOSAL FOR THE**

**CONSOLIDATED VERSION OF THE PROPOSAL AMENDING DIRECTIVE 2002/19/EC**

**(Access Directive)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission,

Having regard to the opinion of the Economic and Social Committee,

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

[Whereas:]

HAVE ADOPTED THIS DIRECTIVE:

## **CHAPTER I**

### **SCOPE, AIM AND DEFINITIONS**

#### *Article 1*

#### **Scope and aim**

1. Within the framework set out in Directive 2002/21/EC (Framework Directive), this Directive harmonises the way in which Member States regulate access to, and interconnection of, electronic communications networks and associated facilities. The aim is to establish a regulatory framework, in accordance with internal market principles, for the relationships between suppliers of networks and services that will result in sustainable competition, interoperability of electronic communications services and consumer benefits.
  
2. This Directive establishes rights and obligations for operators and for undertakings seeking interconnection and/or access to their networks or associated facilities. It sets out objectives for national regulatory authorities with regard to access and interconnection, and lays down procedures to ensure that obligations imposed by national regulatory authorities are reviewed and, where appropriate, withdrawn once the desired objectives have been achieved. Access in this Directive does not refer to access by end-users.

#### *Article 2*

#### **Definitions**

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

The following definitions shall also apply:

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

(b) "interconnection" means the physical and logical linking of public communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking, or to access services provided by another undertaking. Services may be provided by the parties involved or other parties who have access to the network. Interconnection is a specific type of access implemented between public network operators;

(c) "operator" means an undertaking providing or authorised to provide a public communications network or an associated facility;

(d) "wide-screen television service" means a television service that consists wholly or partially of programmes produced and edited to be displayed in a full height wide-screen format. The 16:9 format is the reference format for wide-screen television services;

(e) "local loop" means the physical circuit connecting the network termination point at the subscriber's premises to the main distribution frame or equivalent facility in the fixed public [...] **electronic communications** network.

## **CHAPTER II**

### **GENERAL PROVISIONS**

#### *Article 3*

#### **General framework for access and interconnection**

1. Member States shall ensure that there are no restrictions which prevent undertakings in the same Member State or in different Member States from negotiating between themselves agreements on technical and commercial arrangements for access and/or interconnection, in accordance with Community law. The undertaking requesting access or interconnection does not need to be authorised to operate in the Member State where access or interconnection is requested, if it is not providing services and does not operate a network in that Member State.
  
2. Without prejudice to Article 31 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), Member States shall not maintain legal or administrative measures which oblige operators, when granting access or interconnection, to offer different terms and conditions to different undertakings for equivalent services and/or imposing obligations that are not related to the actual access and interconnection services provided without prejudice to the conditions fixed in the Annex of Directive 2002/20/EC (Authorisation Directive).



#### *Article 4*

### **Rights and obligations for undertakings**

1. Operators of public communications networks shall have a right and, when requested by other undertakings so authorised **in accordance with Article 4 of Directive 2002/20/EC (Authorisation Directive)**, an obligation to negotiate interconnection with each other for the purpose of providing publicly available electronic communications services, in order to ensure provision and interoperability of services throughout the Community. Operators shall offer access and interconnection to other undertakings on terms and conditions consistent with obligations imposed by the national regulatory authority pursuant to Articles 5, 6, 7 and 8.<sup>1</sup>

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

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

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<sup>1</sup> ES has a reservation on this paragraph.

## *Article 5*

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

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

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

- (a) to the extent that is necessary to ensure end-to-end connectivity, obligations on undertakings that control access to end-users, including in justified cases the obligation to interconnect their networks where this is not already the case;
- (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. Deleted.**

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 and 7 of Directive 2002/21/EC (Framework Directive).

(46) *While it is appropriate in some circumstances for a national regulatory authority to impose obligations on operators that do not have significant market power in order to achieve goals such as end-to-end connectivity or interoperability of services, **or in order to promote efficiency and sustainable competition and to ensure the maximum benefit for end-users**, it is however necessary to ensure that such obligations are imposed in conformity with the regulatory framework and in particular its notification procedures.*

**3. Deleted.**

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

### CHAPTER III

## OBLIGATIONS ON OPERATORS AND MARKET REVIEW PROCEDURES

### *Article 6*

#### **Conditional access systems and other facilities**

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

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

(47) *The Commission has the power to adopt implementing measures with a view to adapting the conditions for access to digital television and radio services set out in Annex I to market and technological developments. This is also the case for the minimum list of items in Annex II that must be made public to meet the obligation of transparency.*

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

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

(a) accessibility for end-users to radio and television broadcasts and broadcasting channels and services specified in accordance with Article 31 of Directive 2002/22/EC (Universal Service Directive) would not be adversely affected by such amendment or withdrawal, and

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

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

(ii) conditional access systems and other associated facilities, would not be adversely affected by such amendment or withdrawal.

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

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

*Article 7*

**Review of former obligations for access and interconnection**

**Deleted.**

*Article 8*

**Imposition, amendment or withdrawal of obligations**

1. Member States shall ensure that national regulatory authorities are empowered to impose the obligations identified in Articles 9 to 13a.<sup>2</sup>
  
2. Where an operator is designated as having significant market power on a specific market as a result of a market analysis carried out in accordance with Article 16 of Directive 2002/21/EC (Framework Directive), national regulatory authorities shall impose the obligations set out in Articles 9 to 13 of this Directive as appropriate.
  
3. Without prejudice to:
  - the provisions of Articles 5(1) [...] and 6,
  
  - the provisions of Articles 12 and 13 of Directive 2002/21/EC (Framework Directive), Condition 7 in Part B of the Annex to Directive 2002/20/EC (Authorisation Directive) as applied by virtue of Article 6(1) of that Directive, Articles 27, 28 and 30 of Directive 2002/22/EC (Universal Service Directive) and the relevant provisions of Directive [...] **2002/58/EC of the European Parliament and of the Council of 12 July 2002** concerning the processing of personal data and the protection of privacy in the [...] **electronic communications** sector (**Directive on privacy and electronic communications**) containing obligations on undertakings other than those designated as having significant market power; or

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<sup>2</sup> Reservations according to footnotes on functional separation (Art. 13a).

- the need to comply with international commitments,

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

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

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

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

## Article 9

### Obligation of transparency

1. National regulatory authorities may, in accordance with the provisions of Article 8, impose obligations for transparency in relation to interconnection and/or access, requiring operators to make public specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, **including traffic management policies**, and prices.
  2. In particular where an operator has obligations of non-discrimination, national regulatory authorities may require that operator to publish a reference offer, which shall be sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested, giving a description of the relevant offerings broken down into components according to market needs, and the associated terms and conditions including prices. The national regulatory authority shall, inter alia, be able to impose changes to reference offers to give effect to obligations imposed under this Directive.
  3. National regulatory authorities may specify the precise information to be made available, the level of detail required and the manner of publication.
  4. Notwithstanding paragraph 3, where an operator has obligations under Article 12 concerning **wholesale network infrastructure access, including unbundled access to the [...] local loop 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.
- (42a) It may not be economically viable for new entrants to duplicate the incumbent's local access network in part or in its entirety within a reasonable period of time. In this context, mandating unbundled access to the local loop or sub-loop of operators enjoying significant market power may facilitate market entry and increase competition in retail broadband access markets. In circumstances where unbundled access to local loop or sub-loop is not technically or economically feasible, relevant obligations for the provision of non-physical or virtual network access offering equivalent functionality may apply.*

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

#### *Article 10*

#### **Obligation of non-discrimination**

1. A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations of non-discrimination, in relation to interconnection and/or access.
2. Obligations of non-discrimination shall ensure, in particular, that the operator applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners.

#### *Article 11*

#### **Obligation of accounting separation**

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

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



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

### *Article 12*

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

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

Operators may be required inter alia:

(a) to give third parties access to specified network elements and/or facilities, including **access to network elements which are not active and/or unbundled access to the local loop, to inter alia allow carrier selection and/or pre-selection and/or subscriber line resale offer;**

(b) to negotiate in good faith with undertakings requesting access;

(c) not to withdraw access to facilities already granted;

(d) to provide specified services on a wholesale basis for resale by third parties;

(e) to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services;

(f) to provide co-location or other forms of **associated** facility sharing, including the sharing of ducts, buildings **or entry to buildings, antennae, towers and other supporting constructions, conduits, masts, manholes, and** cabinets;

(g) to provide specified services needed to ensure interoperability of end-to-end services to users, including facilities for intelligent network services or roaming on mobile networks;

(h) to provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services;

(i) to interconnect networks or network facilities;

**(j) to provide access to associated services such as identity, location and presence service.**

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

2. When national regulatory authorities are considering 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/or access involved, **including the viability of other upstream access products such as access to ducts;**

(b) the feasibility of providing the access proposed, in relation to the capacity available;

(c) the initial investment by the facility owner, bearing in mind the risks involved in making the investment;<sup>3</sup>

(d) the need to safeguard competition in the long term, **including through economically efficient infrastructure-based competition**;

(e) where appropriate, any relevant intellectual property rights;

(f) the provision of pan-European services.

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

### *Article 13*

#### **Price control and cost accounting obligations**

1. A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of interconnection and/or access, in situations where a market analysis indicates that a lack of effective competition means that the operator concerned might sustain prices at an excessively high level, or apply a price squeeze, to the detriment of end-users. **To encourage investments by the operator including in next generation networks<sup>4</sup>**, national regulatory authorities shall take into account the investment made by the operator, and allow him a reasonable rate of return on adequate capital employed, taking into account the risks involved.

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<sup>3</sup> UK has a reservation on (c).

<sup>4</sup> DE, ES and CZ have a reservation on this wording.

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

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

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

**5a. Instead of imposing obligations on cost accounting systems, national regulatory authorities may accept the use of an alternative interconnection pricing method, such as the *bill and keep*, provided that such method shall not hinder or distort competition.**

## *Article 13a*

### **Functional separation**<sup>5</sup>

**1. Where the national regulatory authority concludes that the appropriate obligations imposed under Articles 9 to 13 have failed<sup>6</sup> to achieve effective competition and that there are important and persisting competition problems/market failures identified in relation to the wholesale provision of certain access products, it may, as an exceptional measure<sup>7</sup>, in accordance with the provisions of the second subparagraph of Article 8(3), impose an obligation on vertically integrated undertakings to place activities related to the wholesale provision of these access products in an independently operating business entity.**

**That business entity shall supply access products and services to all undertakings, including to other business entities within the parent company, on the same timescales, terms and conditions, including 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, submit a proposal to the Commission that includes:**

**(a) evidence justifying the conclusions of the national regulatory authority as referred to in paragraph 1;**

**(ab) evidence that there is no or little prospect of infrastructure-based competition within a reasonable timeframe;<sup>8</sup>**

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<sup>5</sup> EL, RO, ES, DE and CZ are against the possibility to add functional separation as a remedy and therefore have a reservation on this article.

<sup>6</sup> BE, IT and UK are in favour of changing the wording to “will fail” or “is likely to fail”.

<sup>7</sup> UK, IE, PT and SE suggest the deletion of “as an exceptional measure”, while PL, BG, RO, BE and CZ support this wording.

<sup>8</sup> UK, IE, SE and IT have a reservation on (ab).

**(b) an analysis of the expected impact on the regulatory authority, on the undertaking, and on incentives to investment in a sector as a whole, particularly with regard to the need to ensure social and territorial cohesion and on other stakeholders including in particular the expected impact on infrastructure competition and any potential entailing effects on consumers;**<sup>9</sup>

**3. The draft measure shall include the following elements:**

**(a) the precise nature and level of separation, specifying in particular the legal status of the separate business entity;**

**(b) identification of the assets of the separate business entity, and the products or services to be supplied by this entity;**

**(c) the governance arrangements to ensure the independence of the staff employed by the separate business entity, and the corresponding incentive structure;**

**(d) rules for ensuring compliance with the obligations;**

**(e) rules for ensuring transparency of operational procedures, in particular towards other stakeholders;**

**(f) a monitoring programme to ensure compliance, including publication of an annual report.**

**4. Following the Commission's decision on the draft measure taken in accordance with Article 8(3), the national regulatory authority shall conduct a coordinated analysis of the different markets related to the access network in accordance with the procedure set out in Article 16 of Directive 2002/21/EC (Framework Directive). On the basis of its assessment, the national regulatory authority shall impose, maintain, amend or withdraw obligations, in accordance with Articles 6 and 7 of Directive 2002/21/EC (Framework Directive).**<sup>10</sup>

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<sup>9</sup> SE and UK have a reservation on this paragraph.

<sup>10</sup> IE, PT, UK, MT and IT have a reservation on this paragraph.

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

- (43) *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 has 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 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. Its imposition requires a coordinated analysis of different relevant markets related to the access network, in accordance with the market analysis procedure set out in Article 16 of the Framework Directive. When performing the market analysis and designing the details of this remedy, national regulatory authorities should pay particular attention to the products to be managed by the separate business entities, taking into account the extent of network roll-out and the degree of technological progress, which may affect the substitutability of fixed and wireless services. In order to avoid distortions of competition in the internal market, proposals for functional separation should be approved in advance by the Commission.*
- (44) *The implementation of functional separation should not prevent appropriate coordination mechanisms between the different separate business entities in order to ensure that the economic and management supervision rights of the parent company are protected.*

### *Article 13b*

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

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

**Undertakings shall also inform the national regulatory authority of any change of that intent as well as the final outcome of the process of the separation.**

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

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

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

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



- (45) *Where a vertically integrated undertaking chooses to dispose a substantial part or all of its local access network assets to a separate legal entity under different ownership or by establishing a separate business entity for dealing with access products, the national regulatory authority should assess the effect of the intended transaction on all existing regulatory obligations imposed on the vertically integrated operator in order to ensure the compatibility of any new arrangements with Directive 2002/19/EC (Access Directive) and Directive 2002/22/EC (Universal Service Directive). The national regulatory authority concerned should undertake a new analysis of the markets in which the segregated entity operates, and impose, maintain, amend or withdraw obligations accordingly. To this end, the national regulatory authority should be able to request information from the undertaking.*

## CHAPTER IV PROCEDURAL PROVISIONS

### *Article 14*

#### **Committee**

1. The Commission shall be assisted by the Communications Committee set up by Article 22 of Directive 2002/21/EC (Framework Directive).
2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.
3. Where reference is made to this paragraph, Article 5a(1) to (4) and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

[...]

4. **Deleted.**

### *Article 15*

#### **Publication of, and access to, information**

1. Member States shall ensure that the specific obligations imposed on undertakings under this Directive are published and that the specific product/service and geographical markets are identified. They shall ensure that up-to-date information, provided that the information is not confidential and, in particular, does not comprise business secrets, is made publicly available in a manner that guarantees all interested parties easy access to that information.
2. Member States shall send to the Commission a copy of all such information published. The Commission shall make this information available in a readily accessible form, and shall distribute the information to the Communications Committee as appropriate.

### *Article 16*

#### **Notification**

1. Member States shall notify to the Commission by at the latest the date of application referred to in Article 18(1) second subparagraph the national regulatory authorities responsible for the tasks set out in this Directive.
2. National regulatory authorities shall notify to the Commission the names of operators deemed to have significant market power for the purposes of this Directive, and the obligations imposed upon them under this Directive. Any changes affecting the obligations imposed upon undertakings or of the undertakings affected under the provisions of this Directive shall be notified to the Commission without delay.

*Article 17*

**Review procedures**

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

*[Article 18*

**Transposition**

*Article 19*

**Entry into force**

*Article 20*

**Addressees]**

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

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

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

(a) conditional access systems operated on the market in the Community are to have the necessary technical capability for cost-effective transcontrol allowing the possibility for full control by network operators at local or regional level of the services using such conditional access systems;

(b) all operators of conditional access services, irrespective of the means of transmission, who provide access services to digital television and radio services and whose access services broadcasters depend on to reach any group of potential viewers or listeners are to:

- offer to all broadcasters, on a fair, reasonable and non-discriminatory basis compatible with Community competition law, technical services enabling the broadcasters' digitally-transmitted services to be received by viewers or listeners authorised by means of decoders administered by the service operators, and comply with Community competition law,

- keep separate financial accounts regarding their activity as conditional access providers.

(c) when granting licences to manufacturers of consumer equipment, holders of industrial property rights to conditional access products and systems are to ensure that this is done on fair, reasonable and non-discriminatory terms. Taking into account technical and commercial factors, holders of rights are not to subject the granting of licences to conditions prohibiting, deterring or discouraging the inclusion in the same product of:

- a common interface allowing connection with several other access systems, or

- means specific to another access system, provided that the licensee complies with the relevant and reasonable conditions ensuring, as far as he is concerned, the security of transactions of conditional access system operators.

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

(a) Access to application program interfaces (APIs);

(b) Access to electronic programme guides (EPGs).

## ANNEX II

### **MINIMUM LIST OF ITEMS TO BE INCLUDED IN A REFERENCE OFFER FOR WHOLESALE NETWORK INFRASTRUCTURE ACCESS, INCLUDING UNBUNDLED ACCESS TO THE [...] LOCAL LOOP AT A FIXED LOCATION TO BE PUBLISHED BY NOTIFIED OPERATORS**

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 notified 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 notified operator, [...] **allowing** the use of [...] **a specified part of the capacity of the network infrastructure such as a part of the frequency or equivalent**;

#### **A. Conditions for unbundled access to the local loop**

1. Network elements to which access is offered covering in particular the following elements **together with appropriate associated facilities**:

- (a) **unbundled** access to local loops (**full and shared**);

(b) [...] **unbundled access to local subloops (full and shared), including, when relevant, access to associated facilities such as ducts and/or optical fibre for backhaul;**

(ba) **when relevant, duct access enabling the roll out of access networks;**

2. Information concerning the locations of physical access sites including **street cabinets and distribution frames**, availability of local loops, **subloops and backhaul** in specific parts of the access network **and when relevant, information concerning the locations of ducts and the availability within ducts;**

3. Technical conditions related to access and use of local loops **and subloops**, including the technical characteristics of the twisted [...] pair **and/or optical fibre and/or equivalent, cable distributors, and associated facilities [...]** and, when relevant, **technical conditions related to access to ducts;**

4. Ordering and provisioning procedures, usage restrictions.

#### **B. Co-location services**

1. Information on the notified operator's **existing** relevant sites **or equipment locations and planned update thereof.**

2. Co-location options at the sites indicated under point 1 (including physical co-location and, as appropriate, distant co-location and virtual co-location).

3. Equipment characteristics: restrictions, if any, on equipment that can be co-located.

4. Security issues: measures put in place by notified operators to ensure the security of their locations.

5. Access conditions for staff of competitive operators.

6. Safety standards.
7. Rules for the allocation of space where co-location space is limited.
8. Conditions for beneficiaries to inspect the locations at which physical co-location is available, or sites where co-location has been refused on grounds of lack of capacity.

### **C. Information systems**

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

### **D. Supply conditions**

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

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