Telecommunication Laws in Europe

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Electronic Communication Law and Policy of the European Union[1]

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INTRODUCTION

1.1 In the 21st century, electronic communication plays a key role in creating and exchanging information and knowledge, speeding up economic recovery from the financial and economic crises of the recent past and laying the foundations for a sustainable future. Electronic communications networks are the backbone of the 'information society'. The European Commission's ('the Commission') 'Digital Agenda for Europe'[2] is one of the political initiatives of the Europe 2020 strategy[3] and defines the key enabling role that the use of information and communication technologies (ICT) play for the European Union's overarching objectives of 'smart, sustainable and inclusive growth'.[4] The 'Digital Agenda for Europe' is composed of seven 'pillars': 'Digital Single Market',[5] 'Interoperability & Standards',[6] 'Trust & Security',[7] 'Fast and ultra-fast Internet access',[8] 'Research and Innovation',[9] 'Enhancing digital literacy, skills and inclusion',[10] and 'ICT enabled benefits for EU

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2 See the Digital Agenda's website https://ec.europa.eu/digital-agenda/ (accessed on 30 November 2012).

3 Communication from the Commission, 'Europe 2020 A strategy for smart, sustainable and inclusive growth', COM(2010) 2020 final, 3 March 2010.

4 See Communication from the Commission, 'Europe 2020 A strategy for smart, sustainable and inclusive growth', COM(2010) 2020 final, 3 March,2011.

5 Pillar I aims at supporting the music download business, facilitating online payments by establishing a 'single area' and enhancing the protection of consumers in cyberspace through an update to the EU market rules for the 'digital area'.

6 Pillar II aims at improving the setting of standards and increasing interoperability for ICT equipment and services.

7 Pillar III aims at enhancing online security and at furthering data protection.

8 Pillar IV aims at introducing Internet download rates of 30 mbps for all EU citizens and at achieving a subscription rate of at least 50 per cent of EU households to Internet connections above 500 mbps by 2020 through stimulating investments and radio spectrum regulation measures.

9 Pillar V aims at coordinating and furthering ICT research and development and at enhancing private funding.

10 Pillar VI aims at eliminating the 'Digital Divide' still present in the EU to ensure that all EU citizens can fully participate in an ICT-based society.

society'.[11] It covers EU as well as international dimensions of these 'pillars' such as, eg the promotion of the internationalisation of Internet governance.

1.2 In the early 1980s, the telecommunication sector in Europe was still characterised by exclusive rights of national telecommunication organisations ('TOs') in almost all Member States of the European Union to provide telecommunication networks and services. In 1987, the Commission issued its Green Paper on the development of the common market for telecommunication services and equipment, and started a Europe-wide debate on the liberalisation and harmonisation of the telecommunication regulatory environment, with the objective of adapting it to the requirements of a single Community-wide market.

One of the first landmarks in liberalising the telecommunication markets was the abolition of the TOs' national monopolies for terminal equipment on the basis of the Commission Directive on competition in the markets for telecommunication terminal equipment ('Terminal Equipment Directive'),[12] which was repealed in 2008 by the Commission Directive on competition in the markets in telecommunications terminal equipment, once liberalisation had been achieved.[13] The Services Directive of 28 June 1990 which required Member States to remove 'all special or exclusive rights' that had been granted to TOs 'for the supply of telecommunication services other than voice telephony' (Article 2(1)),[14] was a further step in the liberalisation process. It was subsequently amended to include the abolishment of exclusive rights for the provision of satellite services,[15] to open cable television networks for use for the provision of 'already liberalized' telecommunications services[16] and, in 1996, to oblige Member States to lift all restrictions on operators of mobile and personal communications systems with regard to the establishment of their own infrastructure, the use of infrastructures provided by third parties, and the sharing of infrastructure, other facilities and sites.[17]

The liberalisation process culminated with the Full Competition Directive,[18] which implemented the full liberalisation of telecommunication networks and services with effect from 1 January 1998. The Full Competition Directive required Member States to take the necessary steps to ensure that markets were fully open by

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11 Pillar VII incorporates social and public goals such as the use of ICT reduce energy consumption (e.g. through smart grid technology) or furthering e-health access.

12 Directive 88/301/EEC [1988] OJ L131/73: for further details see fifth edition of this publication, para 1.16.

13 Commission Directive 2008/63/EC of 20 June 2008 on competition in the markets in telecommunications terminal equipment [2008] OJ L162/20.

14 Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services [1990] OJ L192/10: for further details see fourth edition of this book, paras 1.19 et seq.

15 Commission Directive 94/46/EC of 13 October 1994 amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications [1994] OJ L268/15, see fourth edition of this book, para 1.23.

16 Commission Directive 95/51/EC of 18 October 1995 amending Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalised telecommunications services [1995] OJ L256/49: for further details see fourth edition of this book, paras 1.24 et seq.

17 Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications [1996] OJ L20/59: for further details see fourth edition of this book, paras 1.27 et seq.

18 Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets [1996] OJ L74/13: for further details see fourth edition of this book, paras 1.30 et seq.

1 January 1998.[19] Besides these liberalisation-related provisions, the Directive established basic principles and procedural requirements for licensing new entrants to both the voice telephony and the telecommunication infrastructure ('network') markets[20] and introduced basic rules on interconnection.[21]

1.3 The liberalisation process was complemented by the Council's harmonisation directives which aimed at enabling and facilitating the provision of pan-European telecommunications services. These include: the ONP Framework Directive (1990),[22] which was intended to facilitate access by private companies to public telecommunication networks and to certain public telecommunication services; the Leased Lines Directive (1992),[23] which aimed at ensuring the EU-wide availability of a minimum set of leased lines with harmonised technical characteristics; and the Voice Telephony Directive (1995),[24] which was replaced, in 1998, by the Directive of the European Parliament and of the Council 'on the application of open network provision (ONP) to voice telephony and on universal service for telecommunication in a competitive environment.[25] It continued to pursue the twofold aim of the preceding Directive – to ensure the availability of good quality fixed telephony services throughout the EU and to define the set of services to which all users should have access in the context of universal service.

In July 1997, the ONP Framework Directive (1990) and the Leased Lines Directive (1992) were adapted to the 'competitive environment in telecommunications'. Different from the ONP Framework Directive (1990), the ONP Framework Directive (1997)[26] applied not only to the TOs but to all organisations providing public telecommunication networks or services, taking into account an organisation's position in the relevant market. The Directive followed three main approaches for the safeguarding of effective competition in the internal market: it set out the harmonised basic principles to be followed by ONP conditions, it encouraged technical harmonisation by market players on a voluntary basis by providing for the Commission to publish a list of technical European standards drawn up as a basis for harmonised technical interfaces or service features for ONP;[27] and it ensured the

19 With the possibility of transitional periods of up to two years (for Member States with less developed networks) or up to five years (for Member States with very small networks).

20 For details see fourth edition of this book, paras 1.31 et seq.

21 For details see fourth edition of this book, para 1.33.

22 Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision [1990] OJ L192/1: for further details see fourth edition of this book, paras 1.37 et seq.

23 Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines [1992] OJ L165/27: for further details see 4th edition, paras 1.42 et seq.

24 Directive 95/62/EC of the European Parliament and of the Council of 13 December 1995 on the application of open network provision (ONP) to voice telephony [1995] OJ L321/6: for further details see fourth edition of this book, paras 1.44 et seq..

25 Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment ('ONP Voice Telephony Directive (1998)') [1998] OJ L101/24: for further details see fifth edition of this book, para 1.25.

26 Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997 amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications ('ONP Framework Directive (1997)') [1997] OJ L295/23: for further details see fifth edition of this book, paras 1.26 et seq.

27 However, Commission or Council were entitled to make the implementation of such standards or specifications compulsory if the voluntary approach had failed.

effective structural separation of the NRAs from activities that were associated with ownership or control of telecommunication networks, services or equipment.[28]

1.4 In June 1997 the European Parliament and the Council adopted the Directive on interconnection in telecommunication ('Interconnection Directive').[29] The Directive established obligations to grant and rights to obtain interconnection[30] and provided for regulatory measures and dispute resolution procedures at the national level.[31] It promoted a high degree of standardisation and transparency of interconnection terms and prices.[32] It imposed additional obligations on TOs providing public telecommunication networks and systems which have significant market power, in particular with regard to interconnection charges.[33]

To ensure a Community-wide, harmonised framework for licensing and authorisations regimes which do not impose undue burdens on operators, the Community, in 1997, adopted the Licensing Directive[34] setting out principles which the Member States had to observe if they made the provision of a telecommunication service subject to authorisation.

Data protection issues in the old regulatory framework were addressed by the 1995 Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data,[35] covering all kinds of data processing and by a sector-specific Directive, issued in 1997, dealing with data protection in the telecommunication sector.[36]

1.5 Only four years after the liberalisation and the re-regulation of the European telecommunications markets that came with it,[37] the European Union adopted a

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28 For further details see fifth edition of this book, para 1.26.

29 Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) [1997] OJ L199/32: for further details see fourth edition of this book, paras 1.93 et seq.

30 For details see fourth edition of this book, paras 1.98 et seq.

31 For details see fourth edition of this book, paras 1.100 et seq.

32 For details see fourth edition of this book, para 1.105.

33 For details see fourth edition of this book, paras 1.106 et seq.

34 Directive 97/13/EC of the European Parliament and the Council of 10 April 1997 on a common framework for general authorisations and individual licenses in the field of telecommunications services [1997] OJ L117/15.

35 Council Directive 95/46/EC [1995] OJ L281/31; Directive 97/66/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the telecommunications sector [1998] OJ L24/1.

36 Directive 97/66/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the telecommunications sector [1998] OJ L24/1.

37 The most important legal instruments of re-regulation include: Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997 amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications [1997] OJ L295/23; Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licenses in the field of telecommunications services [1997] OJ L117/15; Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision ('ONP') [1997] OJ L199/32; Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on

package of six Directives[38] and one Decision[39] constituting a legal framework for electronic communications (the '2002 Regulatory Package').[40]

In response to the conclusions from both the Convergence Green Paper and the 1999 Review,[41] the Commission, in July 2000, proposed five Draft Directives[42] and one draft Decision[43] for a new regulatory framework for electronic communications networks and services. Except for the E-Privacy Directive, all Directives and the Decision were adopted in the European Parliament's second reading in February 2002.[44] They were published on 24 April 2002 in the *Official Journal*, and entered

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the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment [1998] OJ L 101/24; see also at paras 1.3 and 1.4.

38 Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ('Framework Directive') [2002] OJ L108/33; Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities ('Access Directive') [2002] OJ L108/7; Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services ('Authorisation Directive') [2002] OJ L108/21; 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') [2002] OJ L108/51; 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 ('E-Privacy Directive') [2002] OJ L 201/37; Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services [2002] OJ L 249/21.

39 Commission Decision (2002/622/EC) of 26 July 2002 establishing a Radio Spectrum Policy Group [2002] OJ L198/49.

40 See Bondroit, Cheffert et al, 'Vers un nouveau cadre réglementaire européen des réseaux et services de communications électroniques: Réflexions à mi-chemin' (2001) La Revue Ubiquité 41; Nikolinakos, 'The new European regulatory regime for electronic communications networks and associated services' [2001] 22(3) ECLR 93; Scherer, 'Die Umgestaltung des europäischen und deutschen Telekommunikationsrechts durch das EU-Richtlinienpaket' (2002) Kommunikation und Recht 273 et seq, 329 et seq, 385 et seq; Sinclair, 'A new European communications services regulatory package: an overview' (2001) 7(6) CTLR 156.

41 See para 1.11 below.

42 Proposal for a Directive of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, COM(2000) 393 final, 12 July 2000; Proposal for a Directive of the European Parliament and of the Council on the authorisation of electronic communications networks and services, COM(2000) 386 final, 12 July 2000; Proposal for a Directive of the European Parliament and of the Council on access to, and interconnection of, electronic communications networks and associated facilities, COM(2000) 384 final, 12 July 2000; Proposal for a Directive of the European Parliament and of the Council on universal service and users' rights relating to electronic communications networks and services, COM(2000) 392 final, 12 July 2000.

43 Proposal for a Decision of the European Parliament and of the Council on a regulatory framework for radio spectrum policy in the European Community, COM(2000) 407 final, 12 July 2000.

44 Framework Directive, European Parliament Decision (second reading) of 12 December 2001 [2002] OJ C177E/142; Access Directie, European Parliament Decision (second reading) of 12 December 2001 [2002] OJ C 177E/152; Authorisation Directive, European Parliament Decision (second reading) of 12 December 2001 [2002] OJ C177E/155; Universal Service Directive, European Parliament Decision (second reading) of 12 December 2001 [2002] OJ C177E/157; Radio Spectrum Decision, European Parliament Decision (second reading) of 12 December 2001 [2002] OJC177 E/164.

into force the day following publication. Due to far-reaching amendments by the European Parliament, the adoption and publication of the E-Privacy Directive was delayed until July 2002.[45] In addition, the Commission proposed a Regulation for unbundled access to the local loop,[46] which was adopted in December 2000[47] and entered into force on 2 January 2001. Moreover, the Commission adopted a Directive on competition in the markets for electronic communications services,[48] consolidating all relevant provisions of Directive 90/388 (and the sector-specific amendments) and replacing all existing 'liberalisation Directives'[49] in the telecommunications sector.

1.6 In 2006, the Commission launched a comprehensive review of the 2002 Regulatory Package[50] concluding that its main objectives, the promotion of competition, the completion of the single market and the promotion of the EU citizens' interests had not been achieved.[51] The review found that the single market for telecommunications has not yet been established[52] mainly due to a lack of coherent application and enforcement of the rules set forth in the EU framework.[53] The Commission found that these shortcomings were caused in particular by:

- a lack of enforcement competencies on the part of the Commission to ensure a consistent regulatory practice on the national level, in particular with respect to the imposition of ex ante obligations on undertakings found to have significant market power;[54]
- a lack of independence of the national regulatory authorities from commercial and political influence and the failure of some of the EU Member States to furnish the regulatory authorities with sufficient means to perform their regulatory responsibilities;[55] and

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45 European Parliament Decision (second reading) of 30 May 2002 [2003] OJ C187E/103; 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) [2002] OJ L201/37.

46 Proposal for a Regulation of the European Parliament and of the Council on unbundled access to the local loop, COM(2000) 394 final, 12 July 2000.

47 [2000] OJ L336/4.

48 Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services [2002] OJ L249/21.

49 See para 1.2 above.

50 Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions, on the Review of the EU Regulatory Framework for electronic communications networks and services, COM(2006) 334 final, 29 June 2006; Commission Staff Working Document to the Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions, on the Review of the EU Regulatory Framework for electronic communications networks and services, COM(2006) 334 final, 29 June 2006, SEC(2006) 816, 28 June 2006.

51 Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions, report on the outcome of the Review of the EU regulatory framework for electronic networks and services in accordance with Directive 2002/21/EC and Summary of the 2007 Reform Proposals, COM(2007) 696 final, 13 November 2007, p 13.

52 COM(2006) 334 final, 29 June 2006, p 8.

53 COM(2007) 696 final, 13 November 2007, p 3.

54 SEC(2006) 816, 28 June 2006, p 18; COM(2007) 696 final, 13 November 2007, pp 8 et seq.

55 Commission Staff Working Document, Impact Assessment, 13 November 2007, SEC(2007)1472 final, 13 November 2007, p 68; Communication from the Commission to the

- an overly long duration of appeal procedures as well as the practice by the national courts to regularly suspend regulatory decisions.[56]

Furthermore, the review identified a need for significant improvement of spectrum management.[57]

In November 2007 the Commission submitted to the European Parliament and the Council for adoption in the co-decision procedure its proposals to reform the 2002 Regulatory Package. The proposals' key objectives were to 'address the institutional, procedural and normative deficiencies of the decentralized enforcement system put in place by the 2002 Regulatory Package that has purportedly seriously hindered the achievement of a borderless internal market for electronic communications networks and services'[58] and, thus, consolidate the single market[59] and to improve spectrum management.[60] Furthermore, the proposals sought to strengthen consumers' and users' rights and to ensure that consumers could fully benefit from the single market for electronic communications.[61]

Following controversial and extended negotiations, in April 2009, the European Parliament and the Council found a compromise on the telecommunications reform package. On 6 May 2009, however, the European Parliament, rather than endorsing the entire amended reform package, rejected the intended rules concerning the barring of end users from accessing the Internet in cases of copyright infringements. Instead, the European Parliament voted to adopt the so-called 'amendment 138' which the Parliament had supported in its first reading and which the Council had subsequently rejected. The controversy between Parliament and Council involved the amendment to Article 8(1) of the Framework Directive intended to secure the judicial protection of the Internet users' fundamental rights in national proceedings on alleged breaches of copyright laws that may lead to measures blocking Internet access.[62] Following a conciliation procedure, the Council in November 2009 adopted the amended regulatory package (the '2009 Regulatory Package').

The 2009 Regulatory Package comprises two directives, the 'Better Regulation Directive'[63] (amending the Framework Directive, the Access Directive and the Authorization Directive), as well as the 'Citizens' Rights Directive',[64] which amends

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European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, European Electronic Communications Regulation and Markets 2006 (12th report), COM(2007) 155 final, 29 March 2007, p 14.

56 COM(2006) 334 final, 29 June 2009, p 9; SEC(2006) 816 28 June 2006, p 33.

57 COM(2006) 334 final. 29 June 2006, p 7; SEC(2006) 816, 28 June 2006, pp 11 et seq; COM(2007) 696 final, 13 November 2007, pp 6 et seq.

58 F Rizzuto, 'Reforming the "constitutional fundamentals" of the European Union telecommunications regulatory framework' [2010] 16(2) CTLR 44.

59 COM(2006) 334 final, 29 June 2006, p 7.

60 COM(2007) 696 final, 13 November 2007, pp 6 et seq.

61 COM(2007) 696 final, 13 November 2007, p 10.

62 For further details on the provisions regarding 'Internet freedom', see paras 1.36 et seq below.

63 Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services [2009] OJ L337/37.

64 Directive 2009/136/EC of the European Parliament and the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of

in particular the Universal Services Directive and the e-Privacy Directive. Furthermore, the telecoms reform package comprises a Regulation establishing a European electronic communications market authority, which is called the Body of European Regulators for Electronic Communications ('BEREC').[65]

The Better Regulation Directive and the Citizens' Rights Directive entered into force on 19 December 2009. The EU Member States were obligated to transpose them into national law by 25 May 2011.

1.7 The convergence of the telecommunications, media and information technology sectors has created challenges for the EU regulatory framework. The borders between these once separate sectors are blurred, and market players are confronted with multiple layers of legislation addressing different aspects of the converging communications systems and services. The 2002 EU Regulatory Package' met the challenge of convergence (ie 'the technological improvements by which a number of networks arise with enhanced capabilities to provide multiple services' where one service may be provided over a number of different networks)[66] by providing a single legal framework not only for 'telecommunication networks' but for all 'electronic communication networks' including mobile networks, cable TV networks and even electricity cable systems (if used for the conveyance of signals).[67] Electronic communication (ie the conveyance of signals over electronic communications networks) is, however, only one aspect of the entire phenomenon of the 'information society'. In addition to the 'transmission'-related rules governing electronic communications networks and services, the policy and law of the EU have addressed and continue to address 'content'-related issues such as the regulation of audio-visual media[68]and the regulatory challenges presented by the Internet (eg the question of responsibility for content on the Internet,[69] domain names[70] and copyright protection).[71] Moreover, as new services, such as cloud computing services[72] and machine to machine ('M2M') services,[73] which may combine elements of electronic communications as well as content services, are

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personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection law [2009] OJ L337/11.

65 Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office [2009] OJ L337/1.

66 BEREC report on convergent services (BoR (10) 65) (December 2010), p 2.

67 See Framework Directive, Recital 5.

68 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2010] OJ L95/1.

69 Decision No 276/1999/EC of the European Parliament and of the Council of 25 January 1999 adopting a multi-annual Community action plan on promoting safer use of the Internet by combating illegal and harmful content on global networks [1999] OJ L33/1, amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 [2003] OJ L284/1, and by Decision No 787/2004/EC of the European Parliament and of the Council of 21 April 2004 [2004] OJ L138/12; Council Decision of 29 May 2000 to combat child pornography on the Internet [2000] OJ L138/1.

70 Eg Council Resolution of 3 October 2000 on the organisation and management of the Internet [2000] OJ C293/3.

71 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.

72 Cloud Computing describes infrastructure, platforms, software and services provided over an

offered over convergent networks, the borders between electronic communication services and content services begin to blur.

This chapter deals mainly with the 'core' regulatory aspects of electronic communication in the EU, addressing only in a non-exhaustive way the related areas of media and content regulation. Chapter 2 addresses the application of the competition rules to electronic communications.

FUNDAMENTALS OF EU TELECOMMUNICATIONS LAW

Legislative Powers of the European Union in the Field of Telecommunications

1.8 The EU has legislative powers only in those fields for which the Treaty on the Functioning of the European Union ('TFEU') specifically establishes such powers. Legislative activities in the field of telecommunications can be based either on Article 114 (ex Article 95 of the EC Treaty ('ECT')), aimed at creating a genuine internal market for the free movement of people, goods and services in the EU, or on Article 106 (ex Article 86 of the ECT), providing for the abolition of special or exclusive rights granted to undertakings. In 1993, the Maastricht Treaty introduced explicit telecommunication policy goals which are still relevant today: according to Articles170 to 172 of the EC Treaty (ex Articles154 to 156 ECT) the EU shall contribute to the establishment and development of trans-European networks.[74] Moreover, Article 173 of the TFEU (ex Article 57 of the ECT) calls for action by the EU and the Member States to create a favourable and competitive environment for the Community's industry.

1.9 The EU has, since 1987, pursued a dual regulatory approach of liberalising the telecommunications sector and harmonising market conditions.[75] This approach is a consequence of the distribution of the main regulatory powers between Commission and Council. The Commission is empowered by Article 106 of the TFEU (ex Article 86(3) of the ECT) to dismantle monopoly rights, while the Council is entitled to adopt measures aimed at establishing the internal market under Article 114 of the TFEU (ex Article 95 ECT).[76] On completion of market liberalisation in the EU, this 'duality' of liberalisation and harmonisation powers and the underlying tension between the Commission and the Member States has

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external network where the services are deployed as a kind of outsourcing: see BEREC report on convergent services (BoR (10) 65) (December 2010), p 6.

73 M2M describes the 'exchange of information in data format between two remote machines, through a mobile or fixed network, without human intervention', see BEREC report on convergent services (BoR (10) 65) (December 2010), p 6. The BEREC, in its Draft Work Programme 2013 (BoR(12)92) (September 2012), p 17, recognises the increasing importance of M2M services, stating that 'Machine-to-Machine' is a rapidly developing market' and that 'conservative predictions raise the number of M2M devices to more than 1 billion by 2020'.

74 See Decision No 1376/2002/EC of the European Parliament and of the Council of 12 July 2002 amending Decision No 1336/97/EC on a series of guidelines for trans-European telecommunications networks [2002] OJ L200/1. On 19 October 2011 the Commission issued a proposal for a Regulation on guidelines for trans-European telecommunications networks which is to replace Decision No 1336/97/EC: see Commission Proposal for a Regulation of the European Parliament and of the Council on guidelines for trans-European telecommunications networks and repealing Decision No 1336/97/EC, COM(2011) 657, final.

75 See paras 1.2 to 1.5 above.

76 See para 1.4 above.

been replaced by a political controversy over 'community-centric' versus 'state-centric' regulation and enforcement: Member States tend to consider national regulatory competence and control in the telecommunications sector an important factor to secure the achievement of economic and social policy objectives. Therefore, the EU Member States were reluctant to transfer direct regulatory powers to a 'European Regulator' and favoured a 'state-centric' regulatory model. As a result, the Commission received only limited powers to have the NRAs adopt the Commission's views on appropriate measures to counter distortions to competition resulting from the presence of significant market power on national markets.[77]

Following its review of the 2002 Regulatory Package, where the Commission had concluded that single market integration was severely hampered by an inconsistent application of regulatory remedies on a national level,[78] the Commission's initial reform proposals sought to implement a far more 'community-centric' regulatory and enforcement regime by introducing an EU regulatory body with legal enforcement powers[79] and expanding the Commission's competencies to include veto powers with regard to remedies imposed by the NRAs following market decision and analysis,[80] as well as afford it the possibility to pass Decisions requiring NRAs to replace intended remedies by remedies of the Commission's choosing.[81] These proposals have mostly been rejected in the course of the review process: the proposed 'European Electronic Communications Market Authority' has been replaced by BEREC, which has no legal enforcement powers and which is controlled by the Members States.[82] Furthermore, the Commission has not been given competency to issue binding Decisions with regard to remedies chosen by the NRAs; rather, the Commission may issue Recommendations only, which the Member States can reject as they have retained the power to ultimately decide which remedies are to be imposed to counter market failures.[83]

In sum, the 'state-centric' regulatory enforcement system introduced by the 2002 Regulatory Package has been replaced by a highly complicated system of negotiations and co-regulation which is still largely controlled by the Member States where it concerns the actual choosing and implementing of measures designed to counter identified market failure. It remains to be seen whether this approach can serve to counter the inconsistent application of regulatory remedies on a national level[84] and to help consolidate the single market for electronic telecommunications.

Shaping EU Telecommunications Law: Basic Policy Decisions

1.10 The major policy decisions on the path towards full liberalisation of the European telecommunication markets and a harmonised regulatory framework have been brought about by a series of policy papers and resolutions. The policy

77 See at para 1.58 below.

78 See para 1.6 above.

79 See Proposal for a Regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority, COM(2007) 699, final, 13 November 2007.

80 For details on market analysis and definition as well as the imposition of remedies, see paras 1.62 to 1.77 below.

81 See the Commission Proposal COM(2007) 697, final, 13 November 2007, proposed Art 7, paras 4 and 5 of the Framework Directive.

82 See below, at 1.18.

83 Art 7a(4) et seq of the Framework Directive as amended.

84 See para 1.6 above.

papers,[85] prepared and published by the Commission, are consultative documents setting out basic policy goals for public debate. On that basis, the Council of Telecommunications Ministers and, in some cases, the European Parliament generally adopt resolutions (ie legally non-binding political decisions, establishing action plans and timetables for future legislative and other measures).

1.11 The liberalisation and re-regulation of the telecommunications markets was introduced through several Commission 'Green Papers'.[86]

In 1997 the Commission began to prepare for the transition to the 2002 Regulatory Framework by analysing the implications of convergence in the 'Convergence Green Paper'.[87] In June 2000 the Commission published its '1999 Review', exploring regulatory options for the new legal framework.[88]

1.12 In 2006 the Commission began its review of the 2002 Regulatory Package by issuing its paper COM (2006) 334, final which identified two main areas for change under the 2002 regulatory package, the application to electronic communications of the Commission's policy approach on spectrum management,[89] and the reduction of the regulatory burdens in connection with ex-ante regulation[90] as well as additional changes necessary to consolidate the single market, further the interests of consumers and users, improve security and remove outdated provisions from the regulatory framework.[91] The review process ended with the implementation of the 2009 Regulatory Package.

1.13 Further recent policy initiatives include the European Commission's 'Digital Agenda for Europe'[92] as one of the initiatives of the Europe 2020 strategy[93] issued by the Commission in 2010. The Digital Agenda paper defines the key enabling role that the use of information and communication technologies (ICT) have to play in the European Union's overarching objectives of 'smart, sustainable and inclusive

85 See, e g COM(2007) 696 final, 13 November 2007, p 3, and also para 1.2 above.

86 See the Commission's 1987 Green Paper on the development of the common market for telecommunication services and equipment proposed the introduction of more competition in the telecommunication market combined with a higher degree of harmonisation which resulted in the liberalisation and re-regulation of the telecommunications markets: see at paras 1.2 et seq above. Further Commission Green Papers included the Green Paper on a common approach to mobile and personal communications in the European Union ('Mobile Green Paper'), 27 April 1994, COM(94) 145 final and the 1994/1995 Green Paper on the liberalisation of telecommunications infrastructure and cable television networks ('Infrastructure Green Paper'), 25 October 1004 COM(94) 440.final: Part One and 25 January 1995, COM(94) 682 final: Part Two. In 1995 the Commission adopted a Green Paper on a numbering policy for telecommunication services in Europe Towards an European numbering environment ('Green Paper on a numbering policy for telecommunications'), COM(1996) 590 final, 20 November 1996.

87 Green Paper on the convergence of the telecommunications, media and information tech nology sectors, and the implications for Regulation – Towards an information society approach, COM(1997) 623 final, 03 December 1998.

88 COM(1999) 539 final, 10 November 1999; for an analysis see Scherer, 'The 1999 Review – Towards a new regulatory framework', (2000) info, Vol 2 Iss 3, 313.

89 COM(2005) 411, 6 September 2005.

90 COM (2006) 334 final, 29 June 2006, p 6.

91 COM (2006) 334 final, 29 June 2006, p 7.

92 See the Digital Agenda's website https://ec.europa.eu/digital-agenda/ (accessed on 30 November 2012).

93 Communication from the Commission, Europe 2020 A strategy for smart, sustainable and inclusive growth, COM(2010) 2020 final, 3 March 2010.

growth'.[94] Furthermore, Commission policy papers also play an important role in the development of the EU's frequency management policy.[95]

The Regulatory Instruments

1.14 The most important and most frequently utilised legislative instruments setting a regulatory framework for the telecommunication sector are Directives. In addition, the EU also utilises Decisions[96] and Regulations.[97] The electronic communications regulatory framework also provides for the use of legally non-binding sector-specific measures, such as guidelines,[98] Recommendations[99] and working papers.[100] These 'soft law' regulatory tools can be more easily and quickly agreed on than Directives or Regulations and can be adopted to changing technological and market conditions, allowing for a high degree of responsiveness to changing

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94 See Communication from the Commission, Europe 2020 A strategy for smart, sustainable and inclusive growth, COM(2010) 2020 final, 3 March 2010, p 11; for details see above at para 1.1.

95 See para 1.101 et seq below.

96 Eg Commission Decision 2007/176/EC of 11 December 2006 establishing a list of standards and/or specifications for electronic communications networks, services and associated facilities and services and replacing all previous versions [2007] OJ L86/11, amended by Commission Decision 2008/286/EC [2008] OJ L93/24; Commission Decision 2007/116/EC of 15 February 2007 on reserving the national numbering range beginning with '116' for harmonised numbers for harmonised services of social value [2007] OJ L49/30, amended by Commission Decision 2007/698/EC [2007] OJ L284/31, and Commission Decision 2009/884/EC [2009] OJ L317/46; Decision No 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision) [2002] OJ L108/1, 24 April 2002.

97 Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office [2009] OJ L337/1; Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (recast) ('Roaming Regulation') [2012] OJ L172/10; Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop [2000] OJ L336/4 has been repealed by Art 4 of the Better Regulation Directive.

98 Eg Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services [2002] OJ C165/6 ('Commission Guidelines on market analysis').

99 Eg Commission Recommendation 2010/572/EU of 20 September 2010 on regulated access to Next Generation Access Networks (NGA) [2010] OJ L251/35; Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU [2009] OJ L124/67; Commission Recommendation of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, C(2008) 5925, final; Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services [2007] OJ L344/65; Commission Recommendation 2005/698/EC of 19 September 2005 on accounting separation and cost accounting systems under the regulatory framework for electronic communications [2005] OJ L266/64.

100 Eg Commission Staff Working Document, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the Review of the EU Regulatory Framework for electronic communications networks and services, SEC(2006) 816, 28 June 2006; Commission Staff Working Paper on the Review of the Scope of Universal Service in accordance with Article 15

regulatory needs.[101] The 'cost' of such increased regulatory flexibility, however, is a loss of legal certainty.

1.15 Directives are addressed to, and binding upon, the Member States and require implementation by national laws (Article 288(3) of the TFEU (ex Article 249(3) of the ECT)). Regulations are directly applicable in all Member States and do not need implementation (Article 288(2) of the TFEU (ex Article 249(2) of the ECT)). Directives can be issued by the Council together with the European Parliament, by the Council alone, or by the Commission, depending on the relevant provision of the TFEU on which the Regulations and Directives are based. Directives and Regulations in the telecommunication sector are primarily based either on Article 114 of the TFEU (ex Article 95 of the ECT) or on Article 106 of the TFEU (ex Article 86 of the ECT).[102] The implications of these two legal bases are different: Article 114 of the TFEU provides for the adoption of measures for the approximation of national laws in order to establish the Single European Market. Its predecessor provision, Article 95 of the ECT, has served as the basis of various Council Directives.[103] Directives based on Article 114 of the TFEU are adopted in the ordinary legislative procedure under the co-decision procedure introduced by the Maastricht Treaty, today specified in Article 294 of the TFEU. This procedure strengthens the legislative powers of the European Parliament to the extent that the Parliament may prevent the entry into force of such a Directive. By contrast, the procedure under Article 106(3) of the TFEU (ex Article 86(3) ECT) does not provide for the involvement of the Council or the European Parliament.

1.16 In contrast to Regulations and Directives, Decisions are specifically addressed to natural persons, legal persons, or Member States; they apply solely to their addressees (Article 288(4) of the TFEU (ex Article 294(4) of the ECT)). The Commission's power to issue Decisions can either be derived directly from Treaty provisions (see Article 106(3) of the TFEU (ex Article 86(3) of the ECT)) or from powers conferred by the legislative bodies (Article 17(1) of the TFEU (ex Article 211, 4th indent of the ECT)).[104]

Regulatory Authorities at European Level

1.17 The principal institutional actors at the Community level in regulating the telecommunication sector are the Commission, the Council and, to a lesser extent, the European Parliament. Within the Commission, the Directorate General for Communications Networks, Content and Technology (DG CONNECT) is responsible for telecommunication policy, replacing, from 1 July 2012, the Information Society and Media ('INFSOC') Directorate General.. The main goal of DG CONNECT is to 'manage the Digital Agenda'.[105] This is to be achieved by supporting research and innovation in the ICT environment, promote sharing of knowledge and use of and access to digital goods and services, enhancing digital

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of Directive 2002/22/EC, SEC(2005)660, 25 April 2004; Commission Staff Working Document on the treatment of Voice over Internet Protocol ('VoIP') under the EU Regulatory Framework, 14 June 2004.

101 COM(1999) 539, final, 10 November 1999, p 18; see J Scherer, 'The 1999 Review – towards a new regulatory framework', info (2000) Vol 2 Iss 3, pp 313, 320.

102 See para 1.9 above.

103 Eg the Directives of the '2002 Regulatory Package' with the exception of the Commission Directive on competition in the markets for electronic communications networks and services.

104 See Art 18(3) of the Universal Service Directive.

105 See para 1.1 above.

security, and supporting an open Internet. The Directorate General for Competition, which played a major role in the liberalisation of the electronic communications sector, is responsible for the application of the general EU competition law rules set forth in Articles 101 and 102 of the TFEU (ex Articles 81 and 82 of the ECT). Furthermore, the Directorate General for Competition applies the EU rules on state aids set forth in Article 107 of the TFEU (ex Article 87 ECT).

1.18 There is still no central authority responsible for telecommunication issues at the EU level. Several proposals on the establishment and structure of such an authority have been discussed[106] in the 1990s and again in the course of the 2006 review of the 2002 Regulatory Package.[107] But the proposal to implement a centralised pan-European regulatory authority was rejected once again.[108]

However, the 2002 Regulatory Package, in lieu of a centralised European regulatory agency, established a network of organisational entities with a view to advising the Commission on regulatory measures at the EU level, to ensure cooperation among NRAs and between NRAs and the Commission, and to develop best regulatory practices at the EU level and, beyond the boundaries of the European Union, at a pan-European level: the Communications Committee ('CoCom') and the Radio Spectrum Committee have been established on the basis of Article 22 of the Framework Directive and Article 3 of the Radio Spectrum Decision,[109] respectively. These committees have both advisory and decision-making functions in line with the Council's (new) comitology rules.[110]

Similarly, the Commission has established an advisory group on radio spectrum policy, the Radio Spectrum Policy Group, which is composed of one high-level government expert from each Member State and a high-level representative from the Commission.[111] The purpose of this Group is to assist and advise the Commission on radio spectrum policy, on coordination of policy approaches and, where appropriate, on harmonised conditions with regard to the availability and efficient use of radio spectrum necessary for the establishment and functioning of the internal market.

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106 For a more recent contribution see Ewan Sutherland, 'A Single European Regulatory Authority', International Telecommunications Society, Biennial Conference Montreal, 24–27 June 2008, available at www.imaginar.org/its2008/43.pdf (last accessed 28 December 2012).

107 See Proposal for a Regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority, COM(2007) 699, final, 13 November 2007, see also speech of Commissioner V Reding, SPEECH/06/422 (27 June 2006).

108 Commission Staff Working Document, Impact Assessment, SEC(2006) 817, 29 June 2006, p 21.

109 Commission Decision 2009/884/EC [2009] OJ L317/46; Decision No 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision) [2002] OJ L108/1.

110 Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, [2011] OJ L65/13, repealing Regulation No 1999/468/EC [1999] OJ L184/23.

111 Cf Arts 1 and 3 of Commission Decision (2002/622/EC) of 26 July 2002 establishing a Radio Spectrum Policy Group [2002] OJ L198/49, amended by Commission Decision 2009/978/EU of 16 December 2009 [2009] OJ L336/50.

The European Regulators Group for Electronic Communications Networks and Services (ERG), which had been established as an advisory body of the Commission,[112] has been transformed into the Body of European Regulators for Electronic Communication (BEREC) following the 2006 review of the 2002 Regulatory Package.[113]

The main objectives of BEREC are to 'contribute to the development and better functioning of the internal market for electronic communications networks and services, by aiming to ensure a consistent application of the EU regulatory framework for electronic communications',[114] to 'promote cooperation between NRAs, and between NRAs and the Commission',[115] and to 'advise the Commission, and upon request, the European Parliament and the Council.'[116] In this capacity, BEREC inter alia delivers opinions on the NRAs' draft decisions on market definition and analysis as well as the imposition of remedies in the consolidation procedure under Article 7 of the Framework Directive,[117] supports the Commission when issuing Market Recommendations,[118] and, upon request, provides assistance to the NRAs in market analysis proceedings.[119] Furthermore, BEREC monitors and reports on the electronic communications sector and publishes an annual report[120] on developments in the sector.[121]

The NRAs and the Commission must take 'the utmost account' of any opinion, recommendation, guidelines, advice, and regulatory best practice adopted by BEREC.[122]

1.19 At a pan-European level – and without the involvement of the Commission – the NRAs, in 1997, established the Independent Regulators Group (IRG) which currently consists of representatives from 34 NRAs.[123] The purpose of this group is to share experience and viewpoints among its members on issues of common interest and to develop 'principles of implementation and best practice' ('PIBs') on regulatory matters.

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112 Commission Decision (2002/627/EC) of 29 July 2002 establishing the European Regulators Group for Electronic Communications Networks and Services [2002] OJ L200/38.

113 Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office [2009] OJ L337/1. BEREC consists of the 'Board' and is assisted by the 'Office'. The Board is composed of the heads of the 27 NRAs. The Office is a Community Body which is managed by the 'Management Committee' where the 27 NRAs and the Commission are represented.

114 Art 1, para 3, Regulation (EC) No 1211/2009.

115 Art 1, para 4, Regulation (EC) No 1211/2009.

116 Art 1, para 4, Regulation (EC) No 1211/2009.

117 Art 3, para 1, lit a, Regulation (EC) No 1211/2009.

118 Art 3, para 1, lit c, Regulation (EC) No 1211/2009.

119 Art 3, para 1, lit d, Regulation (EC) No 1211/2009.

120 See Body of European Regulators for Electronic Communications, Annual Report 2010 (BoR (11) 19) (May 2011), providing an overview on BEREC's activities which had, in 2010 a particular focus on roaming and next generation network access and on identifying 'emerging challenges' such as, e g those resulting from convergence.

121 Art 3, para 1, lit n, Regulation (EC) No 1211/2009.

122 Art 3, para 3, Regulation (EC) No 1211/2009.

123 Corresponding to 27 EU Member States, four EFTA members and three candidate countries to the EU.

THE EU REGULATORY FRAMEWORK

Introduction

1.20 With its 2002 Regulatory Package, the European legislator pursued four main regulatory objectives, namely: simplifying and consolidating the current legislation;[124] adapting the regulatory framework to deal with convergence,[125] providing for more flexible regulation[126] and implementing a more harmonised application of the regulatory framework throughout the Community.[127]

In its 2006/2007 review of the 2002 Regulatory Package, the Commission found that these goals had not been fully met and identified shortcomings of the existing system[128] which were addressed in the 2009 Regulatory package consisting of two Directives amending the Directives of the 2002 Regulatory Package and one Regulation establishing the BEREC.[129]

Regulatory Objectives

1.21 The 2009 Regulatory Package introduced changes in the key areas 'better regulation for competitive electronic communications', 'the single market for electronic communications' and 'connecting with citizens'.[130] These changes sought to:

- further secure the independence of the NRAs;[131]
- further the consistency of regulation through establishing the BEREC[132] and provide for a right of the Commission to issue Recommendations with respect to remedies notified by NRAs in the course of market regulation[133] and Decisions where regulatory inconsistencies persist long-term across the EU;[134]
- introduce functional separation as a 'last-resort' remedy;[135]
- introduce measures to accelerate broadband roll-out, particularly in rural areas,[136] and to promote competition and investment in next generation access networks ('NGAs');[137]
- protect consumer and user interests by granting consumers the right to change their communications provider in one working day while keeping their

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124 Communications Review, COM(1999) 539 final, 10 November 1999, p 19; for further details on convergence, see para 1.7 above

125 Recital 5 of the Framework Directive.

126 See Recitals 25 and 27 of the' Framework Directive; see also Communications Review, COM(1999) 539, final, 10 November 1999, pp 7, 14, 57–59.

127 See Art 1(1) and (2) of the Framework Directive, and Recital 16 of theFramework Directive.

128 For details on the identified shortcomings of the 2002 Regulatory Package, see para 1.6 above.

129 See para 1.6 above.

130 See COM(2007) 696 final, 13 November 2007.

131 Arts 3(3), 3a of the Framework Directive, see also Recital 13 of the Better Regulation Directive.

132 Regulation EC/1211/2009 (BEREC Regulation).

133 Art 7a of the Framework Directive.

134 Art 19(1) of the Framework Directive.

135 Art 13a of the Framework Directive.

136 See in particular Arts 8(5)(d) and 12 of the Framework Directive and Art 12(2)(c) of the Access Directive.

137 See in particular Arts 13(1) of the Access Directive and Recital 57 of the Better Regulation Directive.

number[138] and by expanding the information to be provided in consumer contracts;[139]
- introduce an 'Internet freedom provision' to secure the EU citizens' right to Internet access;[140]
- secure 'Internet neutrality';[141]
- enhance the protection of the EU citizen's privacy and strengthening the existing data protection rules;[142] and
- improve access to emergency services.[143]

1.22 The 2009 Regulatory Package has still not fully achieved the objective of simplifying and consolidating the European regulatory framework: the Framework Directive and the specific Directives continue to be characterised by a multitude of cross-references and contain numerous provisions allowing for the adoption of guidelines, Recommendations and Decisions,[144] which have developed into a 'regulatory jungle' comparable to the previous regulatory framework.

In addition, the Member States still retain competency in certain areas such as numbering regulations.

Furthermore, the transposition of the regulatory framework into the national laws of the Member States is not fully coherent. In particular, the treatment of electronic communications services for business customers vary to a large extent across the EU. Depending on the national transposition of the 2009 Regulatory Package's measures to protect user interests, the difficulties faced by providers of business services may become even more pronounced. It is therefore doubtful that the measures implemented by the 2009 Regulatory Package will lessen the obstacles for pan-European (business) services caused by the highly complex regulatory framework which is inconsistently implemented at the Member State level.

1.23 The 2009 Regulatory Package has maintained the formalised procedure of market definition and analysis as the basis for the NRAs' decision on which remedies foreseen by the Access Directive and the Universal Service Directive are imposed on an undertaking found to have significant market power ('SMP'). The NRAs have broad discretion in the selection of these regulatory remedies.[145] This broad discretion has resulted in the inconsistent application of remedies by the NRAs which, in turn, has hindered the establishment of the single market for electronic communications.[146] The 2009 Regulatory Package seeks to secure a more consistent regulation at the Member State level through the establishment of BEREC[147] and by enabling the Commission to issue recommendations with regard to remedies notified by NRAs in the course of market regulation.[148]

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138 Art 30(4) of the Universal Services Directive.
139 Art 20 of the Universal Services Directive.
140 Art 1(3a) of the Framework Directive.
141 Art 8(4)(g) of the Framework Directive, and Arts 21 and 22(3) of the Universal Services Directive.
142 See, e g Arts 4(3) and 5(3) of the e-Privacy Directive.
143 Art 26 of the Universal Services Directive.
144 See para 1.14 above.
145 See Art 8(2) of the Access Directive and the discretionary powers of the NRAs under Arts 9–13 of the Access Directive.
146 SEC(2006) 816, 28 June 2006, p 18; COM(2007) 696 final, 13 November 2007, p 8 et seq.
147 See para 1.18 above.
148 See para 1.58 below.

The EU Regulatory Framework: Overview

1.24 The Framework Directive[149] defines the scope of applicability of the EU Regulatory Framework and its most important legal terms. It requires the Member States to guarantee the independence of the NRAs and the effective structural separation of their regulatory functions from activities associated with ownership or control of undertakings providing electronic communications networks or services (Article 3(2) of the Framework Directive) and to ensure that NRAs exercise their powers impartially, transparently and in a timely manner and have sufficient financial and human resources to perform the responsibilities conferred to them (Article 3(3) of the Framework Directive). It further establishes policy objectives and regulatory principles for the NRAs' regulatory tasks (Article 8 of the Framework Directive) and provides for a consolidation procedure under which the NRAs must 'contribute to the development of the internal market by cooperating with each other and the Commission in a transparent manner to ensure the consistent application, in all Member States', of the Regulatory Framework (Article 7(2) of the Framework Directive) and a procedure for the consistent application of remedies which provides for extensive cooperation by BEREC, the NRAs and the Commission (Article 7a of the Framework Directive). Furthermore, the Framework Directive establishes rules on the management of scarce resources, eg radio frequencies, numbering, naming and addressing (Articles 9, 9a, 9b and 10 of the Framework Directive). The Directive also establishes an obligation on the Member States to cooperate with each other and the Commission in the strategic planning, coordination and harmonisation of radio spectrum use in the EU (Article 8a of the Framework Directive) and provides for the granting of rights of way (Article 11 of the Framework Directive), co-location and facility sharing (Article 12 of the Framework Directive).

With respect to the activities of undertakings providing public communications networks or publicly available electronic communications services which have special or exclusive rights for the provision of services in other sectors in the same or another Member State, the Directive requires Member States to ensure accounting separation and 'structural separation' for the activities associated with the provision of electronic communications networks and services (Article 13 of the Framework Directive).

The 2009 Regulatory Package also introduced new provisions aimed at securing network and services security and integrity including an obligation of undertakings to inform their NRA of breaches of network security or integrity which have had a significant impact on the integrity on the operation of networks or services (Articles 13a and 13b of the Framework Directive). At the core of the Framework Directive are rules regarding the determination of significant market power (Article 14 of the Framework Directive) on the basis of a market definition procedure (Article 15 of the Framework Directive) and a market analysis procedure (Article 16 of the Framework Directive) to be initiated and conducted by the respective NRA in accordance with Community law.

1.25 The Authorisation Directive[150] seeks to simplify and harmonize the authorisation rules and conditions for all electronic communications networks and services (Article 1(1) of the Authorisation Directive). The provision of electronic communications networks or services may, in principle, only be subject to a general

149 Further details below, para 1.32 et seq.

150 Further details below, para 1.90 et seq. See also Nihoul and Rodford, *EU Electronic Communications Law* (Oxford University Press, 2011), Chap 2.

authorisation (Article 3(2) of the Authorisation Directive). Individual rights of use may only be granted where necessary for the use of radio frequencies or numbers (Article 5(1) of the Authorisation Directive). As a rule, individual rights for the use of frequencies and numbers are to be granted only on the basis of open, objective, transparent, non-discriminatory and proportionate procedures (Article 5(2) of the Authorisation Directive). The Authorisation Directive establishes the rights and obligations of the addressees of the general authorisations, of the users of radio frequencies and numbers (Articles 4 and 6 of the Authorisation Directive) and establishes far-reaching rights of the Member States to impose 'administrative charges' on undertakings providing a service or a network under the general authorisation or exercising a right of use (Article 12 of the Authorisation Directive).

1.26 The Access Directive[151] harmonises the way in which Member States regulate, at the wholesale level, access to, and interconnection of electronic communications networks and associated facilities (Article 1(1) of the Access Directive). The Directive creates a framework for the relationships between suppliers of networks and services, based on the principle of priority of commercial negotiations, while allowing for regulatory intervention by the NRAs at their own initiative or, in the absence of agreement between undertakings, at the request of either of the parties involved (Article 5 of the Access Directive). The Directive establishes far-reaching regulatory powers of the NRAs with respect to undertakings designated as having SMP (Article 8 of the Access Directive). If an NRA finds that an undertaking has SMP on an electronic communications market, it must impose at least one remedy to counter the lack of effective competition found on that market (Article 8(2) of the Access Directive). These remedies include obligations relating to transparency (Article 9 of the Access Directive), non-discrimination (Article 10 of the Access Directive), accounting separation (Article 11 of the Access Directive), obligations of access to, and use of specific network facilities (Article 12 of the Access Directive), price control and cost accounting obligations including cost orientation of prices (Article 13 of the Access Directive).

The 2009 Regulatory Package has introduced 'functional separation' as an exceptional measure that the NRAs can impose on vertically integrated undertakings following authorisation by the Commission of such measure (Article 13a of the Access Directive). The Access Directive further establishes a number of regulatory powers, to be exercised regardless of the existence of significant market power, with a view to ensure adequate access and interconnection and interoperability of services 'in a way that promotes efficiency, sustainable competition, and gives the maximum benefit to end-users' (Article 5 of the Access Directive).

1.27 Whereas the Access Directive establishes a framework for the regulation of wholesale markets, the Universal Service Directive governs the provision of electronic communications networks and services to end users (Article 1(1) of the Universal Service Directive).[152] The Directive aims at ensuring the availability throughout the Community of good quality services publicly available through effective competition and deals with circumstances in which the needs of end users are not satisfactorily met by the markets. To this end, the Directive establishes a minimum set of services of a specified quality to which all end users must have

151 Further details below, para 1.130 et seq. See also Nihoul and Rodford, *EU Electronic Communications Law* (Oxford University Press, 2011), Chap 3.

152 Further details below, para 1.172 et seq. See also Nihoul and Rodford, *EU Electronic Communications Law* (Oxford University Press, 2011), Chap 4

access at an affordable price in the light of specific national conditions (Articles 4 to 7, and 9 of the Universal Service Directive). The Universal Service Directive allows Member States to designate one or more undertakings to guarantee the provision of these universal services (Article 8 of the Universal Service Directive) and to establish mechanisms for the financing of universal service obligations (Article 13 of the Universal Service Directive). In addition, the Universal Service Directive establishes rules for the regulation of services provided by undertakings designated as having SMP to end users, including the regulation of retail tariffs (Article 17 of the Universal Service Directive), sector-specific consumer protection rules (Article 20 et seq of the Universal Service Directive), which were significantly extended by the 2009 Regulatory Package in particular with respect to information and transparency duties (Articles 20 and 21 of the Universal Service Directive), and obligations towards disabled end users (Article 23a of the Universal Service Directive). The Universal Service Directive further includes provisions regarding European emergency call numbers and telephone access codes (Article 26 et seq of the Universal Service Directive), dispute resolution (Article 34 of the Universal Service Directive), and provisions facilitating changes of the provider of electronic communications services including number portability (Article 30 of the Universal Service Directive) which the 2009 Regulatory Package significantly amended to the benefit of the end users.

1.28 The Directive concerning the processing of personal data and the protection of privacy in the electronic communications sector (the Privacy Directive)[153] harmonises the national provisions required to ensure an adequate level of protection of fundamental rights and freedoms, in particular the right to privacy and confidentiality with respect to the processing of personal data in the electronic communications sector (Article 1(1) of the Privacy Directive). The Privacy Directive contains provisions regarding the processing of personal data (Article 4 of the Privacy Directive) including a requirement for providers to inform their subscribers of personal data breaches (Article 4(3) of the Privacy Directive) which was introduced by the 2009 Regulatory Package, and provisions on the confidentiality of communications (Article 5 of the Privacy Directive), the processing of traffic data (Article 6 of the Privacy Directive), the protection of location data (Article 9 of the Privacy Directive), and the protection from unsolicited communications (Article 13 of the Privacy Directive). Furthermore, the Privacy Directive provides for a right of end users to receive non-itemised bills (Article 7 of the Privacy Directive), to stop automatic call forwarding (Article 11 of the Privacy Directive), and to refuse inclusion of their data in public directories (Article 12 of the Privacy Directive).

1.29 The Directive on Competition in the Markets for Electronic Communications Services[154] has simplified and consolidated the provisions of the former liberalisation Directives[155] in one single piece of legislation. Apart from the

153 See Chapter 3, 'Data Protection and Privacy'.

154 Directive 2002/77/EC [2002] OJ L249/21.

155 Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services [1990] OJ L192/10, as amended by Commission Directive 94/46/EC of 13 October 1994 amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications [1994] OJ L268/15; Commission Directive 95/51/EC of 18 October 1995 amending Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalised telecommunications services [1995] OJ L256/49; Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications

clarification of certain provisions and terminological adjustments (eg 'telecommunications services', 'telecommunications networks') to the terms used in the other Directives of the EU Regulatory Framework, the main provisions remain unaltered.

1.30 The Regulation on roaming on public mobile communications networks within the Community ('Roaming Regulation')[156] aims at ensuring that users of public mobile communications networks do not pay excessive prices for regulated roaming calls,[157] regulated roaming SMS messages,[158] and regulated data roaming services[159] when travelling in the EU (Article 1(1), sub-para 1 of the Roaming Regulation). The Roaming Regulation imposes maximum prices for regulated roaming services both on the wholesale level (Articles 7 and 9 of the Roaming Regulation), and the retail level (the 'euro tariff', Articles 8 and 10 of the Roaming Regulation). Furthermore, the Roaming Regulation imposes transparency and safeguard mechanisms for regulated data roaming services including an obligation to provide information on charges incurred and a monthly 'default financial limit' to the charges due for regulated data roaming services (Article 15 of the Roaming Regulation). Transparency requirements also apply with respect to the retail charges for regulated SMS services (Article 14 of the Roaming Regulation).

In addition to these obligations which were already included in the previous version of the Roaming Regulation,[160] the current Roaming Regulation most notably includes an obligation on mobile network operators to offer access to roaming services at the wholesale level (Article 3(1) of the Roaming Regulation), both in the

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[1996] OJ L20/59; Commission Directive 96/19/EC of 28 February 1996 amending Directive 90/388/EEC regarding the implementation of full competition in telecommunications markets [1996] OJ L74/13; Commission Directive 1999/64/EC of 23 June 1999 amending Directive 90/388/EEC in order to ensure that telecommunications networks and cable TV networks owned by a single operator are separate legal entities [1999] OJ L175/39.

156 Regulation (EU) No 513/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union (recast) [2012] OJ L172/10. The ECJ has confirmed the validity of the previous version of the Roaming Regulation in its judgment of 8 June 2010, *Vodafone and Others* (C-58/08) [2010] ECR I-4999. For a critical view see Brennecke, 'The EU Roaming Regulation and its non-compliance with Article 95 EC', Beiträge zum Transnationalen Wirtschaftsrecht, October 2008, pp 45 et seq.

157 A regulated roaming call is 'a mobile voice telephony call made by a roaming customer, originating on a visited network and terminating on a public communications network within the Union or received by a roaming customer, originating on a public communications network within the Union and terminating on a visited network' (Art 2, lit h of the Roaming Regulation).

158 A regulated roaming SMS message is 'an SMS message sent by a roaming customer, originating on a visited network and terminating on a public communications network within the Union or received by a roaming customer, originating on a public communications network within the Union and terminating on a visited network' (Art 2, lit k of the Roaming Regulation).

159 A regulated data roaming service is 'a roaming service enabling the use of packet switched data communications by a roaming customer by means of his mobile device while it is connected to a visited network. A regulated data roaming service does not include the transmission or receipt of regulated roaming calls or SMS messages, but does include the transmission and receipt of MMS messages' (Art 2, lit m of the Roaming Regulation).

160 Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile communications networks within the Community ('Roaming Regulation') [2007] OJ L171/ 32, amended by Regulation (EC) No 544/2009 [2009] OJ L167/12.

form of direct wholesale roaming access[161] and wholesale roaming resale access.[162] The mobile network operators are required to publish a reference offer (Article 3(5) of the Roaming Regulation) in accordance with the guidelines on wholesale roaming access prepared by BEREC (Article 3(8) of the Roaming Regulation).[163] Requests for wholesale roaming access can only be refused 'on the basis of objective criteria'[164] (Article 3(2) of the Roaming Regulation).

1.31 The Radio Spectrum Decision[165] establishes a procedure which allows the EU to pursue, largely independently of, but in co-ordination with, the European Conference of Postal and Telecommunications Administrations ('CEPT'), a Community radio spectrum policy. The Decision establishes a consultative body, the Radio Spectrum Committee, which assists the Commission in coordinating policy approaches and, where appropriate, developing harmonised conditions regarding the availability and efficient use of the radio spectrum (Article 1 of the Radio Spectrum Decision).

Regulatory Principles: the Framework Directive

Scope of regulation

1.32 The European legislator has reacted to the technical convergence of mobile and satellite communications with the fixed network, cable television and telecommunications networks and power lines, and communications services on the basis of the Internet protocol by creating a single legal framework for all transmission networks and electronic communication services provided over those networks.[166] To achieve this, the scope of applicability of the traditional European telecommunications law has been expanded by replacing the terms 'public telecommunications network' and 'telecommunications services'[167] with the new, broader terms 'electronic communications network' and 'electronic communications service', and including the – albeit not fully mandatory – requirement of a technology neutral regulation as a regulatory principle of the EU Regulatory Framework (Article 8(1) of the Framework Directive). The 2009 Regulatory Package has confirmed and broadened this approach by requiring radio spectrum management that is both technology neutral (Article 9(3) of the Framework Directive) and service neutral (Article 9(4) of the Framework Directive).[168]

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161 Direct wholesale roaming access is 'making available of facilities and/or services by a mobile network operator to another undertaking, under defined conditions, for the purpose of that other undertaking providing regulated roaming services to roaming customers' (Art 2, lit p of the Roaming Regulation).

162 Wholesale Roaming Resale Access is 'the provision of roaming services on a wholesale basis by a mobile network operator different from the visited network operator to another undertaking for the purpose of that other undertaking providing regulated roaming services to roaming customers' (Art 2, lit q of the Roaming Regulation).

163 BEREC Guidelines on the application of Article 3 of the Roaming Regulation – Wholesale Roaming Access (BoR(12)105) (27 September 2012), p 3.

164 For further details see BEREC Guidelines on the application of Article 3 of the Roaming Regulation – Wholesale Roaming Access (BoR(12)105) (27 September 2012), p 2.

165 Further details below, para 1.103 et seq.

166 See para 1.7 above.

167 See statutory definitions in Art 1(1) of the Services Directive and in Art 2(3) and (4) of the ONP Framework Directive 1990.

168 See para 1.101 below.

1.33 The term 'electronic communications network', as defined in Article 2(a) of the Framework Directive, means:

> 'transmission systems and, where applicable, switching or routing equipment and other resources including network elements which are not active which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means'.

The reference to 'network elements which are not active' has been included to meet the 2009 Regulatory Package's objective that 'certain definitions should be clarified or changed to take account of market and technological developments and to eliminate ambiguities identified in implementing the regulatory framework'.[169]

By way of example, the Directive mentions satellite networks, fixed (circuit- and packet- switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals,[170] networks used for radio and television broadcasting, and cable television networks, regardless of the type of information conveyed. This non-inclusive enumeration leaves room for technological developments, such as Voice over Internet Protocol ('VoIP') services[171] which have started to gradually replace 'traditional' voice telephony services over the Public Switched Telephony Network ('PSTN') in the recent past.[172]

1.34 'Electronic communications service' is defined in Article 2(c) of the Framework Directive as:

> 'a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks'.

This definition clarifies that electronic communication services comprise, but are not limited to, telecommunications services and transmission services and networks used for broadcasting, but that they exclude services 'providing, or exercising

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169 Better Regulation Directive, Recital 12.

170 Cf Commission Recommendation 2005/292/EC on broadband communication through power lines [2005] OJ L93/42..

171 VoIP is a generic term for the conveyance of voice, fax and related services partially or wholly over packet-switched IP-based networks, cf European Regulators Group, 'ERG Common Position on VoIP' (ERG (07) 56rev2) (December 2007), at 1. The ERG Common Position included a comprehensive analysis of ex-ante regulation applied to VoIP services and set out recommended approaches on 15 separate points including access to emergency services, numbering and number portability, and the regulatory qualification of different VoIP services in order to further a harmonised regulatory treatment of VoIP services in the EU. VoIP is a catch-all term for a variety of services which range from mere PC-to-PC communication over the public Internet to full replacements of traditional PSTN-telephony which allow for the receiving of calls using local or nomadic telephone numbers and affording the subscribers the ability to place calls to any national or international number by way of a PSTN-breakout. For a categorisation of various classes of VoIP offerings and a description of their treatment under the Member States' regulatory frameworks for electronic communications, see also Elximann and Wernick, 'The Regulation of Voice over IP (VoIP) in Europe' (2008), a study prepared on behalf of the EU Commission. In 2009 the ERG issued the ERG, VoIP-Action Plan to achieve conformity with ERG Common Position, ERG (09) 19 which provides a comprehensive overview on the measures taken by the NRAs to meet the common positions set forth in ERG's 2007 common position on VoIP.

172 ERG, Common Position on VoIP (ERG (07) 56rev2,) (December 2007), p 4.

editorial control over, content transmitted using electronic communications networks and services' as well as 'information society services',[173] which do not consist wholly or mainly in the conveyance of signals on electronic communications networks.

Ultimately, none of these boundary lines allow for a clear-cut separation of the scope of applicability of the various legislative measures. Rather, in the regulatory practice, NRAs are constantly required to decide whether or not a given service is an 'electronic communications service' or a 'content'-related service, particularly with respect to services which include features of both content and transmission services, such as, for example, complex VoIP services, cloud computing services, and unified communications services.

Furthermore, there are undoubtedly legal interfaces between 'transmission infrastructures' and 'content' if and when regulatory decisions regarding the transmission infrastructure have a direct or indirect effect on 'content'. The 'regulation of transmission infrastructures' and the 'regulation of content' are explicitly intertwined in Article 8(1), para 3 of the Framework Directive which allows the NRAs to 'contribute within their competencies to ensuring the implementation of policies aimed at the promotion of cultural and linguistic diversity, as well as media pluralism'.[174] It may become necessary to further refine the existing definition of 'electronic communications services' in order to secure a consistent treatment of complex services that include features of both electronic communications and content services, and where it is difficult, if not impossible, to determine whether such services consist 'wholly or mainly' in the transmission of signals.

1.35 The scope of applicability of the directives and, in turn, the regulatory powers of the NRAs (see Article 8(2) of the Access Directive) is expanded by the inclusion of 'associated facilities' and 'associated services'. Associated facilities are:

> 'associated services, physical infrastructures and other facilities or elements associated with an electronic communications network and/or an electronic communications service which enable and/or support the provision of services via that network and/or service or have the potential to do so' and include, inter alia, buildings or entries to buildings, antennae, ducts, wires and towers' (Article 2(e) of the Framework Directive).

Associated services are 'those services associated with an electronic communications network and/or an electronic communications service which enable and/or support the provision of services via that network and/or service or have the potential to do so' and include, among other things, conditional access systems, electronic programme guides as well as identity, location and presence services' (Article 2(ea) of the Framework Directive).

'Internet freedom'

1.36 The 2009 Regulatory Framework introduced, in Article 1(3a) of the Framework Directive, a provision adopting limitations to 'measures taken by Member

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173 See statutory definition in Art 1 of Directive 98/34/EC as amended by Directive 98/48/EC of the European Parliament and the Council of 20 July 1998 [1998] OJ L217/18: 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'.

174 Other content-related provisions can be found in Art 5(1), sub-para 2(b) of the Access Directive and Art 31 of the Universal Service Directive.

States regarding end-users' access to, or use of, services and applications through electronic communications networks' (the 'Internet Freedom Provision'). Such measures must respect the fundamental rights and freedoms of natural persons guaranteed by the European Convention for the Protection of Human Rights[175] and the Fundamental Freedoms and general principles of Community law.[176] Furthermore, the Internet Freedom Provision contains procedures which Member States must follow when taking such measures.

1.37 To fully understand the Internet Freedom Provision's purpose and meaning, one must consider its legislative history.

Prior to passage of this provision, there was an understanding that the prosecution of non-commercial infringement of intellectual property rights, in particular by means of criminal law, was within the jurisdiction and responsibility of the Member States; while there were EU legislative acts on the enforcement of intellectual property rights for cases of commercial infringements,[177] the fundamental allocation of the responsibility for the prosecution of non-commercial IP rights infringements had not been challenged.[178] This national legislation was criticised for enabling the executive to restrict users' Internet access without judicial review and for putting the burden of proof on the subscriber.[179]

In particular, the French government had initiated a national legislative initiative to combat online infringements of copyright, allowing the French administration, inter alia, to restrict French citizens accused of online copyright infringements from accessing the Internet.[180] In short, the French opposition made use of the reform process debated in the European Parliament to counteract, at the EU level, the French legislation by promoting the inclusion of the Internet Freedom Provision in the 2009 Regulatory Package.[181] The protracted negotiations on the Internet Freedom Provision delayed the adoption of the 2009 Regulatory Package significantly. The inclusion of the Internet Freedom Provision in the EU Regulatory

175 These include Arts 6 (Right to a fair trial) and 10 (Freedom of expression) of the European Convention on Human Rights (ECHR).

176 These include Arts 11 (Freedom of expression and information), 47 (Right to an effective remedy and to a fair trial) and 48 (Presumption of innocence and right of defence) of the Charter of Fundamental Rights of the European Union.

177 Directive 2004/48 of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L195/16.

178 F Rizzuto, 'European Union Telecommunications Law Reform and Combatting Online Non-Commercial Infringements of Copyright: Seeing Through the Legal Fog' [2011] 17(3) CTLR 75.

179 This, among other things, is why the French Constitutional court found the (first) HADOPI law to be partly unconstitutional. (HADOPI refers to Haute autorité pour la diffusion des oeuvres et la protection des droits sur Internet.) It was held that nowadays, Art 11 (freedom of speech) of the French Declaration of the Rights of Man and the Citizen of 1789 also implies the freedom to access online services. Conseil constitutionnel [CC], Decision no 2009–580 DC, 22 June 2009, *Journal Officiel de la Republique Francaise* [JO – Official Gazette of France] 13 June 2009, 9675, para 12. The decision is available in English at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/2009_580dc.pdf (accessed 3 December 2012). For a detailed analysis see Lucchi 'Access to Network Services and Protection of Constitutional Rights: Recognizing the Essential Role of Internet Access for the Freedom of Expression' (2011) 19 Cardozo J Int'l & Comp L 645.

180 Known as the HADOPI law, implementing the so called 'Three-Strikes-Out'-approach; see E Bonadio, 'File sharing, copyright and freedom of speech' [2011] 33 EIPR 619.

181 Rizzuto, 'European Union Telecommunications Law Reform and Combatting Online Non-Commercial Infringements of Copyright: Seeing Through the Legal Fog' [2011] 17(3) CTLR 75.

Framework also raised significant concerns with respect to a possible lack of the EU's power to regulate this issue.[182]

1.38 The Internet Freedom Provision (Article 1(3a) of the Framework Directive) in its final form contains two key elements.

The first key element is the creation of a right to access the Internet, which derives mainly from the fundamental right of freedom of expression and information.[183] While it remains unclear whether the Internet Freedom Provision implies that Internet access would constitute a new autonomous fundamental right,[184] the provision, in any case, regards Internet access as a prerequisite for exercising the fundamental rights of free speech, free reception and impartation of information[185] and provides that taking into account this relevance, such access may not be freely restricted on the national level.[186]

The second key element of the 'Internet Freedom' provision therefore consists of detailed procedural guidelines for the national prosecution of non-commercial online copyright infringement: measures restricting end-users' access to or use of 'services and applications through electronic communications networks' have to be 'appropriate, proportionate and necessary', and national prosecution procedures must follow specific standards of due process, which include 'due respect for the principle of the presumption of innocence and the right to privacy', a right to be heard as well as a right to effective and timely judicial review. These provisions must be seen in the context of the above mentioned French HADOPI law, as this law, inter alia, contained a significant shift of the burden of proof, requiring the Internet subscribers accused of copyright infringement to prove that they had properly secured their Internet access, or that a third party was in fact responsible for the alleged infringement.[187]

The question that remains, however, is how will national legislators transpose the 'Internet Freedom' provision, including its procedural requirements, and whether substantive amendments to existing national laws will become inevitable. Furthermore, there seems to be room for clarification by way of ECJ rulings with respect to the full scope of the procedural rules as well as the possible lack of EU powers to regulate 'Internet Freedom' issues.

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182 Report of the EP delegation to the Conciliation Committee (A7–0070/2009) (16 November 2009) p 7; for an in-depth analysis of the Internet Freedom Provision and its genesis see Rizzuto, 'European Union Telecommunications Law Reform and Combatting Online Non-Commercial Infringements of Copyright: Seeing Through the Legal Fog' [2011] 17(3) CTLR 75.

183 Articles 10 (Freedom of expression) ECHR and 11 (Freedom of expression and information) of the Charter of Fundamental Rights of the European Union (CFREU).

184 See D Dods, P Brisby et al, 'Reform of European electronic communications law: a special briefing on the radical changes of 2009', [2010] 16(4) CTLR 102.

185 See, on the importance of 'Internet Freedom' to the exercising of fundamental rights, Commissioner N Kroes, 'Internet Freedom' (SPEECH/12/326) (4 May 2009).

186 The Commission stated that the amendment is an important restatement of key legal principles inherent in the legal order of the European Union, especially of citizens' fundamental rights, MEMO/08/681, 7 November 2008.

187 See E Bonadio, 'File sharing, copyright and freedom of speech' [2011] 33 EIPR 619.

National regulatory authorities: organisation, regulatory objectives, competencies and procedural rules

1.39 Some Member States still retain (partial) ownership or control of undertakings providing electronic communications networks or services. In order to secure the independence of their national regulatory authorities, the Member States must ensure that their NRAs 'are legally distinct from and functionally independent of all organisations providing electronic communications networks, equipment or services' (Article 3(2) of the Framework Directive) and there is in place effective structural separation of the regulatory function from activities associated with ownership and control. The Member States also must ensure that NRAs exercise their powers 'impartially and transparently' and that they have sufficient financial and human resources to perform the tasks assigned to them (Article 3(3) of the Framework Directive). The requirement for independence of the NRAs has been further specified by the 2009 Regulatory Package: when performing their tasks under the national rules transposing the EU Regulatory Framework, the NRAs must act independently and may not seek or take instructions from any other body. These requirements are, however, not intended to prevent 'supervision in accordance with national constitutional law' (Article 3(3a) of the Framework Directive). The possibility to provide for supervision of the NRA's actions where this is required by the Member States' constitutions has been included in the course of the review process in order to avoid conflicts between the constitutional demands for control of executive bodies through democratically legitimised bodies[188] and the demands of the EU Regulatory Framework in respect of the NRA's independence.[189] To further secure the independence of the NRAs, only appeal bodies established in accordance with Article 4 of the Framework Directive[190] may suspend or overturn the NRAs' decisions (Article 3(3a) of the Framework Directive).

1.40 Article 8 of the Framework Directive requires the Member States to ensure that the NRAs pursue certain policy objectives and abide by the regulatory principles established by Community law. The NRAs must take all 'reasonable' measures which are aimed at achieving a number of regulatory objectives which are set out in three categories: promotion of competition, development of the internal market, and promotion of the interests of the citizens of the European Union. Each of these overarching, primary regulatory objectives is specified by a broad variety of non-exhaustive secondary objectives. In taking regulatory measures, the NRAs must adhere to the principle of proportionality (Article 8(1), para 1 of the Framework Directive).

Article 8 of the Framework Directive sets forth three primary policy objectives:

- to promote competition and the provision of electronic communications networks and services;

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188 Such conflicts might, for example, have arisen under German constitutional law, which requires effective supervision of the executive bodies' actions by a ministry that is accountable to Parliament.

189 See also ECJ judgment of 9 March 2010, *Commission v Germany* (C-518/07) [2010] ECR I-01885, holding that Germany had failed to ensure 'complete independence', ie 'independence of any external influence' of the data protection supervision authorities by providing for administrative surveillance; however, the Framework Directive explicitly provides for a supervision of the NRAs where required by the Member State's constitution.

190 See paras 1.50 and 1.51 below.

- to contribute to the development of the internal market; and
- to promote the interests of EU citizens.

1.41 The primary policy objective to promote competition and the provision of electronic communications networks and services means, among other things, that the national regulatory authorities must:

- ensure that all users 'derive maximum benefit in terms of choice, price and quality';
- ensure that 'there is no distortion or restriction of competition in the electronic communications sector, including the transmission of content'; and
- encourage 'efficient use' and ensure 'the effective management of radio frequencies and numbering resources' (Article 8(2) of the Framework Directive).

The ECJ has interpreted Article 8 of the Framework Directive to include a duty for Member States to ensure that the NRAs:

> 'take all reasonable measures aimed at promoting competition in the provision of electronic communication services, ensuring that there is no distortion or restriction of competition in the electronic communications sector and removing obstacles to the provision of those services on the European level'.[191]

1.42 The primary policy objective to contribute to the development of the internal market, means, among other things, that the NRAs must:

- remove 'remaining obstacles to the provision of electronic communications networks, associated facilities and services and electronic communications services at the EU level';
- encourage 'the establishment and development of trans-European networks and the inter-operability of trans-European services, and end-to-end connectivity'; and
- cooperate with each other, with the Commission and with BEREC to ensure 'the development of a consistent regulatory practice' and the consistent application of the EU Regulatory Framework (Article 8(3) of the Framework Directive).

1.43 The primary policy objective to promote the interests of the EU citizens means, among other things, that the NRAs must:

- ensure that all EU citizens have access to the Universal Service;
- ensure a high level of consumer protection;
- contribute to ensure a 'high level of protection of personal data and privacy';
- promote the provision of 'clear information' to users;
- address the 'needs of specific social groups, in particular disabled users, elderly users and users with specific social needs';
- ensure public network integrity and security; and
- promote 'the ability of end-users to access and distribute information or run applications and services of their choice' (Article 8(4) of the Framework Directive).[192]

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191 ECJ judgment of 12 November 2009 *Telia Sonera Finland Oyi* (C-192/08) [2009] ECR I-10717, at [49–62].

192 This refers to 'net neutrality': see para 1.198 et seq below.

1.44 The 2009 Regulatory Package has further specified that in pursuit of these primary policy objectives the NRAs are to apply 'objective, transparent, non-discriminatory and proportionate regulatory principles'. This means that the NRA must among other things:

- promote the predictability of regulation through a consistent regulatory approach;
- ensure the non-discriminatory treatment of undertakings providing electronic communications networks and services;
- safeguard competition and promote infrastructure-based competition, where appropriate;
- promote 'efficient investment and innovation in new and enhanced infrastructures' and, in this context, ensure that ex-ante obligations take sufficient account of investment risks and permit cooperative arrangements to diversify the risks of investment while securing competition and preserving the principle of non-discrimination;
- take account of geographic varieties relating to competition and consumers within a Member State; and
- impose 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'.

1.45 The colourful patchwork of the three primary policy objectives is complemented by the regulatory objectives established in the Specific Directives.[193] When balancing the various regulatory objectives, the NRAs will need to consider their relative importance, which is expressed, to a certain extent, by subtle differences in wording ('ensure', 'encourage', 'promote', 'contribute', 'address').

An additional, albeit not mandatory, requirement for the NRAs' regulatory decisions is that they should be technologically neutral: Member States are obliged to ensure that NRAs 'take the utmost account of the desirability of making regulations technologically neutral'.

The obligation of NRAs to contribute to the achievement of content-related regulatory objectives is even weaker, which is hardly surprising given the 'content neutrality' of the 2002 Regulatory Package.[194] However, the access to such content by means of electronic communications has been safeguarded through the introduction of an Internet Freedom Provision in Art 1(3a) of the Framework Directive.[195]

1.46 Article 5(1) of the Framework Directive requires the Member States to ensure that NRAs are able to request, from undertakings providing electronic communications networks and services, all the information, including financial information, that is necessary to ensure conformity with the provisions of the Framework Directive and the Specific Directives. The 2009 Regulatory Package has amended this obligation to include 'information concerning future network or service developments that could have an impact on the wholesale services that [network and service providers] make available to competitors' while undertakings with SMP on wholesale markets may be asked to provide accounting data on the retail markets that are associated with the wholesale markets they have SMP on. The information must be provided 'promptly on request and to the time scales and level of detail required by the national regulatory authority'. The information

193 Article 1(1) and (2) of the Access Directive, Art 1(1) and (2) of the Universal Service Directive, Art 1(1) of the Authorisation Directive.

194 See Art 1(3) of the Framework Directive.

195 See para 1.36 et seq above.

request needs to comply with the principle of proportionality and the NRA must provide the reasons justifying the request for information.

1.47 The Framework Directive establishes a number of procedural rules which pertain, in part, to the regulatory procedures of the NRAs and, in part, to the cooperation between NRAs and Commission. These procedural rules include:

- obligations to publish information;[196]
- obligations to conduct public hearings or consultations;[197] and
- obligations to cooperate.[198]

1.48 Regarding the obligations to conduct public hearings or consultations, the consultation procedure under Article 6 of the Framework Directive is of particular importance. This article requires that Member States ensure that a consultation procedure is conducted where NRAs intend to take measures in accordance with the Framework Directive or the Specific Directives or where they intend to impose restrictions to the use of radio frequencies for electronic communication services according to Article 9(3) and (4) of the Framework Directive 'which have a significant impact on the relevant market'.[199] The Directive does not specify how 'a significant impact on the relevant market' is to be assessed. The Directive also fails to provide detailed guidance for conducting the consultation procedure: the NRAs must 'give interested parties the opportunity to comment on the draft measure within a reasonable period'. This leaves open the question as to who is to be included among the 'interested parties'.[200] It would seem, from the wording of other provisions of secondary Community law, that 'interested parties' are 'third parties whose interests may be affected'; this means that the consultation procedure is not open to any party, but only to parties who can show a sufficient interest in the decision at hand.[201]

More generally, Article 3(4) of the Framework Directive requires the Member States to ensure 'consultation and cooperation' between the NRAs of the various Member States and between the NRAs and national authorities entrusted with the implementation of competition law and consumer law 'on matters of common interest'. This general cooperation obligation is further specified in Article 3(5) of

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196 Article 5(4) of the Framework Directive: obligation to publish such information as would contribute to an open and competitive market; Art 10(3) of the Framework Directive: obligation to publish the national numbering plans; Art 24(1) of the Framework Directive: obligation to publish up-to-date information pertaining to the application of the Directives.

197 Article 6 of the Framework Directive: see para 1.48 below; Art 12(2) of the Framework Directive: obligation to hold a public consultation with all 'interested parties' prior to imposing the sharing of facilities or property.

198 Articles 7 and 7(a) of the Framework Directive, See para 1.53 et seq below.

199 See Arts 7(9), 20 and 21 of the Framework Directive for exceptions.

200 See N Nikolinakos, 'The new European regulatory regime for electronic communications networks and associated services: the proposed Framework and Access/Interconnection Directives' [2001] 22(3) ECLR 93.

201 Cf Recital 32, Art 17(1), sub-para 3, Art 27(4) and Art 33(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1; for a clear distinction between parties showing 'a sufficient interest' and 'other third parties' see also Recital 6, and in particular Art 9 of Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty [1998] OJ L354/18; see also M Szydlo, 'The promotion of investments in new markets in electronic communications and the role of national regulatory authorities after Commission v Germany' [2011] 60(2) ICLQ 533.

the Framework Directive, which requires NRAs and national competition authorities to provide each other 'with the information necessary for the application of the provisions of [the Framework Directive] and the Specific Directives'.

1.49 Article 20 of the Framework Directive sets out the Community law framework for the establishment of dispute resolution procedures to be conducted by the NRAs for speedy, non-judicial resolution of controversies between undertakings in a given Member State. Under this provision, the NRA must, at the request of one of the parties to a controversy, issue a binding decision on any dispute:

> 'arising in connection with obligations arising under [the Framework Directive] or the Specific Directives between undertakings providing electronic communications networks or services in a Member State or between such undertakings and other undertakings in the Member State benefiting from obligations of access and/or interconnection under [the Framework Directive] or the Specific Directives'.

This binding decision must be rendered 'in the shortest possible time frame'.[202] By way of example, the recitals of the Framework Directive[203] mention disputes 'relating to obligations for access and interconnection or to the means of transferring subscriber lines'. The dispute resolution procedure does not preclude either party from bringing an action before the national courts (Article 20(5) of the Framework Directive).

With respect to cross-border disputes arising under the Framework Directive or the Specific Directives between parties in different Member States where the dispute lies within the competence of NRAs of more than one Member State, the Framework Directive provides for a co-ordinated dispute resolution procedure at the request of one of the parties. The competent NRAs coordinate their efforts and have a right to approach BEREC and request an opinion as to the actions to be taken in accordance with the Framework Directive and/or the Specific Directives to resolve the cross-border dispute (Article 21(2) of the Framework Directive). The Member States may make provision to enable the competent NRAs jointly to decline to resolve a dispute 'where other mechanisms, including mediation, exist and would better contribute to resolution of the dispute in a timely manner' (Article 21(3), para 1 of the Framework Directive). If, however, after four months the dispute is not resolved, if the dispute has not been brought before the court by the parties seeking regress, and if either party requests it, the NRAs must 'coordinate their efforts in order to bring about the resolution of the dispute' while 'taking the utmost account of any opinion adopted by BEREC' (Article 21(3) of the Framework Directive). As with dispute resolution procedures for disputes within a Member State, the dispute resolution procedure for cross-border disputes does not preclude either party from bringing an action before the courts (Article 21(4) of the Framework Directive).

Right of appeal against NRA's decisions

1.50 Article 4(1), sentence 1 of the Framework Directive provides that 'effective measures' must exist at a national level, under which any user or undertaking providing electronic communications networks or services 'who is affected' by a decision of an NRA has the right of appeal against the decision to an 'appeal body'

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202 Within four months, except in exceptional circumstances.

203 Recital 32 of the Framework Directive.

that is independent of the parties involved. In this context, the right of appeal against the decision of a national regulatory authority must be 'based on an effective appeal mechanism which permits the merits of the case duly to be taken into account'.[204] The independent appeal body may, but is not required to be a court (Article 4(1), sentence 2 of the Framework Directive). Pending the outcome of any appeal, the decision of the NRA shall stand 'unless the appeal body decides otherwise' (Article 4(1), sentence 3 of the Framework Directive).

1.51 Article 4(1), sentence 1 of the Framework Directive does not limit the right of appeal to the addressees which are subject to an NRA's decision.[205] Rather, it establishes an obligation of national legislators, under EU law, to provide a right of appeal to a user or undertaking providing electronic networks or services who or which may derive rights from the EU legal order (in particular from the electronic communications Directives) and whose rights are affected by an NRA's decision.[206] In this context it is sufficient that the party's rights are 'potentially' affected by the NRA's decision.[207] National legislators are not prevented, by Article 4(1) of the Framework Directive, from extending the right of appeal to other third parties that have an interest in the outcome of the controversy.

The Commission's powers of control and harmonisation

1.52 The European legislator has delegated broad regulatory powers to the NRAs and has strengthened the NRAs' discretion to select the appropriate regulatory remedies;[208] these regulatory powers at the national level are counterbalanced, however, by requirements for co-ordination of NRAs' decisions and positions at the EU level in order to secure a coordinated and coherent application of the EU Regulatory Framework by the Member States.[209] This co-ordination is achieved in the first instance by requiring the NRAs to cooperate and to consult with each other, the Commission and BEREC[210] (Articles 7(2) and (3), and 7a(2) to (6) of the Framework Directive).[211] Furthermore, powers of control and harmonisation have been granted to the Commission, including a right to veto certain decisions of the NRAs.

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204 ECJ Judgment of 13 July 2006, *Mobistar SA* (C-438/04) [2006] ECR I-06675 at [38].

205 Such narrow scope of the right of appeal set forth in Art 4(1) of the Framework Directive might be assumed, considering Recital 12 which states that 'any party who *is the subject of a decision* by a national regulatory authority should have the right to appeal to a body that is independent of the parties involved' [emphasis added].

206 ECJ Judgment of 21 February 2008 *Tele 2 Telecommunication* (C-426/05) [2008] ECR I-00685 at [32], confirming a right of appeal against an NRA's decision in the context of market analysis for the competitors of the regulated undertaking whose rights were adversely affected by the decision; see also ECJ Judgment of 24 April 2008 *Arcor v Bundesrepublik Deutschland* (C-55/06) [2008] ECR I-02931 at [176].

207 ECJ Judgment of 21 February 2008 *Tele 2 Telecommunication* (C-426/05) [2008] ECR I-00685 at [39]; see also ECJ Judgment of 24 April 2008 *Arcor v Bundesrepublik Deutschland* (C-55/06) [2008] ECR I-02931 at [176]

208 See para 1.23 above and paras 1.75 1.122 and 1.142 below.

209 SEC(2006) 816, 28 June 2006, p 18; COM(2007) 696 final, 13 November 2007, p 8 et seq.

210 See paras 1.18 and 1.24 above.

211 See para 1.53 et seq.

The consolidation procedure

1.53 Under the heading 'Consolidating the internal market for electronic communications', the Framework Directive, in Article 7, establishes a co-operation obligation under which the NRAs must co-operate with each other, the Commission and BEREC 'in a transparent manner' in order to ensure 'the consistent application, in all Member States, of the [Framework] Directive and the Specific Directives' (Article 7(2) of the Framework Directive). The provision further establishes a two-tiered 'consolidation procedure' (Article 7(3)–(5) of the Framework Directive).

1.54 The NRAs are required to notify the Commission and the NRAs in other Member States and to conduct a consultation procedure (Article 7(3)) before taking a measure which:

- falls within the scope of Articles 15 or 16 of the Framework Directive[212] or Articles 5 or 8 of the Access Directive;[213] and
- would affect trade between Member States.

The Commission has adopted detailed rules for the notification process in a Recommendation[214] and may according to the newly adopted Article 7a of the Framework Directive issue further Recommendations or guidelines regarding the co-ordination procedure which define the form, content and level of detail for notifications under Article 7(3) of the Framework Directive, the circumstances in which a notification will not be required, and the calculation of time-limits. The NRA must make its draft measure available to the Commission, BEREC and the other national regulatory authorities, together with the reasons on which the measure is based. The NRAs in other Member States, BEREC and the Commission then have one month to comment on the draft measure; this time limit may not be extended.[215]

Once the comment period has ended, the NRA may adopt draft measures that are not subject to the veto-procedure,[216] taking 'the utmost account of comments of other national regulatory authorities, BEREC and the Commission' (Article 7(7) of the Framework Directive); this means that the measure may be adopted despite objections raised by other NRAs and/or the Commission.

1.55 When a measure that an NRA intends to take aims to define a relevant market which differs from those defined in the Commission's Recommendation on relevant product and service markets, [217] or decide whether or not to designate an undertaking as having, either individually or jointly with others, significant market power,[218] the one-month consultation period is followed by the veto procedure

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212 Measures of the NRA in the context of the market definition procedure or the market analysis procedure – see para 1.62 et seq. below.

213 Measures concerning access and interconnection (Art 5 of the Access Directive) and measures concerning undertakings designated to have SMP (Art 8 of the Access Directive); see paras 1.141 et seq and 1.145 et seq below.

214 Commission Recommendation of 23 July 2003 on notifications, time limits and consultations provided for in Art 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services [2003] OJ L190/13.

215 Article 7(3), sentence 3 of the Framework Directive.

216 See para 1.55 below.

217 See para 1.73 et seq below.

218 See paras 1.71 et seq and 1.75 below.

under Article 7(4) of the Framework Directive[219] if the measure would affect trade between the Member States and the Commission has indicated to the NRA that:

- it considers that the draft measure would create a barrier to the single market; or
- it has serious doubts as to its compatibility with Community law and, in particular, the objectives referred to in Article 8 of the Framework Directive.

In this case, the NRA is prevented from adopting the measure for a further two months; this period may not be extended.

During this two-month period, the Commission may issue a decision requiring the NRA concerned to withdraw the draft measure (Article 7(5)(a) of the Framework Directive) or take back its reservations concerning the draft measure (Article 7(5)(a) of the Framework Directive), taking utmost account of the opinion of BEREC before issuing its decision. This decision must 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 (Article 7(5) of the Framework Directive).[220]

Following the Commission's decision requiring the NRA to withdraw a measure, the NRA concerned must amend or withdraw the measure within a period of six months following the Commission's decision; the Commission does not have a right to replace the proposed measure of the NRA with a measure of its own. The NRA's amended measure is subject to public consultation and re-notification (Article 7(6) of the Framework Directive).

1.56 An assessment as to whether a proposed measure 'would affect trade between Member States' is based on the same standard as the comparable assessment under Articles 101(1) and 102 sentence 2 of the TFEU (ex Articles 81(1) and 82, sentence 2 of the ECT). This means that it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the measure in question 'may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States'.[221] The same applies to the prognosis that a proposed measure of an NRA 'would create a barrier to the single market'. The alternatively existing threshold of 'serious doubts as to [the draft measure's] compatibility with Community law' appears to be more difficult to overcome, whereas the further requirement of 'serious doubts as to its compatibility with ... the objectives referred to in article 8' can be more easily met, given both the vagueness and the multitude of the objectives set out in Article 8 of the Framework Directive. [222] In its veto decisions, to date, the Commission has held, inter alia, that a draft measure designating or not designating an undertaking with SMP and the regulatory obligations that may or may not be imposed in one Member State with respect to the provision of a given service 'may have an influence, direct or indirect,

219 NRAs may in exceptional circumstances derogate from the consolidation procedure and adopt provisional measures (Art 7(6) of theFramework Directive); see para 1.57 below.

220 See Commission Recommendation of 23 July 2003 on notifications, time limits and consultations provided for in Art 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services [2003] OJ L190/13.

221 ECJ Judgment of 30 June 1966, Case 56–65, *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 282.

222 See para 1.40 et seq above.

actual or potential, on the ability of undertakings established in other Member States to provide such electronic communications services'.[223]

1.57 The consultation procedure as well as, in particular, the veto procedure can lead to significant delays of the regulatory procedures at national level. The NRAs can aim at avoiding the veto procedure, however, by taking the Commission's objections into account during the consultation procedure.

The veto procedure is the quid pro quo for the flexible and procedure-oriented regulatory approach provided for in the EU Regulatory Package, under which ex-ante obligations can only be imposed on undertakings which have been designated, in the course of a complex, multi-tiered market definition and market analysis procedure, as undertakings with significant market power.[224]

As of April 2010, the Commission had taken six veto decisions, which covered nine cases.[225] In these veto decisions the Commission held, among other things, that:

- the Polish regulator had not provided sufficient reasons for its decision to regulate the markets for Internet traffic exchange services (IP-Peering and IP-Transit) and to support its finding of SMP on these markets;[226]
- the Polish regulator did not sufficiently justify its intent to regulate broadband access services in addition to regulating retail narrowband access;[227]
- the Finnish regulator had failed to provide sufficient evidence to support its finding of the absence of SMP in the markets for (retail) publicly available international telephone services provided at fixed locations for residential customers and for non-residential customers;[228]
- the Finnish regulator had failed to provide sufficient evidence to support its finding of the existence of SMP in the market for access and call origination on public mobile telephone networks;[229]
- the Austrian regulator had failed to provide sufficient evidence to support its finding of the absence of SMP on the market for transit services in the fixed public telephone network;[230] and
- the German regulator had failed to provide sufficient evidence to support its finding that the alternative fixed telephone network operators in Germany, despite having a market share of 100 per cent with respect to their respective networks, did not have SMP in the market for call termination on individual public telephone networks at a fixed location.[231]

While emphasising that the NRAs are accorded discretionary powers corresponding to the complex character of the economic, factual and legal situations that must be assessed, the Commission has included, in its veto decisions, detailed 'proposals' for amending the draft measures. However, the actual number of veto

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223 Cf Commission Decision of 20 February 2004, C(2004)527 final, para 14.

224 See para 1.63 et seq below.

225 Cf S Krueger, 'A consistent and effective implementation of the new regulatory framework: the triangle formed by the European Commission, BEREC and National Regulators' (presentation at the CMT-Conference on The New Regulatory Framework for Telecommunications in Europe, Barcelona, 26 April 2010), p 6, available on: http://www.cmt.es/es/publicaciones/anexos/EC,_BEREC_and_National_Regulators.pdf (accessed on 4 December 2012).

226 Commission Decision of 4 March 2010 in Cases PL/2009/1019 and PL/2009/1020.

227 Commission Decision in Cases PL/2009/518 and PL/2006/24.

228 Commission Decision of 20 February 2004, C (2004) 527 final, para 15 et seq.

229 Commission Decision of 05 October 2004, C (2004) 3682 final, para 11 et seq.

230 Commission Decision of 20 October 2004, C (2004) 4070 final, para 15 et seq.

231 Commission Decision of 17 May 2005, C (2005) 1442 final, para 17 et seq.

decisions is very small compared to the number of notified measures. This indicates that the Commission has refrained from micro-managing the NRAs' market analyses and has limited itself to monitoring misuses of the NRAs' discretion instead.

An NRA may only 'in exceptional circumstances' adopt provisional measures by way of derogation from the consultation and veto procedures where it considers that there is an urgent need to act in order to safeguard competition and protect the interests of users. In this case, the NRA must, without delay, communicate its provisional measures, with full reasons, to the Commission, BEREC and the other NRAs (Article 7(9) of the Framework Directive).

The co-regulation procedure

1.58 The 2009 Regulatory Framework introduced in Article 7a of the Framework Directive a 'co-regulation' procedure intended to secure 'the consistent application of remedies' throughout the EU.

If the Commission is of the opinion that a notified[232] draft measure which seeks to impose, amend or withdraw a remedy imposed on an SMP undertaking or an undertaking controlling access to end users would create a barrier to the single market or in the case of serious doubts as to its compatibility with EU law, the Commission may, within a period of one month, inform the relevant NRA concerned and BEREC of its opinion, including the reasons for its opinion. The NRA concerned may not adopt the intended measure for a further three months following (Article 7a(1), sub-para 1 of the Framework Directive). In the event that no such notification is given, the NRA concerned may adopt the draft measure, taking utmost account of any comments made by the Commission, BEREC and any other NRA (Article 7a(1), sub-para 2 of the Framework Directive).

During the three-month period following such notification of the Commission of its serious doubts under Article 7a(1), sub-para 1 of the Framework Directive, BEREC and the NRA concerned are required to 'co-operate closely' with the objective of identifying the most appropriate and effective measure in the light of the objectives laid down in Article 8 of the Framework Directive and taking into due account the 'need to ensure the development of consistent regulatory practice' and the views of market participants (Article 7a(2) of the Framework Directive).

Within six weeks from the beginning of the three-month period, BEREC must deliver a reasoned opinion on the Commission's notification, indicating whether it believes that the draft measure should be amended or withdrawn, and including specific proposals to that end where appropriate (Article 7a(3) of the Framework Directive).

If BEREC, in its opinion, agrees with the serious doubts of the Commission, it co-operates with the relevant NRA with the aim to identify the most appropriate and effective measure. In this event the NRA may either amend or withdraw its draft measure (Article 7a(4)(a) of the Framework Directive) or make use of its competence to maintain its draft measure as originally notified (Article 7a(4)(b) of the Framework Directive).

If the NRA amends or maintains its draft measure, or if BEREC does not share the serious doubts of the Commission or does not issue an opinion pursuant to

232 Article 7(3) of the Framework Directive: see para 1.53 above.

Article 7a(3) of the Framework Directive, the Commission may, within one month following the end of the three-month period following its notification of serious doubts, either issue a recommendation requiring the NRA concerned to amend or withdraw the draft measure or take a decision to lift its reservations to the draft measure while, in both cases, taking utmost account of any opinion issued by BEREC (Article 7a(5) of the Framework Directive). The NRA may either follow the recommendation of the Commission or adopt the measure despite recommendations to the contrary and has to inform the Commission and BEREC of its final decision (Article 7(6) of the Framework Directive). If the Commission has recommended amendment or withdrawal of the draft measure, the NRA has to provide a reasoned justification if it decides not to amend or withdraw its measure (Article 7a(7) of the Framework Directive).

While the Commission has, under the co-regulation mechanism, a larger say regarding the implementation of remedies by the NRAs, it still lacks veto powers or other binding legal means to set-aside or influence the NRAs' decisions with respect to the application of remedies. It remains to be seen whether the complex co-regulation procedure will contribute to a consistent application of remedies throughout the EU as intended or whether further and more stringent measures will have to be taken to ensure a harmonised approach.

The Commission's power to stipulate standards and specifications

1.59 The Commission's powers to ensure the harmonised application of the EU Regulatory Framework include the publication of non-compulsory standards and specifications to promote the harmonised provision of electronic communications networks and services, the initiation of standardisation procedures, and the power to make technical standards or specifications compulsory if the non-compulsory standards or specifications have not been adequately implemented so that interoperability of services in one or more Member States cannot be ensured (Article 17(3) of the Framework Directive). If the Commission intends to make technical standards compulsory, it will issue a 'notice' and invites comments through a public consultation; the implementation of the relevant standards is made compulsory by referring to them as compulsory standards in the list of standards or specifications published in the *Official Journal*[233] (Article 17(4) of the Framework Directive).

The Commission's power to issue recommendations

1.60 In addition to the recommendations[234] and guidelines[235] which seek to harmonise the market definition and market analysis procedures, the Commission has the power, under Article 19 of the Framework Directive, to issue:

> '[a] recommendation or a decision on the harmonised application of the provisions in this [Framework] Directive and the Specific Directives in order to further the achievement of the objectives set out in article 8 [Framework Directive]'.

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233 See Commission Decision (2007/176/EC) of 11 December 2006 establishing a list of standards and/or specifications for electronic communications networks, services and associated facilities and services and replacing all previous versions [2007] OJ L86/11, as amended by Commission Decision 2008/286/EC of 17 March 2008 [2008] OJ L93/24.

234 Article 15(1) of the Framework Directive; see para 1.66 et seq below.

235 Article 15(2) of the Framework Directive; see para 1.63 below.

These recommendations are issued on the basis of the advisory procedure (Article 22(2) of the Framework Directive) and need to take utmost account of the opinion of BEREC. The – legally non-binding – recommendations (Article 288(5) of the TFEU (Article 249(5) of the EC Treaty)) have a specific 'soft law' quality: Member States must ensure that the NRAs 'take the utmost account of those recommendations in carrying out their tasks' (Article 19(2), sentence 1 of the Framework Directive). Where a national regulatory authority chooses not to follow a recommendation, it must inform the Commission, giving the reasons for its position (Article 19(2), sentence 2 of the Framework Directive).

Safeguarding the Commission's powers of control and harmonisation

1.61 In order to contribute to the development of the single market in the most effective manner, the NRAs need to cooperate closely with each other, the Commission and BEREC (Article 7(2) of the Framework Directive). Moreover, the Commission needs to receive, from Member States and NRAs, all information necessary for the exercise of its harmonisation and control duties. To this end, Article 5(2) of the Framework Directive establishes a right of the Commission to obtain from NRAs all information 'necessary for it to carry out its tasks under the Treaty'. In addition, the EU Regulatory Framework establishes a number of specific information and cooperation obligations, which are set out in the table below.

Provision	Obligation
Article 3(3c) Framework Directive	Obligation of NRAs to take utmost account of BEREC's opinions and common positions when adopting their own decisions for the national markets.
Article 4(3) Framework Directive	Obligation of the Member States to provide the Commission and BEREC with information on the general subject, the number and the duration of appeal proceedings against decisions of NRAs, as well as on the number of decisions to grant interim measures.
Article 7a Framework Directive	Obligation of NRAs, BEREC and the Commission to co-operate with each other with regard to the imposition of remedies.
Article 8a(2) Framework Directive	Duty of the Member States to co-operate with each other and with the Commission, to promote the co-ordination and harmonisation of radio spectrum policy approaches in the EU.
Article 13a(3) Framework Directive	Obligation of NRAs to inform NRAs in other Member States and the European Network and Information Security Agency (ENISA) of breaches of security or loss of integrity that have had a significant impact on the operation of networks or services.
Articles 15(2), 16(1) Framework Directive	Obligation of NRAs to take utmost account of the Commission's Market Recommendation and the Guidelines on market analysis when they define and analyse relevant markets.

Provision	Obligation
Article19(1) Framework Directive	Obligation of Member States to take utmost account of the Commission's Recommendations on the harmonised application of the Directives.
Article24(2) Framework Directive	Obligation of Member States to provide the Commission with up-to-date information pertaining to the application of the Directives.
Article8(5) Access Directive	Obligation of NRAs to notify the Commission of decisions to impose, amend or withdraw obligations on market players not designated as having SMP in order to comply with international commitments.
Article13a(2) and (3) Access Directive	Obligation of NRAs to submit a detailed and reasoned proposal to the Commission when the NRAs intend to impose an obligation for functional separation.
Article15(2) Access Directive	Obligation of Member States to provide to the Commission information on the specific obligations imposed on undertakings under the Access Directive.
Article16 sentence 2 Authorisation Directive	Obligation of Member States to supply at the Commission's request information on the functioning of the national authorisation systems.
Article22(3) Universal Service Directive	Obligation of NRAs to provide the Commission and the BEREC with a summary of the grounds for action, the envisaged requirements and the proposed course of action before setting minimum quality of service requirements on undertakings providing public communications networks.
Article36(1) and (2) Universal Service Directive	Obligation of NRAs to notify the Commission of the names of undertakings designated as having universal service obligations under Article8(1) of the Universal Service Directive as well as of the universal service obligations imposed on such undertakings.

'Significant Market Power' as fundamental prerequisite of regulation

1.62 The Framework Directive and the Specific Directives establish a number of regulatory powers of the NRAs with respect to providers of electronic communications networks and services.[236] The majority of these regulatory powers are aimed at undertakings designated as having significant market power ('SMP').[237] In order to achieve public interest objectives other than the promotion of competition, eg cultural and linguistic diversity, media pluralism, and including the objectives of

236 Cf Revised ERG Common Position on the approach to Appropriate remedies in the ECNS regulatory framework (ERG (06)33) (May 2006); see also ERG Common Position on Best Practices in Remedies Imposed as a Consequence of a Position of Significant Market Power in the Relevant Markets for Wholesale Leased Lines (ERG (07) 54 final).

237 See para 1.64 et seq below.

interoperability and of 'end-to-end' communications, the Directives also provide for regulatory powers regardless of the regulated enterprise's market position.[238]

The following regulatory measures apply exclusively to undertakings designated as having significant market power:

- transparency obligations in conjunction with access and interconnection (Article 9 of the Access Directive);
- obligation of non-discrimination regarding access and interconnection (Article 10 of the Access Directive);
- obligation of accounting separation (Article 11 of the Access Directive);
- obligations of access to, and use of, specific network facilities (Article 12 of the Access Directive);
- price control and cost accounting obligations (Article 13 of the Access Directive, Article 18(1), sentence 2 in conjunction with No 2 Annex II of the Universal Service Directive);
- functional separation (Article 13a of the Access Directive); and
- regulatory controls on retail services (Article 17 of the Universal Service Directive).

The concept of Significant Market Power in the EU Regulatory Framework

1.63 Under the EU Regulatory Framework, the definition of SMP set forth in the Framework Directive is equivalent to the competition law concept of 'dominant market power'. By using this concept, the legislator has taken an important step toward the intended replacement of sector-specific regulation by competition law.[239] The former greater predictability of regulatory measures which had been ensured by the 25 per cent threshold under the previous regulatory framework[240] has been replaced by a 'more flexible' threshold for regulatory measures; this flexibility, however, is limited by the procedural rules of the Framework Directive governing the determination of SMP undertakings and by the Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services[241] ('Commission Guidelines on Market Analysis').

Significant Market Power – assessment criteria

1.64 The Framework Directive replaces the rebuttable presumption which had been set out in several Directives of the previous regulatory framework, under which significant market power was presumed to exist if an organisation had 'a share of more than 25 per cent of a particular telecommunications market in the

238 Eg Arts 5 and 6 of the Access Directive, Art 12(2) of the Framework Directive, Arts 29, 30 and 31 of the Universal Service Directive.

239 The aim of the EU Regulatory Framework is to progressively reduce ex-ante sector specific rules as competition in the markets develops and, ultimately, for electronic communications to be governed by competition law only: see Recital 5 of the Better Regulation Directive.

240 Article 4(3) of Directive 97/33/EC [1997] OJ L199/32, as amended by Directive 98/61/EC [1998] OJ L268/37.

241 Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services [2002] OJ C165/6.

geographical area in a Member State within which it is authorised to operate,[242] with a new definition of significant market power, following closely the definition established, in the case law of the European Court of Justice, for a 'dominant market position'.[243] According to Article 14(2) of the Framework Directive, an undertaking:

> 'shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers'.

The Directive adopts the concept of collective dominance, which has been clarified and developed through jurisprudence of the European Courts in recent years.[244] In particular, the existence of structural links among the undertakings concerned is not a prerequisite for a finding of collective dominance.[245] In ECJ case law, three cumulative criteria must be fulfilled to conclude that undertakings are jointly dominant on a market:

(i) sufficient market transparency which allows the oligopolistic undertakings to detect defection from the tacitly collusive behaviour;
(ii) deterrent mechanisms to secure sustainability of the coordination; and
(iii) a lack of power of customers and existing and future competitors to jeopardise the results expected from the coordination.[246]

However, these criteria must not be applied 'mechanically' but rather assessed taking into account the 'overall economic mechanism of a hypothetical tacit collusion'.[247] Annex II to the Framework Directive provides an 'indicative' and 'not exhaustive' list of market characteristics which are relevant when assessing joint dominance in the context of electronic communications. These include:

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

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242 Article 4(3) of the Interconnection Directive (as amended by Directive 98/61/EC); see also Art 2(3) of the Leased Lines Directive (as amended by ONP Framework Directive (1997)); Art 2(2)(i) of the Voice Telephony Directive (1998) and Art 7(1)(d) in conjunction with Art 2(2) of the Directive 97/13/EC.

243 See the ECJ's definition as provided in ECJ Judgment of 14 February 1978, *United Brands v Commission* (27/76) [1978] ECR I-207, at 286.

244 See ECJ Judgment of 10 July 2008, *Impala* [2008] (413/06) ECR-I 4591; Judgment of the Court of First Instance 28 June 2005, *Airtours* (T-342/99 DEP) [2004] ECR-II 1785; see also ECJ Judgment of 16 March 2000, *Compagnie Maritime Belge et al v Commission* (C-395/96 P and C- 396/96 P) [2000] ECR-I 1365, 1387 et seq, and Judgment of the Court of First Instance, *Gencor v Commission* (T-102/96) [1999] ECR-II 753, 815 et seq; for details see also Commission Guidelines on market analysis, para 86 et seq and European Regulators Group, Working paper on the SMP concept for the new regulatory framework, (ERG(93) 09rev3)(September 2005), p 9 et seq.

245 Commission Guidelines on Market Analysis, paras 87 and 90–94.

246 ECJ Judgment of 10 July 2008, *Impala* (C-413/06) [2008] ECR-I 4591; see also European Regulators Group, Working paper on the SMP concept for the new regulatory framework, (ERG(93) 09rev3) (September 2005), p 9 et seq.

247 ECJ Judgment of 10 July 2008, *Impala* (C-413/06) [2008] ECR-I 4591.

1.65 Article 14(3) of the Framework Directive facilitates the regulation of vertically integrated providers of networks and services. Specifically, this article provides that, where an undertaking has SMP 'on a specific market (the first market), it may also be designated as having significant market power on a closely related market (the second market), where the links between the two markets are such as to allow the market power held in the first market to be leveraged into the second market, thereby strengthening the market power of the undertaking'.[248] Article 14(3), sentence 2 of the Framework Directive which allows the imposition of remedies on such undertakings regarding the second market, was introduced by the 2009 Regulatory Package in order 'to clarify that remedies such as non-discrimination, transparency, accounting separation and prohibitions on anti-competitive bundling, etc may be applied "cross market" to address leverage problems' without a requirement for the NRAs to find 'double dominance' both on the first and second market.[249] However, if an undertaking has been designated as having SMP on an upstream wholesale or access market, the NRAs will usually be in a position to prevent likely spill-over or leverage effects from the upstream market downstream into the retail or services market by imposing on that undertaking specific obligations provided for in the Directives to avoid such effects.[250]

1.66 The concept of significant market power is further specified in the Commission Guidelines on Market Analysis which were adopted on the basis of Article 15(2) of the Framework Directive.[251] The assessment of significant market power is based on a two-step approach. As a first step, the relevant market must be defined because whether or not there is significant market power present on a market can only be determined by reference to the relevant market in question.[252] As a second step, it must be assessed whether the undertaking or undertakings operating on that relevant market enjoy 'a position equivalent to dominance' (Article 15(1) of the Framework Directive) or whether the market is effectively competitive.

1.67 The definition of the 'relevant' market includes determining which products and/or services belong to the respective market,[253] and identifying the geographical scope of the market in question, eg whether the market must be defined on a national or sub-national (eg a regional) level.[254]

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248 See ECJ Judgment of 14 November 1996,*Tetra Pak v Commission* (C-333/94P) [1996] ECR-I 5951, 6008 et seq; ECJ Judgment of 3 October 1985, *Centre Belge d'Etudes de Marche SA v Compagnie Luxembourgeoise de Telediffusion SA* (311/84) [1985] ECR-I 3261 at 3278; ECJ Judgment of 13 December 1991, *Régie des Télégraphes et des Télephones v GB-Inno-BM* (18/88) [1991] ECR-I, 5941, at 5979 et seq; see also Koenig, Kühlings and Braun, 'Die Interpendenz von Märkten in der Telekommunikation', (2001) Computer und Recht 745 at 825; S Polster and M Brandl, 'The new concept of market dominance in the proposed EU telecommunications framework', [2001] 7(8) CTLR 216 at 218.

249 European Parliament, 'Report on the on the proposal for a directive of the European Parliament and of the Council amending Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and Directive 2002/20/EC on the authorisation of electronic communications networks and services' (A-0321/2008), 22 July 2008, p 65.

250 Commission Guidelines on Market Analysis, para 84.

251 [2002] OJ C165/6.

252 Commission Guidelines on Market Analysis, para 34.

253 Definition of the relevant product/service market, see para 1.68.

254 Definition of the relevant geographical market, see para 1.69.

1.68 Under the Commission Guidelines on Market Analysis, the main criteria for defining the relevant product/service market are demand-side substitutability and supply-side substitutability:[255]

(1) Demand-side substitutability can be used to determine to what extent consumers are willing to substitute other services or products for the relevant product or service[256] in reaction to price increases. The concept of demand-side substitutability correlates with the competition law concept of 'sufficient interchangeability' as defined by ECJ case law[257]
(2) Supply-side substitutability indicates whether suppliers which do not yet offer the products or services in question are willing to switch their line of production in the medium to short term or to offer the relevant product or services without having to face significant additional costs,[258] in reaction to price increases.

One way for the NRAs to assess the existence of demand- and supply-side substitutability is to apply the so-called 'SSNIP test'[259] or 'hypothetical monopolist test' which is commonly applied in proceedings under Article 101 of the TFEU (ex Article 81 of the EC Treaty) and Article 102 of the TFEU (ex Article of the 82 EC Treaty). Under this test, an NRA examines the effects of a small but significant lasting increase in the price of a given product or service, assuming the prices of all other products or services remain constant.[260] The Commission acknowledges that the significance of a price increase will depend on each individual case but expects that NRAs should normally examine the customers' (ie the consumers or undertakings concerned) reaction to a permanent price increase of between 5 and 10 per cent. Where prices are subject to regulation, the cost-based, regulated price, which should mirror the prices that would be set under competitive conditions, should generally serve as the starting point for the application of the hypothetical monopolist test.[261] The Commission believes that the responses by customers will aid the NRA's assessment as to whether substitutable products or services exist and, if they do, where the boundaries of the relevant product/service markets should be drawn.[262] The Commission also believes that substitutability between different electronic communications services will increase through convergence.[263]

1.69 With respect to the definition of the geographic market, the Commission Guidelines on Market Analysis refer to the well-established case law of the ECJ pursuant to which the relevant geographic market comprises:

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255 Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services [2007] OJ L344/65, Recital 4.

256 Commission Guidelines on Market Analysis, para 39.

257 'Demand-side substitutability' correlates with the competition law concept of 'sufficient interchangeability', see eg ECJ judgment of 13 December 1979, *Hoffmann-La Roche v Commission* (C-85/79) [1979] ECR I-00461 at [28]; ECJ judgment of 14 November 1996, (C-333/94 P) *Tetra Pack v Commission* (C-333/94 P) [1996] ECR I 5951 at [13].

258 Commission Guidelines on Market Analysis, para 39.

259 The term 'SSNIP' refers to a 'Small but Significant Non-transitory Increase in Price'.

260 Commission Guidelines on Market Analysis, para 40.

261 Commission Guidelines on Market Analysis, para 42.

262 Commission Guidelines on Market Analysis, para 40.

263 Commission Guidelines on Market Analysis, para 47; see also draft BEREC Report on Impact of Fixed Mobile Substitution on Market Definition (BoR (11) 54) (8 December 2011).

> 'an area in which the undertakings concerned are involved in the supply and demand of the relevant products and services, in which area the conditions of competition are similar or sufficiently homogenous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different'.[264]

Recently, the concept of 'regional regulation', based on the definition of markets for electronic communications which do not cover the entire territory of a Member State, has become increasingly relevant.[265] This is a consequence of the existence of competitive electronic communications infrastructures predominantly in urban areas of several Member States so that the competitive conditions may vary on a sub-national level.[266]

1.70 The Commission emphasises that market definition is not a mechanical or abstract process but rather 'requires an analysis of any available evidence of past market behaviour and an overall understanding of the mechanics of a given sector'. Therefore, taking into account in particular the characteristics of the fast changing and steadily developing electronic communications sector, 'a dynamic rather than a static approach is required when engaging in a prospective, or forward-looking, market analysis'.[267]

1.71 In assessing whether or not an undertaking has significant market power on the relevant market, ie 'a position of economic strength affording [the undertaking] the power to behave, to an appreciable extent, independently of competitors, customers, and, ultimately consumers' (Article 14(2) of the Framework Directive), the NRAs have to ensure that their decisions are in accordance with the Commission's practice and the relevant jurisprudence of the ECJ and the General Court.[268] Although the Framework Directive has aligned the definition of SMP with the courts' definition of dominance within the meaning of Article 102 of the TFEU (ex Article 82 of the EC Treaty), the application of the EU Regulatory Framework's definition of SMP by the NRAs requires 'certain methodological adjustments ...

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264 Commission Guidelines on Market Analysis, para 56, see also ECJ judgment of 14 February 1978, *United Brands v Commission* (27/76) [1978] ECR I-207, at 284.

265 See, eg Commission Staff Working Document, Explanatory Note Accompanying document to the Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (second edition) (SEC(2007) 1483/2) (13 November 2007), at 2.4 and ERG Common Position on Geographic Aspects of Market Analysis (definition and remedies) (ERG(08) 20 final) (October 2008). See also OECD (2010), 'Geographically Segmented Regulation for Telecommunications', *OECD Digital Economy Papers*, No 173, (OECD Publishing, 22 June 2010), available at http://dx.doi.org/10.1787/5km4k7mggw7f-en (accessed on 6 December 2012).

266 SEC(2007) 1483/2 (13 November 2007), at 2.4, ERG(08) 20 final, p 2 et seq. See also Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions, on market reviews under the EU Regulatory Framework (3rd report) Further steps towards the consolidation of the internal market for electronic communications, COM(2010) 271 final, 1 June 2010, p 4 and Commission Recommendation 2010/572/EU of 20 September 2010 on regulated access to Next Generation Access Networks (NGA) [2010] OJ L251/35, Recital 9 and para 9.

267 Commission Guidelines on Market Analysis, para 35; see also SEC(2007) 1483/2, 13 November 2007, at 2.2.

268 Commission Guidelines on Market Analysis, para 70. The General Court was named 'Court of First Instance' until 30 November 2012.

regarding the way market power is assessed'.[269] These necessary adjustments result from the fact that competition authorities apply Article 102 of the TFEU ex post, whereas the NRAs must apply the definition of SMP ex ante on a 'forward-looking' basis and are therefore required to base their market analysis on a prognostic assessment which must take into account the expected or foreseeable developments at a technological and economic level over a period of time 'linked to the timing of the next market review'. [270]

The ex-ante assessment of SMP is, in essence, measured by reference to the power of the undertaking concerned to raise prices by restricting output without incurring a significant loss of sales or revenues.[271] In addition to the market share of an undertaking, the criteria upon which the forward-looking market analysis can be based include amongst others:

- the overall size of the undertaking;
- control of infrastructure not easy to duplicate;
- technological advantages or superiority;
- the absence of or low countervailing buying power;
- easy or privileged access to capital markets/financial resources;
- product/services diversification (e g bundled products or services);
- the existence of economies of scale or economies of scope;
- vertical integration;
- a highly developed distribution and sales network;
- the absence of potential competition; and
- barriers to extension.[272]

A dominant position can derive from a combination of these and other criteria, which become more relevant as indicators of significant market power where an undertaking's market share is lower than 50%.

Following established case law, very large market shares (in excess of 50 per cent) are as such, save in exceptional circumstances, evidence of the existence of a dominant position;[273] undertakings with market shares of between 25 and 50 per cent are likely to enjoy a dominant position if additional criteria confirm that the undertaking can behave to an appreciable extent independently of its competitors, customers and consumers.

Undertakings with market shares of no more than 25 per cent are not likely to enjoy a dominant position in their market.[274] In general, the development of market shares will be more meaningful than a snapshot picture of market shares at a given time: The persistence of high market shares over time may indicate significant market power, while declining shares might be a sign of increasing competition;

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269 Commission Guidelines on Market Analysis, para 70.

270 SEC(2007) 1483/2, 13 November 2007, at 2.1.

271 Commission Guidelines on Market Analysis, para 73.

272 Commission Guidelines on Market Analysis, para 78; for further criteria see also European Regulators Group, Working paper on the SMP concept for the new regulatory framework (September 2005), ERG(03) 09rev3, p 3 et seq (single dominance) and p 9 et seq (collective dominance).

273 Commission Guidelines on Market Analysis, para 75; see also Commission Decision of 20 February 2004, C(2004) 527 final, paras 16 et seq; Decision of 17 May 2005, C(2005) 14442 final, para 17 et seq.

274 Commission Guidelines on Market Analysis, para 75.

fluctuating market shares over time may also be indicative of an absence of significant market power in the relevant market.[275]

Significant market power – procedures

1.72 The NRAs decide whether the relevant market is effectively competitive (Article 16(3) of the Framework Directive) or not effectively competitive but dominated by an undertaking which, either individually or jointly with others, enjoys significant market power (Article 16(4) of the Framework Directive).

This decision is prepared in the course of two distinct procedures: the market definition procedure (Article 15 of the Framework Directive); and the market analysis procedure (Article 16 of the Framework Directive). Both of these procedures require the involvement of the Commission, BEREC and the NRAs.

1.73 The market definition procedure is initiated at the European level: The Commission has adopted a recommendation on relevant product and service markets ('Market Recommendation') which identifies those product and service markets within the electronic communication sector, the characteristics of which 'may be such as to justify the imposition of regulatory obligations'.[276] The Market Recommendation seeks to achieve a higher degree of harmonisation and consistency in the application of the EU Regulatory Framework by ensuring that 'the same product and services markets will be subject to Market Analysis in all Member States'.[277]

While the initial Recommendation on relevant product and service markets[278] had defined 18 markets 'in which ex ante regulation may be warranted',[279] which included seven retail-level markets[280] and 11 wholesale-level markets,[281] the current Market Recommendation defines only one market at retail level, the market for 'access to the public telephone network at a fixed location for residential and non-residential customers' and six markets at the wholesale-level. At a wholesale-level the current Market Recommendation retained the markets for 'call origination

275 Commission Guidelines on Market Analysis, para 75.

276 Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services [2007] OJ L344/65.

277 SEC(2007) 1483/2, 13 November 2007, p 4.

278 See Krüger, ‚Marktabgrenzung im Telekommunikationssektor und die Definition von beträchtlicher Marktmacht (SMP)', Kommunikation & Recht-Beilage 1/2003, p 9.

279 Commission Recommendation on relevant markets, para 2.

280 These included the markets for network access, markets for local and/or national telephone services, and markets for international telephone services and distinguish between residential and non-residential customers (markets Nos 1 to 6).

281 These included the markets for 'call origination on the public telephone network provided at a fixed location' (market No 8), call termination on individual public telephone networks provided at a fixed location (market No 9), 'transit services in the fixed public telephone network' (market No 10), 'wholesale unbundled access (including shared access) to metallic loops and sub-loops' (Market No 11), 'wholesale broadband access' (market No 12), 'wholesale terminating segments of leased lines' (market No 13) and 'wholesale trunk segments of leased lines' (market No 14), as well as three mobile communications markets, the market for 'access and call origination on public mobile telephone networks' (market No 15), the market for 'voice call termination on individual mobile networks' (market No 16), and the 'wholesale national market for international roaming on public networks' (market No 17).

on the public telephone network provided at a fixed location' (market No 2, ex market No 8), the market for 'call termination on individual public telephone networks provided at a fixed location' (market No 3, ex market No 9), the market for 'wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location' (Market No 4, ex market No 11), the market for 'wholesale broadband access' (market No 5, ex market No 12), the market for 'wholesale terminating segments of leased lines' (market No 6, ex market no. 13) and one mobile market, the market for 'voice call termination on individual mobile networks' (market No 7, ex market No 16). On 16 October 2012 the Commission launched a public consultation on the revision of the Market Recommendation.[282]

Recently, doubts have been raised as to whether the Market Recommendation is suited to provide a basis for the consistent application of the EU Regulatory Framework as it may be too inflexible to accommodate national differences in the competitive conditions in the telecommunications sector across the Member States.[283] This is because the Market Recommendation is seen to be based on 'European average conditions'[284] while in reality there are some significant differences in the competitive conditions on the markets for electronic communications between the Member States[285] which may require the NRAs to deviate from the product and service markets listed in the Market Recommendation[286] as Article 15(3) of the Framework Directive states that the NRAs are to define relevant markets 'appropriate to national circumstances'. However, the current Market Recommendation provides for a possibility for NRAs to deviate from the markets set forth in the Market Recommendation while, at the same time, prescribing the 'three-criteria' test as a – harmonised – methodical basis for such deviation. The Market Recommendation therefore attempts to provide a middle ground between the need for harmonisation and consistency and the requirement to allow for an application of ex ante-regulation that is suited to the specific competitive conditions in the national relevant markets.[287]

1.74 The market definition procedure continues at the national level: the NRAs must define relevant markets 'appropriate to national circumstances'. In defining

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282 The consultation documents can be accessed at http://ec.europa.eu/digital-agenda/en/news/public-consultation-revision-recommendation-relevant-markets-2007879ec#%5Fen.htm (last accessed on 6 December 2012); the consultation closed on 8 January 2013.

283 See Ulrich Stumpf, ‚Regulierungsinstrumente und Befugnisse bei der Regulierung marktbeherrschender Unternehmen am Beispiel des Telekommunikationssektors', in Gramlich and Manger-Nestler, *Europäisierte Regulierungsstrukturen und -netzwerke*, (Nomos, 2011), p 76.

284 See Ulrich Stumpf, ‚Regulierungsinstrumente und Befugnisse bei der Regulierung marktbeherrschender Unternehmen am Beispiel des Telekommunikationssektors', in Gramlich and Manger-Nestler, *Europäisierte Regulierungsstrukturen und -netzwerke,* (Nomos, 2011), pp 68 et seq.

285 These differences relate in particular to the differences in the deployment of TV cable-networks as alternative infrastructure and the status of Next Generation Access Network roll-out: see Wolfgang Kiesewetter, 'Die Empfehlungspraxis der EU-Kommission im Lichte einer zunehmenden Differenzierung nationaler Besonderheiten in den Wettbewerbsbedingungen unter besonderer Berücksichtigung der Relevante-Märkte-Empfehlung', WIK Diskussionsbeitrag Nr 363, December 2011 ('WIK-Diskussionsbeitrag Nr 363'), p 3 et seq.

286 Cases where an NRA has deviated from the Market Recommendation include Cases PL/2009/1019 and PL/2009/1020 where the Polish regulator intended to regulate the markets for Internet traffic exchange services (IP-Peering and IP-Transit); the Commission has vetoed the Polish regulator's draft measure.

287 Cf Wolfgang Kiesewetter, WIK Diskussionsbeitrag Nr. 363, p 26 and para 1.74 for details on the 'three criteria test'.

the relevant markets, the NRAs are not only bound by 'the principles of competition law' but also must take 'the utmost account of the recommendation and the guidelines' (Article 15(3) of the Framework Directive). Although this alters neither the non-binding nature of the recommendation nor of the guidelines, (Article 288(5) of the TFEU (ex Article 249(5) of the ECT)), it does require that NRAs justify their market definitions.

Market definition at the national level requires the application of the 'three-criteria test' where an NRA assesses markets not defined in the Market Recommendation.[288] The NRA must assess whether the following three criteria are met cumulatively:

(i) the presence of structural, legal or regulatory high and non-transitory barriers to entry;
(ii) a market structure which does not tend towards effective competition within the relevant time horizon,[289] taking into account the competitive conditions behind the entry barriers; and
(iii) the insufficiency of general competition law to adequately address the identified market failures.[290]

Where these three criteria are not met for a market defined in the Market Recommendation, the NRAs may opt not to conduct a market analysis for the market in question.[291]

The need to justify national market definitions is further strengthened by procedural rules: if an NRA intends to deviate from the relevant markets defined in the Market Recommendation, it must give interested parties the opportunity to comment (Article 6) and, in addition, must follow the consultation procedure under Article 7 (Article 15(3), sentence 2 Framework Directive). If the Commission believes that the definition of a relevant market which differs from those set out in the Market Recommendation would affect trade between Member States or if it has serious doubts as to its compatibility with Community law, the Commission can issue a decision requiring the relevant NRA to withdraw its proposed market definition in accordance with Article 7(4) of the Framework Directive.[292] The Commission may define trans-national markets after consultation with the NRAs in accordance with the procedure set out in Article 22(3) of the Framework Directive.

1.75 The market definition procedure is followed by a market analysis procedure, which seeks to determine whether a relevant market is 'effectively competitive' (Article 16(3) of the Framework Directive). In the course of the market analysis, the NRAs must again take 'the utmost account of the [Commission's] Guidelines' (Article 16(1), sentence 1 of the Framework Directive). The Framework Directive specifically distinguishes three procedural alternatives:

- ***Alternative 1:*** The NRA concludes that the relevant market is 'effectively competitive'. In this case, it shall not impose or maintain any specific regulatory obligations and, in cases where sector-specific regulatory obligations already exist, such obligations placed on undertakings in that relevant

288 Market Recommendation, at 2;
289 As regards the temporal aspect of market analysis, see para 1.71 above.
290 Market Recommendation, at 2; for further details on the assessment criteria, see Market Recommendation, Recital 5 et seq.
291 Market Recommendation, Recital 17.
292 See para 1.55 et seq above; see also Commission Decision of 4 March 2010 in Cases PL/2009/1019 and PL/2009/1020.

market shall be withdrawn. The 'parties affected', which will include the competitors on the relevant market, shall be given 'an appropriate period of notice' prior to the withdrawal of the obligations (Article 16(3) of the Framework Directive).

- ***Alternative 2:*** The NRA determines that a relevant market is not effectively competitive. In this case it has to identify undertakings with significant market power[293] on that market, and impose on such undertakings 'appropriate specific regulatory obligations' in accordance with Article 16(2) of the Framework Directive to maintain or amend such obligations where they already exist (Article 16(4) of the Framework Directive).
- It should be noted that neither alternative 1 nor alternative 2 allows for any discretion of the NRA in deciding whether to impose sector-specific obligations ('remedies'). If the market is 'effectively competitive', the NRA cannot impose sector-specific regulatory obligations (unless certain exceptions apply[294]); if, however, a relevant market is not effectively competitive, the NRA is obliged to impose 'appropriate specific regulatory obligations' upon the undertakings designated as having SMP, which means that at a minimum one remedy must be imposed. The NRA's discretion therefore relates (only) to the selection of the appropriate remedy.
- ***Alternative 3:*** In the case of trans-national markets which have been identified by a Commission Decision (Article 15(4) of the Framework Directive), the NRAs concerned must jointly conduct the market analysis 'taking the utmost account of the guidelines' and decide 'in a concerted fashion' on any imposition, maintenance, amendment or withdrawal of regulatory obligations (article 16(5) Framework Directive).

1.76 All three procedural alternatives are subject to the provisions regarding the consultation procedure (Article 6 of the Framework Directive) and the consolidation procedure (Article 7 of the Framework Directive). As a consequence, all 'interested parties' must be given the opportunity to comment on draft measures to impose, maintain, amend or withdraw SMP obligations. Furthermore, the NRAs of other Member States, BEREC, and the Commission must be consulted. In all three procedural alternatives, the Commission has a right of veto if it believes that an intended decision, by the NRA, to designate or not to designate an undertaking as having SMP would affect trade between Member States, and provided that the Commission has indicated to the NRA that it believes that the proposed decision 'would create a barrier to the single market or that it has serious doubts as to the proposed decision's compatibility with Community law' and, in particular, the regulatory objectives referred to in article 8 Framework Directive (article 7(4) Framework Directive).[295]

1.77 The 2009 Regulatory Package has introduced mandatory time limits for the NRA's market analysis procedures (both with regard to new procedures and the review of existing measures) with a goal to provide market players with regulatory certainty (Article 16(6) of the Framework Directive)[296]: As a rule, the NRAs have to perform a market analysis and to notify, to the Commission, the draft measure within three years from the adoption of the previous measures relating to the relevant market. As an exception, this three-year review period may be extended for up to three additional years if an NRA has notified a proposed extension to the

293 See para 1.64 et seq above.
294 See para 1.143 et seq below.
295 See para 1.40 et seq above.
296 See Recital 47 of the Framework Directive.

Commission including the reasons for such extension and if the Commission does not object within one month of this notification (Article 15(6), lit a of the Framework Directive).

Where a revised recommendation on relevant markets is adopted and markets are concerned which have not previously been notified to the Commission, the NRAs must perform a market analysis and notify the draft measure to the Commission within two years (Article 15(6), lit b of the Framework Directive). NRAs from Member States which have newly joined the EU must perform market analyses and notify their draft measures within two years from the respective Member States' accession (Article 15(6), of the lit c Framework Directive).

Where an NRA has not completed its analysis of a relevant market identified in the relevant market recommendation within these time limits it may approach BEREC for assistance with the market analysis and identification of the remedies to be imposed (Article 15(7) of the Framework Directive).

Rules on radio frequency spectrum management

1.78 The 2009 Regulatory Package introduced substantial changes to allow for strategic planning and EU-wide co-ordination of spectrum policy and to further liberalise and harmonise both the management of radio frequencies and the granting of rights of use for radio frequencies. Whereas the Framework Directive sets out the general principles and procedures of strategic planning and management of spectrum[297] as well as the related competencies of the Commission, the Member States and the NRAs, the Authorisation Directive addresses rights of use for radio frequencies and their allocation.[298] Furthermore, the EU Regulatory Framework provides for specific exceptions to the frequency management rules where broadcasting services are concerned: Broadcasting services are exempted from the revised, more flexible frequency management procedures; measures that require an electronic communications service to be provided in a specific frequency band can be justified when necessary to ensure the fulfilment of a general interest objective, such as, among other things, the provision of broadcasting services (Article 9(4) of the Framework Directive). In addition, frequency trading or transfer[299] is not applicable with respect to frequencies which are used for broadcasting (Article 9b of the Framework Directive).

Further duties of the NRAs

1.79 The NRAs' regulatory duties under the Framework Directive further include the management of national numbering resources and rights of way as well as the regulation of the shared use of network infrastructure and facilities by providers of electronic communications networks.

Management of national numbering resources

1.80 The EU Regulatory Framework, in the Framework Directive (Article 10) and in the Authorisation Directive (Articles 5–6 and 10–15), contains rules relating to numbering, naming and addressing. Whereas the Framework Directive defines

297 See para 101 et seq below

298 See para 1.107 et seq below.

299 See para 1.111 below.

the duties of the NRAs with respect to the assignment of national numbering resources and the management of the national numbering plans (Article 10(1), sentence 1 of the Framework Directive), and the basic principles for the allocation of numbers, the Authorisation Directive defines the rights of use in relation to numbers and the corresponding obligations that the NRAs may impose upon providers of electronic communications networks and services.[300]

The duties of the NRAs include the allocation of numbering resources and the administration of the national numbering plans (Article 10(1), sentence 1 of the Framework Directive). The allocation of national numbering resources is governed by the principles of objectivity, transparency, and non-discrimination (Article 10(1), sentence 2 of the Framework Directive).

1.81 The principle of non-discrimination (equal treatment) is specified in Article 10(2), sentence 1 of the Framework Directive with respect to national numbering plans and procedures and also applies with respect to the relationship between the assignees of numbering resources and third parties. Member States must ensure that an undertaking which has been allocated a range of numbers does not discriminate against other providers of electronic communications services with respect to the number sequences used to give access to their services; this non-discrimination obligation applies regardless of the market position of the undertaking concerned (Article 10(2), sentence 2 of the Framework Directive). The transparency obligation (Article 10(1) of the Framework Directive) is further specified by an obligation to publish national numbering plans and all subsequent additions or amendments to these plans (Article 10(3) of the Framework Directive).

1.82 In order to ensure harmonisation of the use of numbering resources both within the Community and beyond the Community's borders, Article 10(4) and (5) of the Framework Directive establishes co-operation and co-ordination obligations. In order to harmonise numbering resources within the Community to support the functioning of the internal market and the development of pan-European services, the Commission may take appropriate 'technical implementing measures' on the basis of the regulatory procedure in accordance with Article 22(3) of the Framework Directive. Article 19(1) of the Framework Directive complements this harmonisation power and allows the Commission to take 'the appropriate technical implementing measures' if it finds that divergence at national level with respect to national provisions regarding the harmonisation of numbering resources creates a barrier to the single market.

Rights of way

1.83 Article 11 of the Framework Directive establishes principles for the granting of rights of way, ie of 'rights to install facilities on, over, or under public or private property' (Article 11(1), sentence 1 of the Framework Directive).

1.84 The Directive distinguishes between rights of way for undertakings 'authorised to provide public electronic communications networks' and 'undertakings authorised to provide electronic communications networks other than to the public', and allows Member States to establish differing procedures depending on whether the applicant is providing public communications networks or not (Article 11(1), sentence 2 of the Framework Directive). In either case, however, the procedures for the granting of rights to install the relevant facilities must be covered

300 See para 1.115 et seq below.

by the same administrative principles: the procedures must be simple, efficient, transparent, publicly available and apply without discrimination and without delay (Article 11(1), sentence 1, indent 3 of the Framework Directive).

Article 11(1), sentence 3 of the Framework Directive does not require the Member States to provide that undertakings which are authorised to provide electronic communications networks other than to the public are able to obtain, upon application, a right to install facilities on, over or under public property. Rather, the Directive merely provides that the administrative principles set out in Article 11(1), sentence 2 of the Framework Directive should apply only if national law allows for the granting of such rights. This interpretation of the requirements set forth in Article 11(1), sentence 3 of the Framework Directive is preferable since it reflects the principle of neutrality with regard to the rules of Member States governing the system of property ownership (Article 345 of the TFEU (ex Article 295 of the ECT)), which are specifically confirmed in Recital 22 of the Framework Directive. As the Directive is 'without prejudice to national provisions governing the expropriation or use of property', it cannot be assumed that the Directive intends to require the Member States to create new, extended rights of way.

1.85 Article 11(2) of the Framework Directive obliges Member States to ensure that, where public or local authorities retain ownership or control of undertakings operating public electronic communications networks or services, there is effective 'structural separation' of the function responsible for granting the rights of way from activities associated with ownership or control. In addition, Article 11(3) of the Framework Directive requires Member States to ensure that 'effective mechanisms exist to allow undertakings to appeal against decisions on the granting of rights of way to a body that is independent of the parties involved'.

Co-location and sharing of network elements and associated facilities for providers of electronic communications networks

1.86 The NRAs should encourage the facility sharing on the basis of voluntary agreements.[301] One of the goals of the 2009 Regulatory Package is to strengthen the powers of Member States to ensure that the roll-out of new networks, in particular of next generation access networks ('NGA') could be implemented in a 'fair, efficient and environmentally responsible way'. In order to achieve this goal, the 2009 Regulatory Package strengthened and expanded the provisions regarding mandated facility and property sharing independently of access obligations imposed on undertakings having SMP.[302]

1.87 Article 12(1) of the Framework Directive provides for the power of the NRAs to impose the compulsory sharing of network elements and associated facilities on undertakings operating electronic communications networks which have been granted rights of way or which may take advantage of procedures for the expropriation or use of property. These measures may mandate the sharing of facilities and property such as buildings, entries to buildings, building wiring, masts, antennae, towers and other supporting constructions, ducts, conduits, manholes and cabinets (Article 12(1) of the Framework Directive) and may also be imposed as a requirement to grant physical co-location (Article 12(2), sentence 1 of the Framework Directive).

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301 Cf Recital 23 of the Framework Directive.

302 Cf Recital 43 of the Better Regulation Directive.

These obligations may only be imposed 'taking full account of the principle of proportionality' (Article 12(1) of the Framework Directive) and after an 'appropriate period of public consultation' open to all interested parties (Article 12(2) of the Framework Directive).

1.88 Where a 'duplication of such infrastructure would be economically inefficient or physically impracticable', Member States have to provide for the NRAs' right to impose, on the owners of such wiring as well as on network operators having been granted rights of way or able to take advantage of procedures for the expropriation or use of property, 'obligations in relation to the sharing of wiring inside buildings or up to the first concentration or distribution point where this is located outside the building'. These sharing or coordination arrangements may include rules for the allocation of the costs of the sharing which may be adjusted for risk where appropriate (Article 12(3) of the Framework Directive). These measures may only be taken following public consultation (Article 12(3) of the Framework Directive) and must be objective, transparent and non-discriminatory (Article 12(5) of the Framework Directive).

By including the 'owners of wiring' within the potential addressees of sharing obligations, the Commission's goal of enhancing broadband coverage is furthered. 'Owners of wiring' incudes in particular the owners of cable TV wiring already present in a large number of households as addressees of potential obligations, thereby facilitating access to the homes of the end users without limiting such obligations to SMP-undertakings.

1.89 To further promote the efficient sharing of facilities and property, the 2009 Regulatory Package introduced a right for 'competent national authorities' to request information from undertakings 'in order for these authorities in conjunction with national regulatory authorities, to be able to establish a detailed inventory of the nature, availability and geographical location of the facilities' which may be the subject of mandated facility sharing (Article 12(4) of the Framework Directive).

Regulation of Market Entry: the Authorisation Directive

Objectives and scope of regulation

1.90 The Authorisation Directive seeks to harmonise and simplify the authorisation rules and conditions with the goal of implementing an internal market in electronic communications networks and services (Article 1(1) of the Authorisation Directive). The Directive requires the Member States to ensure the freedom to provide electronic communications networks and services (Article 3(1), sentence 1 of the Authorisation Directive). This freedom may only be limited by conditions specifically set out in the Authorisation Directive (Article 3(1), sentence 1 of the Authorisation Directive).

1.91 The Directive provides that the provision of electronic communications networks or services may, in principle, only be subject to a 'general authorisation' (Article 3(2), sentence 1 of the Authorisation Directive).[303] The priority of general authorisations over the granting of individual rights of use also applies with respect to use of frequencies (Article 5(1) of the Framework Directive). To ensure compliance with the conditions of the general authorisations or the usage rights, the Authorisation Directive establishes harmonised enforcement powers for the NRAs

303 See para 1.92 et seq below.

and provides for a harmonised application of 'administrative charges' which may be imposed on undertakings providing a service or a network under the general authorisations or exercising a right of use, as well as the fees for rights of use and rights to install facilities.[304] With respect to existing authorisations, the Directive establishes transitional rules, which have to be applied in conjunction with Article 9a of the Framework Directive (Article 17 of the Authorisation Directive).[305]

Establishing a regime of general authorisations

1.92 The Authorisation Directive seeks to prevent barriers to market entry and to secure the freedom to provide electronic communications networks and services by abolishing the licensing (or 'permit') requirement for the provision of electronic telecommunications networks and services under the former telecommunications regulatory regime[306] and providing for a priority of general authorisations for the use of radio spectrum resources over the granting of individual usage rights.

Procedural rules

1.93 The Member States may make the provision of electronic communications networks or services subject to general authorisations (Article 3(1) of the Authorisation Directive), more specifically, subject to the conditions set out in the general authorisations (Articles 6(1) and 10 of the Authorisation Directive). In addition, Member States may establish a notification requirement for the provision of electronic communications networks and services. This notification may not, however:

> 'entail more than a declaration by a legal or natural person to the national regulatory authority of the intention to commence the provision of electronic communications networks or services and the submission of a minimum of information which is required to allow the NRA to keep a register of providers of electronic communications networks and services' (Article 3(3) of the Authorisation Directive).

The notification must not be combined with any form of 'explicit decision' or any other administrative act by the NRA before undertakings may begin providing electronic communications networks and services (Article 6(2), sentence 2 of the Authorisation Directive); rather, the undertaking concerned may begin its activity immediately upon notification (Article 3(2), sentence 3 of the Authorisation Directive), subject only to provisions regarding the rights of use for radio frequencies or numbers (Articles 5, 6 and 7 of the Authorisation Directive).

1.94 Under Article 9 of the Authorisation Directive, NRAs must, at the request of an undertaking, issue within one week a standardised declaration 'confirming, where applicable, that the undertaking has submitted a notification under Article 3(2) and detailing under what circumstances any undertaking providing electronic communications networks or services under the general authorisation has the right to 'apply for rights to install facilities, negotiate interconnection and/or obtain access or interconnection'. The purpose of this standardised declaration is to facilitate the exercise of those rights in relation to other governmental entities or other undertakings.

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304 See para 1.126 et seq below.

305 See para 1.129 below.

306 See fourth edition of this book, para 1.144 et seq.

Content of general authorisations

1.95 The 'general authorisation' is 'a legal framework established by a 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' (Article 2(2) of the Authorisation Directive).

1.96 From the general authorisation, a 'minimum' number of rights, set out in Article 4 of the Authorisation Directive, is derived, namely:

- a right to provide electronic communications networks and services; and
- a right that applications for the necessary rights to install facilities are considered in accordance with the provisions with respect to rights of way[307] (Article 4(1)(a) and (b) of the Authorisation Directive),

and, in the case of undertakings providing electronic communications networks or services to the public

- the right to negotiate interconnection with and where applicable obtain access to or interconnection from other providers of publicly available communications networks and services covered by a general authorisation anywhere in the Community in accordance with the provisions of the Access Directive; and
- the right to be given an opportunity to be designated to provide different elements of an universal service and/or to cover different parts of the national territory in accordance with the Universal Service Directive (Article 4 (2)(a) and (b) of the Authorisation Directive).

1.97 The Directive does not define, in detail, the manner in which Member States must establish the 'legal framework', which constitutes 'general authorisations' (Article 2(2)(a) of the Authorisation Directive). In particular, the Directive leaves to Member States the decision as to whether general authorisations should be granted on the basis of governmental ordinances or in the form of 'class licences'.[308] The use of the term 'general authorisation' (in German *Allgemeingenehmigung*, in French *autorisation générale*, in Italian *autorizzazione generale*, in Spanish *autorización general*) would seem to indicate that the 'legal framework' is to be established by the executive branch of the national governments.

Conditions attached to general authorisations

1.98 The general authorisations for the provision of electronic communications networks or services may be subject only to those conditions that are listed in the Annex to the Authorisation Directive. Part A of the Annex establishes a 'maximum' list of conditions, which is considerably more precise than the conditions set out in the 1997 Licensing Directive.[309] The conditions may be attached to general authorisations, but only if they are objectively justified in relation to the network or service concerned, non-discriminatory, proportionate and transparent (Article 6(1), sentence 2 of the Authorisation Directive). The general authorisation shall only contain conditions which are 'specific for that sector ... and shall not duplicate

307 See para 1.83 et seq above.

308 See, on class licences, fourth edition of this book, para 16. 22 et seq

309 See Annex, paras 1–3.6 of the Licensing Directive.

conditions which are applicable to undertakings by virtue of other national legislation' (Article 6(3) of the Authorisation Directive).

1.99 The specific obligations which may be imposed on providers of electronic communications networks and services in the course of the ex-ante regulation of undertakings designated as having SMP on the basis of the Access Directive or on the basis of the Universal Service Directive[310] must be 'legally separate' from the rights and obligations under the general authorisation. In order to ensure regulatory transparency, the criteria and procedures for imposing such specific obligations on individual undertakings shall be set out in the general authorisation (Article 6(2) of the Authorisation Directive).

Rights of use for radio frequencies

1.100 The allocation of frequency bands and the assignment of rights of use for radio frequencies must take into account both general policy objectives provided for in the Framework Directive as well as the provisions of the Authorisation Directive which establish frequency assignment procedures and principles.

Strategic planning and co-ordination of spectrum policy

1.101 The overall objective of spectrum policy in the European Union, as set out in the Framework Directive, is to ensure that radio frequencies which are 'a scarce public resource that has an important public and market value' are managed as effectively and efficiently as possible from an economic, social and environmental perspective, taking into account the important role of radio spectrum for electronic communications, the objectives of cultural diversity and media pluralism and social and territorial cohesion.[311] As EU spectrum management has not been able to keep up with the changes through 'rapid technological development and convergence'[312] a new system for spectrum management was introduced that 'permits different models of spectrum licensing (the traditional administrative, unlicensed and the new market-based approaches[313]) to co-exist so as to promote economic and technical efficiency' in the use of spectrum, provides for more flexibility in spectrum management and is based on the core principles of 'service neutrality' and 'technological neutrality'.[314]

1.102 To achieve the spectrum policy objectives, the Framework Directive has established a system for the Community's strategic planning, coordination and harmonisation of the use of radio spectrum in the EU. Traditionally, spectrum planning and allocation have been under the control of Member States' administrations, subject to international agreements including ITU regulations and co-ordination by CEPT.[315] The Framework Directive requires Member States to cooperate with each other and with the Commission in the strategic planning and

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310 Obligations according to Arts 5(1) and (2), 6 and 8 of the Access Directive; art 17 of the Universal Service Directive.

311 Recital 24 of the Better Regulation Directive.

312 COM(2006) 334 final, 19 June 2006, p 7.

313 See Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee and the Committee of the Regions, A market-based approach to spectrum management in the European Union, COM(2005) 400 final, 14 September 2005.

314 COM(2006) 334 final, 19 June 2006, p 7.

315 The European Conference of Postal and Telecommunications Administrations (CEPT), an

coordination in the use of radio spectrum (Article 8a of the Framework Directive). The objective of this cooperation is:

> '[to] promote the co-ordination of radio spectrum policy approaches in the European Community and, where appropriate, harmonized conditions with regard to the availability and efficient use of radio spectrum necessary for the establishment and functioning of the internal market in electronic communications' (Article 8a(2) of the Framework Directive).

The policy orientations and objectives for the strategic planning and harmonisation of the use of radio spectrum are set out in the European Community's 'multi-annual radio spectrum policy programmes' (Article 8a(3) of the Framework Directive).

These radio spectrum policy programmes ('RSPP') are Decisions adopted by the European Parliament and the Council.[316] On 14 March 2012, the first multi-annual RSPP ('RSPP 2012') was issued. The RSPP 2012 seeks, among other things, to encourage an efficient spectrum management and use, to ensure that sufficient spectrum is allocated to meet demand for wireless data services, to 'breach the digital dividend' by fostering the availability of broadband access and making available sufficient spectrum for broadband services, to maximise flexibility of spectrum use, to encourage 'passive infrastructure sharing',[317] to provide for a more efficient use of spectrum through increasing the use of general authorisations, to counter inefficient 'frequency hoarding', and to reduce the 'fragmentation ... of the internal market' through more coordinated and harmonised technical conditions for spectrum use (Article 3 of the RSPP 2012).

The RSPP 2012 further sets out 'general regulatory principles' which, among other things, confirm the priority of general authorisations over the granting of individual rights of use, the principles of 'technology and service neutrality', and the importance of harmonisation and enhanced flexibility of frequency use (Article 2 of the RSPP 2012).

The 'general regulatory principles' and 'policy objectives' are supported by provisions with respect to, inter alia, 'enhanced efficiency and flexibility' (Article 4 of the RSPP 2012), 'competition' (Article 5 of the RSPP 2012), and 'spectrum needs for wireless broadband communications' (Article 6 of the RSPP 2012) which set out co-operation requirements for the Member States and the Commission as well as promote certain actions to be taken by the Member States.

The RSPP 2012 sets up an 'inventory' to be administered by the Commission. This inventory will include data provided by the Member States and will support a coordinated strategic planning and spectrum management. It aims at allowing, among other things, the identification of frequency bands where the efficiency of frequency use can be improved (also by means of re-allocations) and at facilitating spectrum-sharing (Article 9 of the RSPP 2012).

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organisation consisting of, at present, 48 countries which co-operate in the regulation of post, radio spectrum and communications networks.

316 See Decision No 243/2012/EU of the European Parliament and of the Council of 14 March 2012 establishing a multiannual radio spectrum policy programme [2012] OJ L81/7. See also Commission Proposal for a Decision of the European Parliament and of the Council establishing the first radio spectrum policy programme COM(2010) 471 final, 20 September 2010.

317 See para 1.87 et seq above.

Furthermore, the RSPP includes procedural rules to facilitate internal negotiations between the Commission and the Member States, between the Member States, and between Member States and countries neighbouring the EU as well as co-operation obligations (Article 10 et seq of the RSPP 2012).

The Member States must apply the 'policy orientations and objectives' set out in the RSPP 2012 by 1 July 2015 (Article 14 of the RSPP 2012)

1.103 The RSPPs are based on opinions of the radio spectrum policy group ('RSPG'), ie an advisory group which is composed of one high-level government expert from each Member State and a high-level representative from the Commission.[318]

The RSPG was established by the Commission's Radio Spectrum Decision, which was amended in 2009[319] and assists and advises the Commission on issues related to spectrum policy and in the coordination of spectrum policy approaches, with preparing the radio spectrum policy programmes, and, where appropriate on harmonising measures with regard to the availability and efficient use of radio spectrum necessary for the establishment and functioning of the internal market (Article 2(1) of the Radio Spectrum Decision). The RSPG also has to issue opinions or reports on matters related to electronic communications upon request by the European Parliament, the Council or the Commission (Article 4 of the Radio Spectrum Decision).

Based on the RSPG's opinions, which are legally non-binding, the Commission submits legislative proposals to the European Parliament and the Council, 'taking utmost account of the opinion of the Radio Spectrum Policy Group' (Article 8a(3) of the Framework Directive).

This complex planning process which attempts to strike an institutional balance among the Commission, the Member States and the European Parliament, was established as a reaction to the Commission's initial proposal to 'create an EU entity in charge of managing EU aspects of spectrum'.[320]

The institutional balance for international frequency policies is the same as for frequency policies at the EU level: based on opinions of the RSPG, the Commission may propose 'common policy objectives' to the European Parliament and the Council where this is necessary to ensure the effective co-ordination of the interests of the EU in international organisations, such as for example the ITU and CEPT (Article 8a(4) of the Framework Directive).[321]

1.104 The Radio Spectrum Decision further establishes a technology-neutral regulatory framework, allowing for the Community-wide harmonisation of frequency uses on the basis of a legally binding Community spectrum policy as well as a generally applicable procedure under which harmonisation measures are adopted

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318 Cf Arts 1 and 3 of the Commission Decision of 26 July 2002 establishing a Radio Spectrum Policy Group [2002] OJ L198/49, amended by Commission Decision 2009/978/EU of 16 December 2009 [2009] OJ L336/50.

319 Decision No 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision) [2002] OJ L108/1, as amended by Commission Decision 2009/978/EU, [2009] OJ L336/50.

320 Proposal for a Regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority, COM(2007) 699 final, 13 November 2007.

321 Cf Recital 30 of the Better Regulation Directive.

with a view to ensuring the effective implementation of a radio spectrum policy in the Community and to ensuring harmonised conditions for the availability and efficient use of radio spectrum (Article 1 of the Radio Spectrum Decision).

It is also aimed at the international representation of the Community, for example in the context of ITU World Radio Communication Conferences (Article 6 of the Radio Spectrum Decision). In this context, the RSPG supports the Commission in proposing common policy objectives to the Parliament and the Council where necessary to ensure an effective co-ordination of the EU's interests in international organisations 'competent in radio spectrum matters' (Article 2(2) of the Radio Spectrum Decision).

1.105 To date, the Commission has adopted numerous harmonisation Decisions on the basis of Article 4(3) of the Radio Spectrum Decision.[322] The procedures[323] for the adoption of technical implementing measures to ensure harmonised conditions for the availability and use of radio spectrum allow, on the one hand, for the continued co-operation between the Community and CEPT,[324] with a view to adopting harmonisation measures beyond the Community borders in all 48 member countries of CEPT while transforming those CEPT measures that comply with the Community's spectrum policy objectives, with the force of law. On the other hand, the Community retains the freedom to accelerate CEPT procedures, which have sometimes been exceedingly slow in the past, to reject measures proposed by CEPT, where necessary, and to adopt Community measures outside the remit of CEPT.

1.106 The availability of information regarding the national radio frequency allocation and information regarding the availability and use of radio spectrum in the Community is a precondition for the development of a Community radio spectrum policy. Article 5 of the Radio Spectrum Decision obliges Member States to publish this information in a user-friendly manner,[325] taking into account confidentiality requirements (Article 8 of the Radio Spectrum Decision).

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322 See, e g Commission Decision 2009/766/EC of 16 October 2009 on the harmonisation of the 900 MHz and 1800 MHz frequency bands for terrestrial systems capable of providing pan-European electronic communications services in the Community [2009] OJ L274/32 as amended by Commission Implementing Decision 2011/251/EU of 18 April 2011 amending Decision 2009/766/EC on the harmonisation of the 900 MHz and 1800 MHz frequency bands for terrestrial systems capable of providing pan-European electronic communications services in the Community [2011] OJ L106/9; Commission Decision 2010/267/EU of 6 May 2010 on harmonised technical conditions of use in the 790–862 MHz frequency band for terrestrial systems capable of providing electronic communications services in the European Union [2010] OJ L117/95.

323 For details on the procedures established by the Radio Spectrum Decision see the fifth edition of this book, paras 1.195 et seq. In this context, note should be taken of the EU's changed rules applying to the Commission's exercise of implementing powers which are set out in Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers [2011] OJ L55/13 and which repeal Council Directive 1999/468/EC of 28 June 1999.

324 Cf Recital 13 of the Radio Spectrum Decision on the need for harmonising the use of radio spectrum, particularly at the Community's borders.

325 Cf Recital 14 of the Radio Spectrum Decision.

Principles of frequency allocation

1.107 To improve the consistency of spectrum allocation in the EU while ensuring a high degree of flexibility to take into account market needs and technological developments, the Framework Directive establishes three principles of frequency allocation that must be observed by Member States.

The principle of technology neutrality requires that all types of electronic communications technology may be used in the radio frequencies that are declared available for electronic communication services in the National Frequency Allocation Plans (Article 9(3), subpara 1 of the Framework Directive), subject to exceptions in limited cases (Article 9(3), subpara 2 of the Framework Directive).

The principle of service neutrality obligates Member States to ensure that all types of electronic communication services may be provided in those radio bands that have been allocated to electronic communications services. Exceptions are permissible only when they are justified in order to ensure the fulfilment of general interest objectives 'as defined by the Member States' (Article 9(4), subpara 2 of the Framework Directive).

The third principle governing Member States' frequency allocation plans is the principle of spectrum tradability: Member States shall ensure that undertakings may transfer or lease the rights of use of radio frequencies in commonly defined bands (Article 9b(1) of the Framework Directive).

The Framework Directive establishes a transitional phase of five years starting from 25 May 2011 for a reassessment of existing restrictions of the technology neutrality and the service neutrality of frequency uses (Article 9a(1) of the Framework Directive).

1.108 One example for the implementation of the principles of 'service neutrality' and 'technological neutrality' is the amendment of the 'GSM Directive[326] to allow for a more flexible usage of the 900 MHz frequency band.[327] While use of the 900 MHz spectrum had been reserved for 'a public pan-European cellular digital mobile communications service' to be provided based on the GSM standard,[328] the flexibilisation brought about in 2009 opens the 900 MHz spectrum for 'GSM and UMTS systems capable of providing electronic communications services that can coexist with the GSM system'.[329] Further, the amended GSM Directive provides for an obligation of the Member States to assess, prior to flexibilisation, whether the existing usage rights in the 900 MHz band must be re-allocated in order to prevent distortions to competition in the mobile markets concerned which may result from flexibilisation.[330] The Member States were obliged to implement the provisions of the amended GSM Directive by 9 May 2010. It is to be expected that the process of spectrum flexibilisation and, where necessary, refarming will be highly controversial at the Member State level.

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326 Council Directive 87/372/EEC [1987] OJ L196/85.

327 Directive 2009/114/EC of the European Parliament and of the Council of 16 September 2009 amending Council Directive 87/372/EEC on the frequency bands to be reserved for the coordinated introduction of public pan-European cellular digital land-based mobile communications in the Community [2009] OJ L274/25.

328 Article 1 of the GSM Directive.

329 Article 1(1) of Council Directive 87/372/EEC as amended by Directive 2009/114/EC ('amended GSM Directive').

330 So-called 'refarming': see Art 1(2) of the amended GSM Directive.

1.109 The assignment of frequencies to particular users – which is referred to as 'granting of rights of use for radio frequencies' in the Authorisation Directive[331] – is governed by the principle that 'the least onerous authorization system possible should be used'.[332] With regard to rights of use of radio frequencies granted after 25 May 2011 and subject to transitional rules for frequencies assigned prior to 25 May 2011,[333] the principles of technology neutrality and service neutrality apply.

To facilitate access to radio frequency resources, the Authorisation Directive provides that conditions for the use of radio spectrum to provide electronic communication services should 'normally' be based on general authorisations.[334] The granting of individual rights of use is therefore the exception, rather than the rule. Member States may grant individual rights of use in a limited number of cases, mainly in order to avoid harmful interference and ensure technical quality of service, safeguard efficient use of spectrum or fulfil other objectives of general interest as defined by Member States in conformity with Community law (Article 5(1) of the Authorisation Directive). Where it is necessary to grant individual rights of use of radio frequencies, Member States are obliged to grant such rights, upon request, to any undertaking providing networks or services (Article 5(2) of the Authorisation Directive). Both the general authorisation as well as the individual granting of a right of use may be subject to conditions[335]

Procedural rules

1.110 The Directive provides that the procedures for the granting of frequency usage rights shall be open, objective, transparent, non-discriminatory and proportionate (Article 5(2), subpara 2 of the Authorisation Directive). The recitals clarify that Member States may, as part of the application procedure for granting rights to use a radio frequency, 'verify whether the applicant will be able to comply with the conditions attached to such rights'; if the applicant cannot prove this ability, the application for the right to use a radio frequency may be rejected.[336] An exception to the requirement of open procedures (but not to the principles of transparency, objectivity, proportionality and non-discrimination) may apply in cases where the granting of individual rights of use of radio frequencies to the providers of radio and television broadcast content services is necessary to achieve a general interest objective. Decisions on the vesting of rights of use must be taken 'as soon as possible after receipt of the complete application'; they must be communicated to the applicant and made public. In the case of radio frequencies that have been allocated for specific purposes within the national frequency plan, the decision must be taken within six weeks after receipt of the complete application (Article 5(3) of the Authorisation Directive).

Transferability and time limitations

1.111 As part of the EU's new approach to spectrum management, the Authorisation Directive seeks to enhance access to spectrum resources, innovation and

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331 Cf Art 5(1) of the Authorisation Directive.

332 Recital 7 of the Authorisation Directive. See also Arti 2(a) of the RSPP 2012 (Decision No 243/2012/EU).

333 Cf Art 9a(1) of the Framework Directive.

334 Cf Recital 67 of the Better Regulation Directive; see also at para 1.92 et seq above

335 See para 1.112 below.

336 Recital 13 of the Authorisation Directive.

investment in new technologies by limiting the period of time for which frequency usage rights are granted and by allowing co-ordinated (ie governmentally controlled) spectrum trading.

When granting rights of use, Member States must specify whether those rights can be transferred by the holder of the rights, and under which conditions (Article 5(2), subpara 3 of the Authorisation Directive).

When Member States grant rights of use for a limited period of time. the duration must be 'appropriate for the services concerned' and allow for an appropriate period for investment amortisation. If individual rights to use radio frequencies are granted for 10 years or more and such rights may not be leased or transferred, the national authorities must conduct a review, including a public consultation, taking into account market coverage and technological development[337] in order to determine whether the individual right of use can be converted to a general authorisation or made transferable or leasable (Article 5(2), subpara 5 of the Authorisation Directive).

Admissible conditions

1.112 The granting of frequency usage rights by general authorisation and by individual right of use may be subject only to the conditions specified in the Annex to the Authorisation Directive. Such conditions must be non-discriminatory, proportionate and transparent and must be in accordance with the principles of technology neutrality and service neutrality set out in Article 9 of the Framework Directive.[338] The Annex sets out a list of conditions which may be attached to a general authorisation and a list of conditions which may be attached to individual rights of use for radio frequencies. The latter include 'any commitments, which the undertaking obtaining the usage right has made in the course of a competitive or comparative selection procedure.' This may comprise network build-out obligations, obligations regarding geographical coverage as well as the obligation to pay fees for the right of use of the radio frequencies.[339]

Limitation of the number of rights of use to be granted

1.113 According to Article 5(5) of the Authorisation Directive, the number of rights of use for radio frequencies may be limited 'where this is necessary to ensure the efficient use of radio frequencies'. The substantive and procedural rules regarding such limitations are set out in Article 7: the decision to limit the number of rights of use to be granted for radio frequencies is to be prepared by giving all interested parties, including users and consumers, the opportunity to be heard. The decision must 'give due weight to the need to maximise benefits for users and to facilitate the development of competition' (Article 7(1)(a) of the Authorisation Directive). The decision, including its reasons, must be published and must be reviewed 'at reasonable intervals or at the reasonable request of affected undertakings' (Article 7(1)(e) of the Authorisation Directive). Where the granting of rights of use for radio frequencies has been limited, Member States may grant such rights on the basis of competitive or comparative selection procedures (Article 7(4) of the Authorisation Directive); the Directive does not grant preference to one of these two selection procedures.

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337 Recital 69 of the Better Regulation Directive.

338 See para 1.107 above.

339 Annex, Part B, no 7.

HARMONISED ASSIGNMENT OF RADIO FREQUENCIES

1.114 Where the usage of radio frequencies has been harmonised, access conditions and procedures have been agreed on, and undertakings to which the radio frequencies shall be assigned have been selected in accordance with international agreements and Community rules, Member States are obliged to grant the right of use for such radio frequencies in accordance therewith and without imposing any further conditions, additional criteria or procedures which would restrict, alter or delay the correct implementation of the common assignment of such radio frequencies (Article 8 of the Authorisation Directive). In practice, the Commission bases spectrum harmonising measures predominantly on Article 4(3) of the Radio Spectrum Decision.[340]

Rights of use for numbers

GENERAL AUTHORISATIONS AND GRANTING OF INDIVIDUAL RIGHTS

1.115 The provisions in the Authorisation Directive with respect to rights of use for numbers follow broadly those regarding rights of use for radio frequencies. With respect to the granting of rights of use for numbers, the Directive provides, as in the case of radio frequencies, that rights of use shall be granted by Member States to any undertaking providing or using networks or services under a general authorisation upon request. It follows from Article 5(1) of the Authorisation Directive, which establishes the priority of general authorisations for the use of frequencies, that rights of use for numbers should be granted on an individual basis. The recitals indicate that rights to numbers may also be allocated from a European numbering plan.[341] Member States may, but are not required to, grant rights of use for numbers to undertakings other than providers of telecommunications networks or services.[342]

1.116 The assignment of rights of use for numbers must be based on open, objective, transparent, non-discriminatory and proportionate procedures (Article 5(2), sentence 2 of the Authorisation Directive). Decisions on rights of use for numbers shall be taken 'as soon as possible' after receipt of the complete application and must be communicated and published. In the case of numbers that have been allocated for specific purposes within the national numbering plan, allocation decisions shall be taken within three weeks (Article 5(3) of the Authorisation Directive). In the case of numbers of exceptional economic value that are to be assigned based on competitive or comparative selection procedures, allocation decisions shall be taken within a maximum period of six weeks (Article 5(4) of the Authorisation Directive).

ADMISSIBLE CONDITIONS

1.117 Rights of use for numbers may be granted for a limited period of time[343] provided that the duration is 'appropriate for the service concerned' (Article 5(4), sentence 4 of the Authorisation Directive). The regulatory approach regarding the conditions that may be attached to the rights of use for numbers is identical to the

340 See para 1.105 above.
341 See Recital 11 of the Authorisation Directive.
342 See Recital 14 of the Authorisation Directive.
343 See Annex, Part C, no 5 of the Authorisation Directive.

approach regarding radio frequencies: Part C of the Annex to the Authorisation Directive sets out an inclusive list of conditions which may be attached to rights of use for numbers. These include, inter alia, conditions for the effective and efficient use of numbers, the obligation to provide public directories subscriber information for the purposes of Articles 5 and 25 of the Universal Service Directive, and the obligation to pay usage fees in accordance with Article 13 of the Authorisation Directive.[344] Member States may determine whether or not rights of use for numbers can be transferred to other undertakings,[345] to the extent that number portability is not governed by Community law.[346]

Limitation of the number of rights of use to be granted

1.118 Member States may, after giving all interested parties the opportunity to comment, decide to grant rights of use for numbers of exceptional economic value through competitive or comparative selection procedures (Article 5(4) of the Authorisation Directive). The Directive does not, however, provide for detailed procedural rules as in the case of selection procedures regarding radio frequencies (Article 7 of the Authorisation Directive).

The NRAs' enforcement powers

1.119 In order to monitor whether undertakings comply with the conditions established in the general authorisations or with the conditions attached to rights of use granted to undertakings as well as to monitor the compliance with the 'specific obligations' which are imposed on providers of electronic communications networks and services designated as having SMP[347] (Article 10(1) of the Access Directive), NRAs need to obtain, from the undertakings, relevant information. To this end, the Authorisation Directive establishes far-reaching powers of the NRAs to obtain information (Article 10(1), sentence 2, and Article 11 of the Authorisation Directive).[348] The Directive also establishes both procedural and substantive rules to ensure compliance with the conditions of the general authorisations or rights of use and with respect to 'specific obligations' (Article 10, paras (2) to (7) of the Authorisation Directive).[349]

Powers to request information

1.120 In exercising their powers to obtain information from undertakings operating under general authorisations, rights of use for frequencies or numbers or fulfilling 'specific obligations' which have been imposed on the basis of Article 6(2) of the Authorisation Directive,[350] the NRAs are bound by the principle of proportionality. They may only request information that is proportionate and objectively justified to achieve specific objectives (Article 11(1), sentence 1 of the Authorisation Directive) and are obliged to inform the undertakings of the specific purpose for

344 Annex, Part C, no 7 and Art 13 of the Authorisation Directive.

345 See Arts 9 and 9b of the Framework Directive for the transfer of rights of use for frequencies: see also para 1.111 above. See Art 5(2), sentence 5 for the transfer of rights of use for numbers.

346 See Art 30(1) of the Universal Service Directive.

347 Obligations according to Arts 5(1) and (2), 6 and 8 of the Access Directive; Art 17 of the Universal Service Directive.

348 See paras 1.120 et seq below.

349 See paras 1.122 et seq below.

350 See para 1.99 above.

which the information is to be used (Article 11(2) of the Authorisation Directive). The purposes for which information may be required by the NRAs include the 'systematic or case-by-case verification of compliance with' conditions attached to general authorisations regarding financial contributions to the funding of universal services (Annex, Part A, no 1) or administrative charges in accordance with Article 12 of the Authorisation Directive (Annex, Part A, no 2), and with conditions attached to rights of use for radio frequencies or numbers regarding the effective and efficient use of frequencies or numbers (Annex, Part B, No 2 and Annex, Part C, no 2) and regarding usage fees in accordance with Article 13 of the Authorisation Directive (Annex, Part B, No 6 and Annex, Part C, no 7). Moreover, NRAs may require information to verify compliance with obligations imposed on providers of electronic communications networks and services under Articles 5(1), 5(2), 6 and 8 of the Access Directive and Article 17 of the Universal Service Directive or with obligations imposed under the Universal Service Directive on undertakings designated to provide universal services. In addition, the NRA may engage in the case-by-case verification of compliance with any of the conditions set out in the Annex to the Authorisation Directive, where a complaint has been received or where the NRA has other reasons to believe that the condition is not being complied with or in the case of an investigation by the NRA upon its own initiative (Article 11(1)(b) of the Authorisation Directive). Furthermore, the NRA may require information for comparative overviews of quality and price of services and for market analysis[351] as well as to safeguard the effective management of radio frequencies and in order to evaluate further network developments which may have an impact on wholesale services made available for competitors.[352]

1.121 If an undertaking fails to provide information, inter alia, in conjunction with the verification of compliance with conditions of general authorisations within reasonable periods stipulated by the NRA, the NRA may impose financial penalties on the basis of national laws (Article 10(4) of the Authorisation Directive).

Powers to ensure compliance with the conditions of the authorisations

1.122 Article 10 of the Authorisation Directive establishes a tiered procedure for the enforcement of the conditions of the general authorisations, of rights of use, and of the 'specific obligations' of SMP undertakings, and sets out the measures that the NRAs may take: where an NRA finds that an undertaking is not complying with one or more of the conditions of the general authorisation, of rights of use or with the 'specific obligations' imposed on SMP undertakings, it shall notify the undertaking of those findings and give the undertaking a reasonable opportunity to state its view (Article 10(2) of the Authorisation Directive).

1.123 The NRAs may require the undertaking to cease the non-compliance or breach either immediately or within a reasonable period of time and shall take appropriate and proportionate action to ensure compliance; in this context, the Member States must grant to their NRAs the power to impose 'dissuasive financial penalties' which may have a retroactive effect and orders to cease or delay the provision of a service or a bundle thereof where continuation of service provision would lead to significant harm to competition until access obligations imposed

351 According to Arts 6(3), 7(3), 8(2) and 13(1) of the Access Directive or Arts 16(3), 17(1)(a), 18(1) and (2) and 19(2) of the Universal Service Directive.

352 Article 11(1) (g) and (h) of the Authorisation Directive which were introduced by the 2009 Regulatory Package.

following market analysis have been fulfilled (Article 10(3), sentences 1 and 2 of the Authorisation Directive). The measures taken by the NRAs must be communicated to the undertaking concerned together with the reasons for action and must afford the undertaking a reasonable period to comply with the measure (Article 10(3), sentence 3 of the Authorisation Directive).

1.124 NRAs may prevent an undertaking from continuing to provide electronic communications networks or services or suspend or withdraw rights of use only in cases of 'serious or repeated breaches' of relevant conditions or 'specific obligations', and where measures aimed at ensuring compliance have failed. Proportionate, effective and dissuasive sanctions and penalties may be imposed for such a breach, 'even if the breach has subsequently been rectified' (Article 10(5) of the Authorisation Directive).

1.125 Urgent interim measures are permissible if the relevant authority 'has evidence' of a breach of the conditions of the general authorisation, of rights of use or of 'specific obligations' of the SMP undertaking representing an 'immediate and serious threat to public safety, public security or public health' or likely to create serious economic or operational problems for other providers or users of electronic communications networks or services or other users of the frequency spectrum. Such interim measures may be valid for a maximum of three months and may be extended by a further three months where enforcement procedures have not been completed. (Article 10(6) of the Authorisation Directive). In transposing and applying the concepts of 'public safety', 'public security' and 'public health' into national laws and in applying these concepts, national legislators and regulators will have to be mindful of the jurisprudence of the ECJ in relation to the identical terms used in Article 30 of the ECT[353] which has been replaced by Articles 87 and 88 of the TFEU.

Administrative charges and fees for rights of use

Administrative charges

1.126 Article 12 of the Authorisation Directive introduces an important innovation to European telecommunications law: under this provision, Member States may impose on undertakings providing a service or a network under the general authorisation, or to whom a right of use has been granted, certain administrative charges. Despite the comforting wording that these administrative charges shall cover 'only' the administrative costs 'which will be incurred in the management, control and enforcement of the general authorisation scheme and of rights of use and of specific obligations as referred to in Article 6(2) (Article 12(1)(a) of the Authorisation Directive), it is clear that the administrative charges may cover the costs of the entirety of the NRAs' operations. Specifically, Article 12(1)(a) of the Authorisation Directive states in its second part that the administrative costs:

> 'may include costs for international cooperation, harmonisation and standardisation, market analysis, monitoring compliance and other market

353 See, with regard to 'public order', ECJ judgment of 23 November 1978, *Thompson* (7/78) [1978] ECR 2247 at 2275; ECJ judgment of 22 June 1994, *Deutsches Milchkonto* (C-426/92) [1994] ECR 2757 at 2782; ECJ judgment of 4 December 1974, *van Duyn v Home Office* (41/74) [1974] ECR 1337. For 'public safety', see ECJ judgment of 10 July 1984, *Campus Oil* (72/83) [1984] ECR 2727, 2751; ECJ judgment of 17 June 1987, *Commission v Italy* (154/85) [1987] ECR 2717. For 'health protection', see ECJ judgment of 8 July 1975, *Rewe* (4/75) [1975] ECR 843, 859; ECJ judgment of 12 March 1987, *Commission v Germany* (178/84) [1987] ECR 1227.

control, as well as regulatory work in all its preparation and enforcement of secondary legislation and administrative decisions, such as decisions on access and interconnection'.

On this basis, there will hardly be any administrative task of an NRA the cost of which the NRA may not defray by way of the administrative charge.

1.127 By way of limitation, Article 12(1)(b) of the Authorisation Directive provides that the administrative charges shall be imposed upon the individual undertakings providing a network or a service based on general authorisation or having been granted rights of use in an objective, transparent and proportionate manner which minimises additional administrative costs and attendant charges. The recitals mention, as an example of a fair, simple, and transparent alternative for these 'charge attribution criteria', a turnover-related distribution key.[354] The principle of proportionality is specified in the recitals by the caveat that the system for administrative charges should not distort competition or create barriers for entry into the market.[355]

As a procedural safeguard for the principle of proportionality, Article 12(2) of the Authorisation Directive provides that, where NRAs impose administrative charges, they shall publish a yearly overview of their administrative costs and of the total sum of the charges collected. Taking account of the difference between the total sum of the charges and the administrative costs, appropriate adjustments must be made (Article 12(2) of the Authorisation Directive).

It should be noted that the Directive does not establish an *obligation* on Member States to impose administrative charges and that the attribution basis for the charge does not need to include all of the administrative costs set out in Article 12(1)(a) of the Authorisation Directive.

Fees for rights of use

1.128 Notwithstanding the administrative charges and, as the recitals explicitly state, 'in addition' to them,[356] 'Member States may allow the relevant authority to impose fees for the rights of use for radio frequencies or numbers or rights to install facilities on, over or under public or private property'. These fees shall 'reflect the need to ensure the optimal use of the resources' (Article 13, sentence 1 of the Authorisation Directive).

Transitional regulations for existing authorisations

1.129 The Authorisation Directive contains transition provisions for those authorisations which were already in existence on 31 December 2009. These authorisations had to be brought into line with the provisions of the Directive by 19 December 2011 at the latest (Article 17(1) of the Authorisation Directive). Only where the application of this rule results in a reduction of the rights or in the extension of the obligations under an authorisation already in existence are Member States allowed to extend the validity of those rights and obligations until 30 September 2012, provided that the rights of other undertakings under EU law are not affected thereby (Article 17(2) of the Authorisation Directive).

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354 Recital 31, sentence 4 of the Authorisation Directive.

355 Recital 31, sentence 1 of the Authorisation Directive.

356 Recital 32 of the Authorisation Directive.

Regulation of Network Access and Interconnection: the Access Directive

Objectives and scope of regulation

1.130 The Access Directive harmonises the way in which Member States regulate access to, and interconnection of, electronic communications networks and associated facilities and, therefore, concerns regulation at a wholesale level. The objective of the Directive 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' (Article 1, sentence 2 of the Access Directive).

Ultimately, the EU Regulatory Framework aims at replacing the ex ante regulation of network access and interconnection by an ex post control under general competition law.[357]

1.131 The Directive defines the legal concepts of, and establishes the general principles for, access and interconnection, the rights and obligations of undertakings – in particular the principle that agreements on a commercial basis shall have priority over regulatory decisions – as well as powers and responsibilities of the NRAs.[358] With respect to these regulatory powers, the Directive sets out both regulatory powers which exist irrespective of the market position of undertakings[359] and regulatory powers which exist only with respect to SMP undertakings;[360] specific access obligations exist with respect to digital television and radio broadcasting services.[361]

1.132 The Access Directive applies to operators[362] of public communications networks[363] and to undertakings seeking interconnection or access to their networks or associated facilities. Non-public networks are not within the scope of the Directive, unless they benefit from access to public networks.[364] In accordance with the principle of content neutrality, which governs the entire EU Regulatory Framework,[365] the Access Directive does not apply to 'services providing content'.[366]

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357 Recital 5 of the Better Regulation Directive.

358 See para 1.141 et seq below.

359 See para 1.143 et seq below.

360 See para 1.145 et seq below.

361 See para 1.167 et seq below.

362 An operator is 'an undertaking providing or authorized to provide a public communications network or associated facility' which may own the relevant infrastructure facilities or may rent some or all of them; cf Art 2(c) of the Access Directive and Recital 3, sentence 2.

363 See Art 2(c) of the Framework Directive for a statutory definition; see also Recital 1, sentence 3 of the Access Directive: 'The provisions of this Directive apply to those networks that are used for the provision of publicly available electronic communications services'.

364 Cf Recital 1 of the Access Directive.

365 Article 1(3) of the Framework Directive: see also paras 1.7 and 1.34 above.

366 Recital 2 specifically mentions, as an example of 'services providing content', the offer for sale of a package of sound or television broadcasting content.

Fundamental terms of regulation

1.133 The Access Directive, unlike its predecessors,[367] defines access broadly as:

> 'the making available of facilities and/or services, to another undertaking, on either an exclusive or non-exclusive basis, for the purpose of providing electronic communications services, including when they are used for the provision of information society services or broadcast content' (Article 2(a), sentence 1 of the Access Directive).

The latter part of the definition emphasises that the EU Regulatory Framework is a 'transmission-centric' regulatory framework.[368] This definition is further illustrated by a non-inclusive list of examples, according to which 'access' includes access to:

- network elements and associated facilities, which may involve the connection of equipment, by fixed or non-fixed means;[369]
- physical infrastructure including buildings, ducts and masts;
- relevant software systems including operational support systems;
- information systems and databases for pre-ordering, provisioning, ordering, maintaining and repair requests, and billing;
- number translation or systems offering equivalent functionality;
- fixed and mobile networks, in particular for roaming;
- conditional access systems for digital television services; and
- virtual network services (Article 2(a), sentence 2 of the Access Directive).

The Directive specifically excludes, from its scope of applicability, access by end users, which is governed by the Universal Service Directive.[370]

1.134 'Interconnection' is defined, in Article 2(b), sentence 2 of the Access Directive, as 'a specific type of access implemented between public network operators'. It is further described as:

> '[the] physical and logical linking of public communications networks used by the same or a different undertaking in order to allow the users of an undertaking to communicate with users of the same or another undertaking, or to access services provided by another undertaking' (Article 2(b), sentence 1 of the Access Directive).

Services of the (interconnected) public communications networks may be provided by the parties involved in the interconnection or by other parties who have access to the network.[371]

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367 The previous telecommunications directives refrained from defining the term 'access' and addressed only the access to telecommunications networks, cf Art 4(2) of Directive 97/33/EC and Art 16(1) of Directive 98/10/EC.

368 See para 1.34 above.

369 This includes access to the local loop and to facilities and services that are necessary to provide services over the local loop; cf the definition of 'local loop' in Art 2(e) of the Access Directive as well as Annex II of the Access Directive.

370 Art 2(a) sentence 1 Access Directive; similarly art 2(1)(a) Directive 97/33/EC; cf fourth edition of this book, paras 1.96 et seq. Cf Art 1(2), sentence 3 of the Access Directive: see also para 1.185 et seq. below.

371 Article 2(b), sentence 1 Access Directive; similarly Art 2(1)(a) of the Directive 97/33/EC; cf fourth edition of this book, paras 1.96 et seq.

Regulatory principles

Freedom of access

1.135 Member States must ensure that undertakings are not prevented from negotiating between themselves agreements on technical and commercial arrangements for access or interconnection either in the same Member States or in different Member States. In particular, undertakings requesting access or interconnection must not be required to obtain an authorisation to operate in the Member State where access or interconnection is requested.[372]

Priority of commercial negotiations

1.136 The principle that commercial negotiation takes priority over regulatory intervention[373] follows from the regulatory approach of Articles 3 and 4 of the Access Directive on the one hand, and Article 5(1) and (3) of the Access Directive on the other hand. The principle of priority of commercial negotiations is also emphasised in the recitals which stipulate that 'undertakings which receive requests for access or interconnection should in principle conclude such agreements on a commercial basis, and negotiate in good faith'; NRAs should have the power to secure 'where commercial negotiation fails' adequate access and interconnection and interoperability of services in the interest of end-users.[374]

1.137 To that effect, Article 4(1), sentence 1 of the Access Directive establishes a right of operators of public communications networks 'to negotiate interconnection with each other'. At the request of another authorised undertaking, operators of public communications networks are obliged to negotiate, in good faith,[375] interconnection. The purpose of the right and obligation to negotiate is 'to ensure provision and interoperability of services throughout the Community'; this does not mean that the obligation to negotiate exists only in the case of cross-border interconnection. This follows both from the definition of 'interconnection' in Article 2(b) of the Access Directive, which is not limited to cross-border interconnection, and from the Directive's justification set out in a recital which explains that there should be no restrictions that prevent undertakings from negotiating access and interconnection arrangements between themselves, 'in particular', but not only, 'on cross-border agreements'.[376]

1.138 While the obligation to negotiate refers only to interconnection,[377] the obligation of operators to submit offers refers to both access and interconnection. This obligation to contract does not apply, however, to all operators of public communication networks, but only to those upon which the NRA has imposed

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372 Art 3(1) of the Access Directive.

373 This principle was already enshrined in the previous regulatory framework, cf. Art 4(1) in conjunction with An Directive 97/33/EC.

374 Recital 5, sentence 2 and Recital 6 of the Access Directive; but see also art 5(4) Framework Directive on the authorisation of the NRA to take action ex-officio in reasonable cases.

375 ECJ judgment of 12 November 2009, *Telia Sonera Finland Oyi* (C-192/08)[2009] ERC I-10717 at [49–62]

376 Recital 5 of the Access Directive.

377 See ECJ judgment of 13 November 2008, *Commission v Poland* (C-227/07) [2008] ECR I – 8403 at [23], [35–47], [49]; ECJ judgment of 12 November 2009, *Telia Sonera Finland Oyi* (C-192/08) [2009] ERC I-10717 at [26–36], [40], [43–48].

specific 'obligations'.[378] Only those operators upon which the NRA has imposed obligations pursuant to Articles 5, 6 and 8 of the Access Directive are obliged to offer access and interconnection to other undertakings 'on terms and conditions consistent with' the obligations imposed.

1.139 Article 4(2) of the Access Directive establishes specific access obligations reflecting the Community's policy decision to introduce widescreen television services: Public electronic communications networks established for the distribution of digital television services must be capable of distributing widescreen television services and programs. Network operators that receive and re-distribute widescreen television services or programs are obliged to maintain the wide-screen format.[379]

1.140 Undertakings which acquire information from another undertaking 'before, during or after the process of negotiating access or interconnection arrangements' may use that information only for the purposes for which it was supplied. Member States are required to ensure the effectiveness of this confidentiality obligation which applies with respect to 'any other party', including 'other departments, subsidiaries or partners' of the undertaking (Article 4(3) of the Access Directive).

Overview of the NRAs' regulatory powers under the Access Directive

1.141 The Access Directive sets out general objectives to be pursued by the NRAs in exercising their responsibilities with respect to access and interconnection (Article 5(1), sub-para 1 of the Access Directive) and distinguishes between general regulatory powers (Article 5(1), sub-para 2 of the Access Directive) and those existing with respect to SMP undertakings (Article 8 of the Framework Directive), specifying the former (Article 5(1), sub-para 2 (a), (ab) and (b) of the Access Directive). In the exercise of all regulatory powers, the NRAs are bound by the principles of objectivity, transparency, proportionality and non-discrimination; all obligations and conditions imposed on the basis of Article 5 of the Access Directive are subject to the consultation procedure according to Article 6 of the Framework Directive and the consolidation procedure under Articles 7 and 7a of the Framework Directive (Article 5(2) of the Framework Directive).[380]

1.142 Article 5(1), sub-para 1 of the Access Directive establishes three specific tasks of the NRAs. They are required to encourage and, where appropriate, ensure:

- adequate access;
- adequate interconnection; and
- interoperability of services.

These specific obligations are to be fulfilled in pursuit of the more general objectives set out in Article 8 of the Framework Directive.[381] In exercising their responsibilities, the NRAs must promote efficiency, sustainable competition and provide the maximum benefit to end users. The multitude and variety of regulatory objectives contained in Article 5(1), sub-para 1 of the Access Directive allow for an

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378 According to Art 5 (see para 1.143 et seq below), Art 6 (see para 1.167 et seq below) and Art 8 (see para 1.145 et seq below).

379 For an analysis of access obligations in connection with radio broadcasting services, see para 1.167 et seq below.

380 See paras 1.48 and 1.53 et seq above; on the corresponding requirements with respect to access related regulatory powers towards SMP undertakings, see Art 8(4) of the Access Directive.

381 See para 1.40 et seq above.

extraordinarily broad discretion of the NRAs in their selection of the appropriate regulatory measures, both when regulating undertakings regardless of their market position[382] and when regulating SMP undertakings.[383]

Regulatory powers applicable to all market participants

THE BASIC REGULATORY POWERS UNDER ARTICLE 5(1), SUB-PARA 2 (A), (AB)

1.143 Member States must grant their NRAs, regulatory powers with respect to operators regardless of their market position. Article 5 of the Access Directive specifies the purpose and the scope of these regulatory powers 'in particular' with respect to specific market segments,[384] which seems to indicate that additional, more far-reaching national regulation remains permissible. Under Article 5(1), sub-para 2(a) of the Access Directive, NRAs may 'to the extent that it is necessary to ensure end-to-end connectivity, [impose] obligations on undertakings that control access to end-users'. This provision is aimed at ensuring 'the end-to-end connectivity of the networks'.[385]

The 2009 Regulatory Package introduced further specific 'obligations' which NRAs may impose upon undertakings that control access to end users, regardless of their market position, in order to ensure end-to-end connectivity: Under Article 5(1), sub-para 2(ab) of the Access Directive, the NRAs may impose interoperability obligations on undertakings controlling access to end-users 'in justified cases'.

IMPOSING OTHER OBLIGATIONS

1.144 The obligations that the NRAs may impose on non-SMP undertakings controlling access to end-users are not exhaustively listed in Article 5(1) of the Access Directive.[386]

Rather, according to the cross-reference to Article 5(1) of the Access Directive contained in Article 8(3), first indent of the Access Directive, NRAs may not impose the obligations set out in Articles 9 to 13 of the Access Directive on operators that have not been designated as SMP undertakings, 'without prejudice' to Article 5(1) of the Access Directive. It follows, on the contrary, that the obligations set out in Articles 9 to 13 of the Access Directive may, under exceptional circumstances, be imposed upon operators that have not been designated as SMP undertakings 'to the extent that is necessary to ensure end-to-end connectivity', if and when such undertakings 'control access to end-users'. This includes the NRA's power to require a non-SMP undertaking which controls access to end-users to negotiate, in good faith, interconnection with other operators of public communications networks upon request.[387]

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382 See para 1.143 et seq below.

383 See para 1.145 et seq below.

384 On regulatory powers with regard to the access to digital radio and television broadcasting services, see para 1.167 et seq below.

385 See Common Position (EC) No 36/2001 adopted by the Council of 17 September 2001 [2001] OJ C337/1, p 16.

386 ECJ judgment of 12 November 2009, *Telia Sonera Finland Oyi* (C-192/08) [2009] ECR I-10717 at [26–36], [40], [43–48].

387 ECJ judgment of 12 November 2009, *Telia Sonera Finland Oyi* (C-192/08) [2009] ECR I-10717 at [26–36], [40], [43–48].

Regulatory powers only applicable to market participants designated as having SMP

1.145 With respect to the regulation of access and interconnection for SMP undertakings, Article 8(1) of the Access Directive obliges the Member States to ensure that NRAs are empowered to impose the obligations set out in Articles 9 to 13a of the Access Directive. These obligations are:

- obligations of transparency (Article 9);
- obligations of non-discrimination (Article 10);
- obligations of accounting separation (Article 11);
- obligations of access to, and use of, specific network facilities (Article 12);
- obligations relating to price control and cost accounting (Article 13); and
- obligation relating to functional separation (Article 13a).

Regulatory principles

1.146 If an undertaking has been designated as having significant market power on a specific market, the NRA is obliged to impose the obligations set out in the Access Directive 'as appropriate' (Article 8(1) of the Access Directive). This means that the NRA has discretion in the selection of the regulatory remedies to be imposed upon undertakings ('as appropriate'), but no discretion in deciding whether or not to impose remedies.[388] When selecting remedies, the NRAs are obliged to take into account 'the nature of the problem identified' and the objectives set out in Article 8 of the Framework Directive (Article 8(4) of the Access Directive). The Access Directive's reference to regulatory objectives set out in Article 8 of the Framework Directive broadens the NRAs' discretion. Limitations result, in particular, from the principle of proportionality, which is specifically mentioned in Article 8(4), sentence 1 of the Access Directive, and from the procedural requirement that obligations shall only be imposed following consultation in accordance with Articles 6 and 7 of the Framework Directive (Article 8(2), sentence 2 of the Access Directive).[389] It remains to be seen whether the further consultation procedure set forth in Article 7a of the Framework Directive[390] as well as the Commission's Recommendations[391] will serve their purpose to achieve a more consistent selection and application of remedies by the NRAs.[392]

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388 Cf Art 8(2) of the Access Directive: '... the [NRA] shall impose the obligation ... as appropriate'. If SMP is found, the NRAs have to impose at least one remedy on the undertaking concerned.

389 See paras 1.48 and 1.53 et seq above.

390 See para 1.58 above.

391 See, eg Commission Recommendation 2010/572/EU of 20 September 2010 on regulated access to Next Generation Access Networks (NGA) [2010] OJ L251/35; Commission Recommendation 2009/396/EC of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU [2009] OJ L124/67. The ERG, too, has issued guidance documents aimed at enhancing regulatory consistency in the application of remedies by the NRAs; these include ERG Common Position on best practice in remedies imposed as a consequence of a position of significant power in the relevant markets for wholesale leased lines (ERG (07) final 080331), and the more general Revised ERG Common Position on the approach to Appropriate remedies in the ECNS regulatory framework (ERG (06) 33) (May 2006).

392 In its third report on market reviews under the EU Regulatory Framework, the Commission has confirmed its findings from its 2006/2007 review that the NRA's practice regarding the

1.147 When an NRA intends to impose upon an operator with significant market power other obligations with respect to access or interconnection than those set out in Articles 9 to 13 of the Access Directive, specific procedural safeguards apply. In this case, the NRA has to submit its request to the Commission, which decides on it, taking utmost account of the opinion of BEREC following consultation with the Communications Committee.[393]

Obligations of transparency

1.148 According to Article 9(1) of the Access Directive, NRAs may impose, upon SMP undertakings, 'obligations for transparency in relation to interconnection and/or access'. These obligations serve, in particular, to speed up negotiation, avoid disputes and give confidence to market players that a service is not being provided on discriminatory terms.[394] The object of transparency obligations can be information in relation to access (Article 2(a) of the Access Directive) or interconnection of public communications networks (Article 2(b) of the Access Directive). The Directive mentions, in a non-exhaustive list ('such as'), accounting information, technical specifications, network characteristics, terms and conditions for supply and use including any conditions limiting access to and/or use of services and applications if such conditions are allowed under national law in conformity with EU law, and prices.[395]

1.149 The NRAs' discretion extends not only to the scope of the transparency obligation imposed, but also to the modalities of bringing about transparency. The NRAs may 'specify the precise information to be made available, the level of detail required and the manner of publication' (Article 9(3) of the Access Directive). This includes a determination as to whether or not the information has to be provided free of charge and whether such publication has to be made on paper or electronically.[396]

1.150 Specific means to ensure transparency are 'reference offers', the publication of which may be required by NRAs (Article 9(2) of the Access Directive). The NRAs' power to require the publication of a reference offer exists 'in particular', but not only, where an operator has obligations of non-discrimination.[397] The reference offers must comply with the unbundling obligation, which means that they must be sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested and must be broken down into components according to market needs and provide the associated terms and conditions including prices.

1.151 Specific transparency requirements apply with respect to operators with obligations to offer wholesale network infrastructure access, including shared or fully unbundled access to the local loop at a fixed location. Under Article 9(4) of the Access Directive, NRAs are obliged to ensure the publication of a reference offer by such operators. The reference offer shall contain at least the elements set out in Annex II to the Access Directive, which corresponds in parts to the requirements formerly set out in Regulation 2887/2000.[398] This list has been amended and expanded by the 2009 Regulatory Package to not only cover local loop access but 'wholesale network infrastructure access' as such, of which local loop is only one, albeit an important, category and which, in reaction to the EU Regulatory Framework's goal to further NGA roll-out, now also explicitly covers, eg 'duct access enabling the roll-out of access networks' where necessary (Access Directive, Annex II, A.1(c)).

choice of remedies 'still varies across Europe, even where the underlying market problems are very similar': COM(2010) 271 final, 1 June 2010, p 4.

393 Art 8(3), sub-para 2 of the Access Directive in conjunction with Art 14(2) of the Framework Directive.

394 Cf Recital 16 of the Access Directive.

395 See also the Commission's Directive Proposal, COM(2000) 384 final, 12 July 2000, p 7, mentioning 'access, interconnection and interoperability conditions' as further examples.

396 Recital 16 of the Access Directive.

397 See para 1.152 below.

Obligations of non-discrimination

1.152 In order to ensure 'in particular' that SMP undertakings, specifically vertically integrated undertakings,[399] apply 'equivalent conditions in equivalent circumstances to other undertakings providing equivalent services and information to others under the same conditions and of the same quality as they provide for their own services, or those of their subsidiaries or partners', the NRAs may impose obligations of non-discrimination in relation to interconnection or access (Article 10(2) of the Access Directive).[400] The scope of applicability of these obligations is quite broad: the Directive merely requires that the non-discrimination obligations pertain to 'interconnection and/or access' and serve the objectives set out in Article 8 of the Access Directive.

1.153 The Commission has conducted a public consultation 'on the application of a non-discrimination obligation under Article 10 of the Access Directive' which closed on 28 November 2011, having identified the non-discrimination obligation as one of the key remedies 'to be imposed ex ante to resolve competition problems resulting from the existence of access bottlenecks'; the Commission found that the NRAs had, in their regulatory practice, mostly focussed on cases of price discrimination such as, for example, margin squeezes. In the Commission's opinion, however, discriminatory practices not related to pricing, such as quality discrimination, undue requirements or delaying tactics, can have even more severe results than price-based discrimination, a fact which has, to date, been recognised by some but not all NRAs. The Commission concluded that the non-discrimination obligation is not imposed consistently on a national level. This concerns, for example, obligations to 'provide strictly equivalent access conditions for wholesale products' and a trend for some NRAs to favour national companies to the disadvantage of foreign companies seeking access. A further area of concern is the conditions applied to the migration from 'old to new wholesale products', in particular the migration from legacy infrastructure to next generation access networks. Based on these considerations, the Commission has identified three 'main problems':

(i) a lack of clarity as to the scope of the non-discrimination obligations which may cause regulation on a national level to be ineffective;
(ii) a 'too lenient approach' with regard to the imposition and enforcement of the obligation; and

398 Regulation (EC) No 2887/2000 of the European Parliament and the Council of 18 December 2000 on the unbundled access to local loops [2000] OJ L336/4, as repealed by Art 4 of the Better Regulation Directive.

399 Recital 17 of the Access Directive.

400 See also Arts 6 and 9 of Directive 97/33/EC.

(iii) significant differences in the NRA's 'regulatory approaches across the EU' which hinders market integration and the provision of pan-European services.

To provide for a consistent application of the non-discrimination obligation, the Commission is working on a draft Recommendation on non-discrimination which is expected to be published by the end of 2012.[401]

Specific obligations of access

1.154 While the obligations of transparency, non-discrimination and accounting separation seek to ensure fair access and interconnection, Article 12 of the Access Directive is aimed at the granting of access as such. Under this provision, the NRAs are empowered to impose obligations on SMP undertakings to meet reasonable requests for access to, and use of, specific network elements and associated facilities. In deciding on the imposition of access obligations, as in the case of the obligations under Articles 9 to 13 of the Access Directive, NRAs must take into account the regulatory objectives of Article 8 of the Framework Directive (cf Article 8(4) of the Access Directive). Obligations of access to, and use of, specific network facilities should be considered by NRAs in particular (but not only) in situations where the NRA 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 users' interest (Article 12(1), sub-para 1 of the Access Directive).

1.155 Among the specific obligations which NRAs may impose upon SMP undertakings are the following:

- the obligation 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, enable carrier selection, carrier pre-selection and/or subscriber line resale offers';
- the obligation to 'negotiate in good faith with undertakings requesting access';
- the obligation to 'provide specified services on a wholesale basis for resale by third parties';
- the obligation to 'grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services';
- the obligation to 'provide co-location or other forms of facility sharing';
- the obligation to 'interconnect networks or network facilities'; and
- the obligation to 'provide access to associated services such as identity, location or presence services'.

These and other specific obligations are set out in a non-exhaustive catalogue in Article 12(1), sub-para 2 of the Access Directive.

When imposing access obligations, the NRAs may attach conditions ensuring 'fairness, reasonableness and timeliness' (Article 12(1), sub-para 3 of the Access Directive).

1.156 Article 8(4) of the Access Directive repeats and Article 12(2) of the Access Directive reiterates that regulatory decisions regarding the imposition of access obligations shall be justified in the light of the objectives laid down in Article 8 of

401 BEREC, Draft Work Programme 2013 (BoR(12)92) (September 2012), p 18.

the Framework Directive and must comply with the principle of proportionality (Article 8(1) of the Framework Directive)[402] which applies to all regulatory decisions. Article 12(2) of the Access Directive specifies the principle of proportionality by providing a non-exhaustive list of 'factors' which shall be taken into account when assessing whether access obligations would be proportionate to the objectives set out in Article 8 of the Framework Directive. These factors – many of which are based on the 'essential facilities' case law of the Commission and the ECJ[403] – have been amended by the 2009 Regulatory Package to support infrastructure investment, and include:

- 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';
- the 'feasibility of providing the access proposed, in relation to the capacity available';
- the 'initial investment by the facility owner, taking account of any public investment made and the risks involved in making the investment';
- the 'need to safeguard competition in the long term, with particular attention to economically efficient infrastructure-based competition'; and
- the 'provision of pan-European services'.

The recitals point out that mandating access to network infrastructures can be justified as 'a means of increasing competition', but that the imposition by NRAs of mandated access that increases competition in the short term should not reduce incentives for competitors to invest in alternative facilities that will secure more competition in the long term;[404] this aim has now been included in the factors listed in Article 12(2) of the Framework Directive. This emphasises the need to balance, in each individual case, the rights of an infrastructure owner to exploit its infrastructure for its own benefit, and the rights of other service providers to access facilities that are essential for the provision of competing services.[405]

Price control and cost accounting obligations

1.157 The obligations which NRAs may impose upon SMP undertakings include obligations relating to cost recovery and price controls, including obligations for cost orientation of prices in relation to the provision of specific types of interconnection and/or access (Article 13(1), sentence 1 of the Access Directive). These price control measures are predicated on indications, based on a market analysis under Article 16 of the Framework Directive, 'that the operator concerned might sustain prices at an excessively high level, or apply a price squeeze, to the detriment of end-users'. The Directive does not require proof of excessive prices or of price squeezing; rather, a mere 'indication' that a lack of effective competition might lead to these results is sufficient. In order to further infrastructure investments, in particular investments in NGA, Article 13(1), sentence 3 of the Access Directive provides for a duty of the NRAs:

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402 See para 1.40 above.

403 Cf in particular European Commission: Decision (IV 34.174- *B& I Line PLC v Ceiling Harbours Ltd*) Bull EC No 6, 1992, para 1.3.30; Decision 94/19/EC of 21 December 1993 (IV/34.689 – *Sea Containers v Stena Sealink – Interim measures*) [1994] OJ L15/8; Decision 94/119/EC of 21 December 1993, *Port of Rødby* [1994] OJ L55/52. See also ECJ judgment of 6 April 1995, *Magill* (C-241/91 P and C-242/91) [1995] ECR I-743.

404 Recital 19 of the Access Directive.

405 Recital 57 of the Better Regulation Directive.

'[to] take into account the investments made by the operator and allow him a reasonable rate of return on adequate capital employed, taking into account any risks specific to a particular new investment network project'.[406]

1.158 Whereas the threshold for regulatory intervention by the NRAs is low, Article 13(1) of the Access Directive provides for a broad variety of regulatory measures, ranging, as the recitals specifically state,[407] from relatively light measures to relatively stringent measures, such as the obligation that the prices must be cost-oriented,[408] culminating in the ex-ante regulation of prices.

1.159 In determining cost-oriented prices, the NRAs have to 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' (Article 13(1), sentences 2 and 3 of the Access Directive). The burden of proof that 'charges are derived from costs including a reasonable rate of return on investment' lies with the regulated undertaking (Article 13(3), sentence 1 of the Access Directive); furthermore, the undertaking must provide, at the NRAs' request, 'full justification' for its prices and, where necessary, adjust such prices (Article 13(3), sentence 3 of the Access Directive). The Directive specifically states that cost-orientation of prices means 'cost of efficient provision of services' and allows NRAs to use cost-accounting methods independent of those used by the undertaking in order to calculate the cost of efficient provision of services (Article 13(3), sentence 2 of the Access Directive).

1.160 When regulating cost recovery mechanisms or pricing methodologies, the NRAs are bound by the triple objectives of efficiency, promoting sustainable competition and maximising consumer benefits (Article 13(2), sentence 1 of the Access Directive). In pursuing these objectives, the NRAs may also 'take account' of prices available in comparable competitive markets (Article 13(2), sentence 2 of the Access Directive). This means that the NRAs may make use of national or international benchmarks which may be of relevance, particularly where the NRA has to determine whether an undertaking's prices are 'cost-orientated'

1.161 Under Article 13(1) of the Access Directive, the NRAs may also impose an obligation to implement specific cost-accounting systems. The obligation to implement cost accounting systems serves to ensure that the regulated undertakings follow 'fair, objective and transparent criteria' when allocating their costs to their services where they are under an obligation for price controls or cost-orientated prices.[409] If an NRA mandates the implementation of a specific cost-accounting system in order to support price controls, the description of the cost-accounting system must be made publicly available, showing at a minimum the main categories under which costs are grouped and the rules used for cost allocation (Article 13(4), sentence 1 of the Access Directive). Compliance with the mandated cost accounting

406 Cf Commission Recommendation 2010/572/EU of 20 September 2010 on regulated access to Next Generation Access Networks (NGA) [2010] OJ L251/35, para 25.

407 See also Recital 20 of the Access Directive.

408 See, eg Commission Recommendation 2009/396/EC of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU [2009] OJ L124/67, para 1 et seq.

409 Art 1, sub-para 2 of Commission Recommendation of 19 September 2005 on accounting separation and cost accounting systems under the regulatory framework for electronic communications [2005] OJ L 266/64 ('Accounting Recommendation'); further details on the scope of the obligation to implement cost accounting systems are set out in Arts 2 et seq of the Accounting Recommendation.

must be verified by a 'qualified independent body', which may either be the NRA or an independent third party;[410] the results of the review must be published.

Obligation of accounting separation

1.162 The Access Directive establishes broad powers for NRAs to impose obligations for accounting separation 'in relation to specified activities related to interconnection and/or access' (Article 11(1), sub-para 1) and empowers NRAs to request, in particular, vertically integrated companies to make transparent their wholesale prices and their internal transfer prices (Article 11(1), sub-para 2). The main purpose of this specific accounting obligation is to ensure compliance with non-discrimination obligations under Article 10 of the Access Directive and to prevent unfair cross-subsidisation practices. The NRAs may specify the format and the accounting methodology to be used. The obligation to implement accounting separation is aimed at providing the NRA with more detailed information than available from the statutory financial statements of the regulated undertaking in order:

> 'to reflect as closely as possible the performance of parts of the notified operator's business as if they had operated as separate businesses, and in the case of vertically integrated undertakings, to prevent discrimination in favour of their own activities and to prevent unfair cross-subsidy'.[411]

1.163 In order to facilitate the verification of compliance with both transparency obligations and non-discrimination obligations, the NRAs may – above and beyond their information powers under Article 5 of the Framework Directive[412] – require that accounting records, including data on revenues received from third parties, are provided on request. This information may be published, subject to national and Community rules and commercial confidentiality, provided that the publication 'would contribute to an open and competitive market' (Article 11(2), sentence 2 of the Access Directive).[413]

Obligation to implement functional separation

1.164 The 2009 Regulatory Package introduced 'functional separation' as a further remedy available to the NRAs in order to require the regulated undertaking to separate the entity which has control of the undertaking's access network from the undertaking's services entities operating on downstream markets.[414]

Where an NRA concludes that 'the appropriate obligations imposed under Articles 9 to 13 have failed to achieve effective competition and that there are important and persisting competition problems and/or market failures identified in relation to the wholesale provision of certain access product markets', the NRA may, as an exceptional measure, impose 'an obligation on vertically integrated undertakings to place activities related to the wholesale provision of relevant access products in an

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410 See clarification in Recital 21 of the Access Directive.

411 Art 1, sub-para 3 of the Accounting Recommendation.

412 See para 1.46 above.

413 Details on the scope of the obligation to implement accounting separation are set out in Arts 2 et seq of the Accounting Recommendation.

414 Commission Questionnaire for the public consultation on the application of a non-discrimination obligation under Article 10 of the Access Directive (including functional separation under Article 13a), p 4.

independently operating business entity' (Article 13a(1), sub-para 1 of the Access Directive). The business entity of the vertically integrated undertaking has to provide access products and services to all undertakings, including to other business entities within the parent company on the same conditions and within the same timeframe (Article 13a(1), sub-para 2 of the Access Directive).[415]

1.165 Article 13a, paras (2)–(4) of the Access Directive sets out specific procedural rules for the imposition of functional separation. Where an NRA intends to impose functional separation on an undertaking it has to submit a reasoned proposal to the Commission, which includes:

- evidence justifying the NRA's conclusion that 'the appropriate obligations imposed under Articles 9 to 13 have failed to achieve effective competition' and that 'there are important and persisting competition problems and/or market failures' regarding the wholesale provision of the relevant access product market (Article 13a(2)(a) of the Access Directive);
- a reasoned assessment stating that there is little probability of 'effective and sustainable infrastructure-based competition within a reasonable timeframe' (Article 13a(2)(b) of the Access Directive);
- a detailed analysis of the impact of the functional separation on the NRA, on the regulated undertaking and the electronic communications sector as a whole, and on investments in the sector (Article 13a(2)(c) of the Access Directive); and
- an analysis of the reasons justifying the conclusion that functional separation will be the most efficient way to remedy the competition failures identified on the relevant market (Article 13a(2)(d) of the Access Directive).

The draft measure has to include:

- a description of the precise nature and level of the functional separation including details on the legal status of the separated business entity (Article 13a(3)(a) of the Access Directive);
- details on the assets of the separated business entity as well as on the products or services to be provided by the entity (Article 13a(3)(b) of the Access Directive); and
- details on documentation ensuring transparency and compliance with the obligation (Article 13a(3)(c)–(f) of the Access Directive).

The Commission then authorises or rejects the draft measure following the procedure under Article 8(3) of the Access Directive and taking utmost account of the opinion of BEREC (Article 13a(4) of the Access Directive).

Article 13a(5) of the Access Directive clarifies that the undertaking subject to functional separation may still be subject to the transparency, non-discrimination, accounting separation and other access-related obligations under Articles 9–13 of the Access Directive.

1.166 Article 13b of the Access Directive sets out an obligation for vertically integrated undertakings which have SMP on at least one relevant market to inform the NRA in advance of any voluntary separation of their local access networks or significant parts thereof; this obligation serves to allow the NRA to assess the impact of the planned transaction.

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415 For further guidance on the concept of functional separation see BEREC Guidance on functional separation under Articles 13a and 13b of the revised Access Directive and national experiences February 2011, BOR (10) 44 Rev 1.

Access to digital radio and television broadcasting services

Obligations to provide access on fair, reasonable and non-discriminatory terms

1.167 The specific issues of access to digital radio and television broadcasting services[416] are governed by Article 5(1), sub-para 2(b) of the Access Directive. Under this provision, Member States may grant their NRAs the powers to impose, regardless of an undertaking's market position, fair, reasonable and non-discriminatory terms of access to Application Programming Interfaces (API)[417] and Electronic Programme Guides (EPG). This provision is to be read in conjunction with Article 6(1) and Part I of Annex I to the Access Directive, which transposed the provisions of the Television Standards Directive 95/47/EC on conditional access systems[418] into the EU Regulatory Framework.

Obligations concerning conditional access systems

1.168 Article 6(1) of the Access Directive provides that the conditions set out in Part 1 of Annex I to the Access Directive apply to conditional access to digital television and radio services broadcasts. According to these conditions, conditional access systems operated on the EU market 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'.[419] Operators of conditional access services who provide access services to digital television and radio services and whose access is necessary for services broadcasters to reach any group of potential viewers or listeners are obliged to offer their services on fair, reasonable and non-discriminatory terms.[420] The owners of industrial property rights to conditional access products and systems shall not 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.[421]

1.169 The obligations and conditions for access to digital television and radio services can be adapted to economic and technical developments under the regulatory procedure (Article 6(2) of the Access Directive).

1.170 Member States were afforded the possibility to allow their respective NRA to conduct a market analysis in accordance with Article 16(1) of the Framework Directive 'as soon as possible' after the entry into force of the 2002 Regulatory

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416 The terminology of the Access Directive is inconsistent: Art 5(1)(b) mentions 'radio and television broadcasting services', Art 6 (3) sub-para 2(b)(i) mentions 'television and radio broadcasting services' while Art 31(1), sentence 1 of the Universal Service Directive mentions 'radio or television broadcast channels'.

417 According to Art 2(p) of the Framework Directive: 'Application programming interfaces (API)' means "the software interfaces between applications, made available by broadcasters or service providers, and the resources in the enhanced digital television equipment for digital television and radio services".'

418 Directive 95/47/EC of the European Parliament and the Council of 24 October 1995 on the use of standards for the transmission of television signals [1995] OJ L281/51; the Directive has been repealed by Art 26 of the Framework Directive.

419 Annex I, Part I(a) to the Access Directive.

420 Annex I, Part I(b) of the Access Directive.

421 Annex I, Part I(c) of the Access Directive.

Package in order to ascertain whether to maintain, amend or withdraw the conditions for access to digital television and radio services (Article 6(3) of the Access Directive). Where an NRA concluded, as a result of this market analysis, that one or more operators did not have significant market power on the relevant market, it could amend or withdraw the conditions imposed on the basis of Article 6 and Annex I. Whereas Article 16(3) of the Framework Directive provides that the NRA is obliged to withdraw obligations imposed on undertakings if the market is effectively competitive,[422] the Access Directive provides for the NRAs' discretion in the case of operators of access systems or services ('[NRA] may amend or withdraw'). If the NRA decides to amend or withdraw the access conditions, it is bound by the provisions of Article 6(3), sub-para 2(a) and (b) of the Access Directive: neither the accessibility for end-users to radio and television broadcasts and broadcasting channels and services specified in the 'must carry' provision under Article 31 of the Universal Service Directive, nor the prospects for effective competition in the markets for retail digital television and radio broadcasting services and for conditional access systems in other associated services, must be adversely affected by the amendment or withdrawal of access obligations.[423]

Obligations concerning the interoperability of digital interactive television services

1.171 In the interest of the speedy creation of 'open' APIs, Article 18(1) of the Framework Directive obliges the Member States to encourage providers of digital interactive television services and providers of enhanced digital television equipment to use and to comply with APIs.[424]

Regulation of Universal Services and Users' Rights: the Universal Service Directive

Objectives and scope of regulation

1.172 The Universal Service Directive seeks to ensure 'the availability throughout the Community of good quality, publicly available services through effective competition and choice'; in addition, it provides for regulatory measures in those cases of market failure 'in which the needs of end-users are not satisfactorily met by the market' and includes provisions aimed at facilitating access to electronic communications for disabled end users (Article 1(1) of the Universal Service Directive).

1.173 The EU Regulatory Framework contains provisions regarding the scope, imposition and financing of universal service obligations.[425] The Universal Service

422 See para 1.75 above.

423 Cf Art 6(3), sub-para 2(b)(i) and (ii) of the Access Directive.

424 For a list of standards regarding the interoperability of digital interactive television services see Commission Amendment of the List of standards and/or specifications for electronic communications networks, services and associated facilities and services [2006] OJ C71/04.

425 In essence, the current universal service provisions reflect the universal service regime of the previous EU framework, which was spread out over a number of Directives: see in particular Arts 3 and 4c of Directive 90/388/EEC of 28 June 1990 (in the version of Directive 96/19/EC of 13 March 1996 [1996] OJ L74/13) on competition in the markets for telecommunications services [1990] OJ L192/10; Art 5 of Directive 97/33/EC of 30 June 1997 (in the version of

Directive establishes a 'minimum set of services of specified quality to which all end users must have access, at an affordable price in the light of specific national conditions, without distorting competition' (Article 1(2) of the Universal Services Directive); the scope of services to be part of the universal service is a topic of continuous debate and controversy.[426] Furthermore, the Universal Service Directive provides, with reference to the Framework Directive,[427] for the regulation of SMP undertakings in retail markets, thereby complementing the Access Directive, which is aimed at wholesale markets[428] (article 17 Universal Services Directive).[429] Under the heading 'End-user interests and rights', the Directive establishes consumer rights, obligations of network operators and service providers and allows for regulatory measures in the interest of consumer and end-user protection (Articles 20–31 of the Universal Service Directive).[430]

Regulation of universal service obligations

SCOPE OF UNIVERSAL SERVICE OBLIGATIONS

1.174 The Member States are obliged to ensure that the services described in Articles 4–7 of the Universal Service Directive are made available to all end-users in their respective territory 'independently of geographical location, and, in the light of specific national conditions, at an affordable price' (Article 3(1) of the Universal Service Directive). The nature of the 'specific national conditions'[431] is neither defined in the provisions of the Universal Service Directive nor in its recitals. Recital 7 merely confirms what already follows from Article 3(1), namely that the 'specific national conditions' are relevant only for the determination of the 'affordable price'. In establishing the universal service obligation, the Universal Service Directive refers back to the definition set out in Article 2(j) of the Framework Directive which, in turn, refers to the Universal Service Directive for the definition of the 'minimum set of services' which comprise the 'universal service'. The Directive allows the Member States, to a large degree, to determine 'the most efficient and appropriate approach' to ensure the provision of universal services. They have to respect the principles of objectivity, transparency, non-discrimination and proportionality and are obliged to minimise market distortions, 'in particular the provision of services at prices or subject to other terms and conditions which depart from normal commercial conditions whilst safeguarding the public interest'.[432]

1.175 Despite an ongoing political controversy regarding the extension of the catalogue of universal services, in particular with a view to the inclusion of

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Directive 98/61/EC of 24 September 1998 [1988] OJ L268/37) on interconnection in telecommunications with regards to ensuring universal service and the interoperability through application of the principles of Open Network Provision (ONP) [1997] OJ L199/23 and Art 4 of Directive 98/10/EC of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment [1998] OJ L 101/24.

426 See para 1.175 below.

427 See para 1.62 et seq above.

428 See para 1.130 et seq above.

429 See para 1.185 et seq below.

430 See para 1.192 et seq below.

431 See also Art 3(1) of Directive 98/10/EC.

432 See also Art 3(1) of Directive 98/10/EC.

broadband Internet access services,[433] the EU legislators left the scope of universal service obligations essentially unchanged in the 2009 Regulatory Package[434] while, at the same time, adapting the list of obligations to the changes resulting from the move of electronic communications networks to IP networks and the increased importance of VoIP services[435] and strengthening the rights of disabled end users. The universal service obligations include in particular:

- the connection at a fixed location to the electronic communications network (Article 4(1) of the Universal Service Directive) and the availability of a publicly available telephone service over the network which allows for originating and receiving national and international calls (Article 4(3) of the Universal Service Directive). The connection provided to the electronic communications networks has to be capable of supporting voice, facsimile and data communications at data rates which are sufficient to allow for 'functional Internet access',[436] taking into account technical feasibility as well as 'prevailing technology used by the majority of subscribers' (Article 4(2), sentence 1 of the Universal Service Directive);
- the provision of at least one comprehensive directory to be provided to end users either in printed or electronic form or both and to be updated at least once a year (Article 5(1)(a) of the Universal Service Directive);
- the provision of a comprehensive telephone directory enquiry service for end users (Article 5(1)(b) of the Universal Service Directive);[437] and
- the provision of public pay telephones 'or other public voice telephony access points' (Article 6(1)) including the possibility of making emergency calls from public pay telephones using the single European emergency call number and other national emergency numbers free of charge (Article 6(3)). The extension of the universal service obligation to include, as an alternative to public pay telephones ('or') the provision of 'other public voice telephony access points' has been implemented in reaction to the reduction of the number of public payphones and to ensure 'technology neutrality and continued access ... to voice telephony'.[438]

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433 See, eg the contributions to the Commission's public consultation on universal service principles in e-communication (May 2010), available at http://ec.europa.eu/information_society/policy/ecomm/library/public_consult/universal_service_2010/comments/index_en.htm (accessed on 10 December 2012).

434 See Recital 5 of the Citizens' Rights Directive

435 Recital 15 of the Citizens Rights Directive states that: 'Member States should be able to separate universal service obligations concerning the connection to the public telecommunications network at a fixed location from the provision of the publicly available telephone service' in reaction to the increasing move towards IP networks and an increased choice of consumers between a 'range of competing voice service providers'. As a result, the term 'connection to the public telephone network' has been replaced by the broader term 'connection to the public communications network' (see, eg Art 4(1) of the Universal Service Directive).

436 The term 'functional Internet access' provides the Member States with a degree of flexibility when defining the actual type of Internet access to be provided under the national universal service obligation; to date, three Member States (Finland, Spain and Malta) have opted to include broadband access: see Communication from the Commission to the European Parliament, the Council, the European Economic Committee and the Committee of the Regions, Universal service in e-communications: report on the outcome of the public consultation and the third periodic review of the scope in accordance with Article 15 of Directive 2002/22/EC, COM(2011) 795 final, 23 November 2011, p 3.

437 See para 1.202 below.

438 See Recital 11 of the Citizens' Rights Directive.

The rights of disabled users to 'equivalent access'[439] to the public telephone service and directory enquiry services, that are part of the universal service,[440] have been strengthened considerably by the 2009 Regulatory Package. Access of disabled end users 'should be 'functionally equivalent, such that disabled end-users benefit from the same usability of services as other end-users, but by different means'.[441] Such specific measures may include, for example, making available public telephones, public text telephones or equivalent measures for deaf or speech-impaired people, and providing services such as directory enquiry services or equivalent measures free of charge for blind or partially sighted people.[442] The Universal Service Directive has been changed to make the implementation of measures ensuring equivalent access for disabled end-users mandatory for the Member States ('Member States *shall* take specific measures').[443]

1.176 The list of universal services is exhaustive. The Directive provides that the Commission shall 'periodically' review the scope of the universal service every three years (Article 15(1) of the Universal Service Directive). In the course of this review, the Commission has to take into account social, economic and technological developments in accordance with Article 15(2) of the Universal Service Directive and the methodology which is set out in Annex V of the Universal Service Directive. The Directive provides that any change to the scope of universal services should be subject to the 'twin test' of services that become available to a substantial majority of the population, with a consequent risk of social exclusion for those who cannot afford them.[444] The 'twin test' is to be conducted at the EU level; consequently, Member States are not permitted to expand, on their own, the scope of universal service obligations or to impose on market players 'financial contributions which relate to measures which are not part of universal service obligations'.[445]

In its third periodic review of the scope of the universal service,[446] the Commission rejected, once more, demands to expand the universal service to include 'functional Internet access at broadband speeds' at EU level as it considered such inclusion 'premature'.[447]

1.177 Outside the scope of universal service obligations, Member States remain free to make publicly available further services and finance them in conformity with Community law, but not by means of contributions from market players (Article 32 of the Universal Service Directive).[448] This provision is aimed at opening, to

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439 See also Art 23a of the Universal Service Directive which obligates the Member States to enable the NRAs to take measures to ensure 'equivalence in access and choice for disabled end-users'.

440 Arts 4(3) and 5 of the Universal Service Directive.

441 Recital 12 of the Citizens' Rights Directive.

442 See Recital 13 of the Universal Service Directive.

443 Prior to the 2009 Regulatory Package, Art 7(1) of the Universal Service Directive read: 'Member States *may* take specific measures …'.

444 Recital 25 as well as Art 15 of the Universal Service Directive; on the criteria of review see Annex V of the Universal Service Directive.

445 Cf Recital 25 of the Universal Service Directive.

446 Communication from the Commission to the European Parliament, the Council, the European Economic Committee and the Committee of the Regions, Universal service in e-communications: report on the outcome of the public consultation and the third periodic review of the scope in accordance with Article 15 of Directive 2002/22/EC, COM(2011) 795 final, 23 November 2011.

447 COM(2011) 795 final, 23 November 2011, p 12 et seq.

448 Cf Recital 25 of the Universal Service Directive.

Member States, a broad spectrum of possible measures,[449] which are not, however, specified in the Universal Service Directive.

Procedure for the designation of undertakings obliged to provide universal services

1.178 Member States are free in determining 'the most efficient and appropriate approach' to ensure the provision of universal services (Article 3(1) of the Universal Service Directive)[450] which may[451] include the 'designation' of one or more undertakings who have to provide different elements of universal service or have to cover different parts of the the Member State's territory. It follows from Article 8(2), sentence 2 of the Universal Service Directive that this 'designation' is a legally binding regulatory measure that is aimed to ensure, among other things, 'that universal service is provided in a cost-effective manner'. The designation procedure must be efficient, objective, transparent and non-discriminatory and may not exclude any undertaking a priori from being designated (Article 8(2), sentence 1 of the Universal Service Directive). Furthermore the procedure must adhere to the 'principle of minimal distortion to competition.' The ECJ has found that a designation procedure that excludes from the potential providers such undertakings that are unable to serve the entire territory of a Member State does not comply with the aforementioned criteria.[452]

Undertakings with a universal service obligation may use whatever technology is appropriate to meet their obligations as long as they comply with the quality requirements established under the Universal Service Directive and national legislation; this can for example include the use of VoIP technology.[453]

The 2009 Regulatory Package introduced obligations for undertakings which have been designated as universal service providers and which intend to transfer their local access network or a substantial part thereof to a separate legal entity under different ownership to inform the NRAs of their plans (Article 8(3) of the Universal Service Directive).

Regulation of retail tariffs, users' expenditures and quality of service

1.179 To ensure that the end user tariffs for the provision of universal services are affordable, Article 9(1) of the Universal Service Directive requires the NRAs to monitor the evolution and level of retail tariffs 'in particular in relation to national consumer prices and income'. The objective of this monitoring duty is to ensure that the services are provided 'at an affordable price' (Article 3(1) of the Universal Service Directive). It follows, from this objective as well as from the NRA's power to, inter alia, mandate 'special tariff options' or compliance with 'price caps' (Article 8(2) and (3) of the Universal Service Directive), that Member States are not only empowered to 'monitor' but also to regulate end user tariffs in order to achieve 'affordability'.

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449 COM(2001) 503 final [2001] OJ C332 E/292, p 298.

450 ECJ judgment of 19 June 2008 *Commission v France* (C-220/07) [2008] ECR I-95 at [31–36].

451 Art 9(1) of the Universal Services Directive shows that there is no requirement for the Member States to designate a universal service provider, in particular, where the services concerned are 'available on the market'.

452 ECJ judgment of 19 June 2008 *Commission v France* (C-220/07) [2008] ECR I-95 at [31–36].

453 Cf Commission Staff Working Document on the treatment of Voice over Internet Protocol (VoIP) under the EU Regulatory Framework, 14 June 2004, p 11.

1.180 With respect to the regulation of end user tariffs, the Universal Service Directive provides for a number of regulatory options. Member States may:

- require that designated undertakings provide tariff options or packages to consumers that are different from the options offered under 'normal commercial conditions', for example to ensure that users with low incomes or with special social needs are not excluded from access to the electronic telecommunications network or from using the services that are part of the universal service (Article 9(2) of the Universal Service Directive);
- in addition to tariff regulation, ensure that consumers with low incomes or special social needs are given support (Article 9(3) of the Universal Service Directive); and
- require undertakings with universal service obligations to apply 'common tariffs, including geographical averaging, throughout the territory, in the light of national conditions or to comply with price caps' (Article 9(4) of the Universal Service Directive).

The NRAs have to ensure that, where a designated undertaking is obliged to provide special tariff options, common tariffs, including geographical averaging, or to comply with price caps, the conditions are fully transparent and are published and are applied in accordance with the principle of non-discrimination (Article 9(5) of the Universal Service Directive).

1.181 To allow subscribers to control their expenditures for universal services, the Universal Service Directive provides, on the one hand, that designated undertakings have to establish terms and conditions in a way that subscribers are not required to pay for facilities or services which are not necessary or not required for the service requested (Article 10(1) of the Universal Service Directive). On the other hand, Article 10(2) of the Universal Service Directive requires the Member States to ensure that the designated undertakings provide specific facilities and services specified in Part A of Annex I to the Universal Service Directive, allowing subscribers to monitor and control expenditure and avoid unwarranted disconnection of service. These facilities and services include, among others, itemised billing, selective call barring for outgoing calls or premium SMS or MMS (free of charge), and prepayment systems for the provision of access to the electronic communications network and the use of publicly available telephone services.[454] These broad obligations are limited by Article 10(3) of the Universal Service Directive which requires Member States to ensure that the relevant authority is able to waive the requirement to provide the facilities or services mentioned 'if it is satisfied that the facility is widely available'.

1.182 The Universal Service Directive establishes powers of the NRAs to establish quality standards and monitor compliance with performance targets in relation to universal services, which have been broadened by the 2009 Regulatory Package. Article 11 of the Universal Service Directive obliges NRAs to obtain information concerning the undertaking's performance in the provision of universal service according to the quality of service parameters set out in Annex III of the Universal Service Directive (Article 11(1) Universal Service Directive) and enables them to establish additional quality of service standards to assess the performance of undertakings in the provision of services to disabled users (Article 11(2) of the

454 The provision of these facilities and services according to Annex I, Part A of the Universal Service Directive is not a universal service obligation. This follows from the separation between Art 10(2) of the Universal Service Directive and the 'catalogue' of universal service obligations in Arts 4–7 of the Universal Service Directive.

Universal Service Directive). NRAs may set criteria for the content, form and manner of information to be published in order to ensure user-friendly access to such information for end users and consumers (Article 10(3) of the Universal Service Directive). In addition, NRAs are able to set performance targets Article 11(4) Universal Service Directive) and to monitor compliance with these targets by designated undertakings (Article 11(5) of the Universal Service Directive). If an undertaking persistently fails to meet the performance targets, the NRA may take 'specific measures' on the basis of the Authorisation Directive (Article 11(6), sentence 1 of the Universal Service Directive), which may include a prohibition to provide services (Article 10(5) of the Authorisation Directive). In order to ensure the accuracy and comparability of the data made available by undertakings with universal service obligations, NRAs may order independent audits or similar reviews of the performance data at the expense of the undertaking concerned (Article 11(6), sentence 2 of the Universal Service Directive).

Cost calculation and financing of universal services

1.183 The Universal Service Directive requires Member States to ensure, upon request from a designated undertaking, the establishment of a financing mechanism if the undertaking is found to be 'subject to an unfair burden' (Article 13(1) of the Universal Service Directive). The Directive establishes rules for the determination of the net cost of the universal service provision: the NRAs may determine the net cost of the universal service obligation in accordance with Article 12(1) of the Universal Service Directive; in this case, they have to follow the calculation rules set out in Part A of Annex IV. Alternatively, the NRAs may base their calculation on the net costs of providing universal service identified by a 'designation mechanism' in accordance with Article 8(2) Universal Service Directive.

1.184 The compensation of the undertakings that have been designated for the provision of universal services can be based on a mechanism that ensures compensation of the net cost from public funds (Article 13(1)(a) of the Universal Service Directive)[455] and/or on a sharing of the net cost of universal service obligations between providers of electronic communications networks and services (Article 13(1)(b) of the Universal Service Directive). Contrary to the previous framework,[456] universal services cannot be financed by 'a supplementary charge added to the interconnection charge'.[457] The cost sharing (Article 13(1)(b) of the Universal Service Directive) has to be supervised by the NRA or 'another body independent from the beneficiaries under the NRA's supervision'; the sharing mechanism must comply with the principles of transparency, minimal market distortion, non-discrimination and proportionality (Article 13(3) in conjunction with Annex IV, Part B of the Universal Service Directive). The Member States have the right not to require contributions from undertakings whose national turnover is below a set threshold. An exemption applies to undertakings that are not providing services in the territory of the Member State that has established a sharing mechanism: These undertakings may not be subject to charges related to the sharing of the cost of universal service obligations (Article 13(4), sentence 2 of the Universal Service Directive).

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455 The predecessor provision (Art 5 of Directive 97/33/EC) did not provide for this possibility.

456 See Art 5(2) of Directive 97/33/EC.

457 Art 5(2) of Directive 97/33/EC.

Regulation of retail markets

MARKET ANALYSIS

1.185 Regulation of retail services is based on a market analysis according to the rules set out in the Framework Directive.[458]

PREREQUISITES FOR THE REGULATION OF RETAIL MARKETS

1.186 On the basis of its market analysis, an NRA has to impose 'appropriate regulatory obligations on undertakings identified as having significant market power' on a relevant retail market (Article 17(1) of the Universal Service Directive). This obligation to regulate, which leaves no room for discretion, applies only if:

- the NRA has determined as a result of its market analysis[459] that a given retail market is not effectively competitive (Article 17(1)(a) of the Universal Service Directive); and
- the NRA has further concluded that obligations imposed under the Access Directive would not result in the achievement of the regulatory objectives set out in Article 8 of the Framework Directive[460] (Article 17(1)(b) of the Universal Service Directive).

Article 17(5) of the Universal Service Directive mirrors Article 17(1)(a) of the Universal Service Directive and clarifies that NRAs shall not apply retail control mechanisms to geographical or user markets where they are satisfied that there is effective competition.[461]

REGULATORY POWERS

1.187 If the NRA has determined that a given retail market is not effectively competitive and that regulation at the wholesale level would not achieve the regulatory objectives, it is obliged to 'impose appropriate regulatory obligations' on those undertakings that have been identified as having significant market power (Article 17(1) of the Universal Service Directive).

1.188 The NRAs' broad discretion in selecting regulatory remedies is somewhat mitigated by the regulatory objectives set out in Article 8 of the Framework Directive[462] and the principle of proportionality. The Universal Service Directive includes a non-exhaustive list of possible ex-ante obligations which NRAs may impose upon SMP undertakings. They include, but are not limited to, the requirements set out in Article 17(2), sentence 1 of the Universal Service Directive that the SMP undertakings do not:

- charge excessive prices;
- inhibit market entry or restrict competition by setting predatory prices;
- show undue preference to specific end-users; or
- unreasonably bundle services.

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458 See para 1.64 et seq above.

459 See para 1.75 above and also Art 16(3) of the Framework Directive.

460 See para 1.40 et seq above; this requirement was included to prevent 'over-regulation', cf [2002] OJ C53E/195.

461 Measures of tariff regulation under Art 9(2) of the Universal Service Directive, requiring undertakings to provide special tariff options or tariff bundles, remain unaffected.

462 See paras 1.40 et seq above.

1.189 In order to protect the end-users' interests and to promote effective competition, NRAs may regulate end-user tariffs. Article 17(2), sentence 3 of the Universal Service Directive provides for three different types of tariff regulation. The NRAs:

(i) may apply to SMP undertakings 'appropriate retail price cap measures';
(ii) may take 'measures to control individual tariffs'; and
(iii) can take measures 'to orient tariffs towards costs or prices on comparable markets'.

This list of possible regulatory measures, which may be taken 'as a last resort and after due consideration',[463] is non-exhaustive. The recitals specifically state that NRAs may use 'price cap regulation, geographical averaging *or similar instruments*' to achieve the twin objectives of promoting effective competition whilst pursuing public interest needs.[464]

The provisions allowing for end-user tariff regulation are complemented by mandatory rules regarding the implementation of cost accounting systems which further limit the NRAs' regulatory discretion. Where an SMP undertaking is subject to retail tariff regulation or other relevant retail controls, the NRAs are required to ensure that 'the necessary and appropriate cost accounting systems are implemented' (Article 17(4), sentence 1 of the Universal Service Directive) and may specify only format and accounting methodology to be used (Article 17(4), sentence 2 of the Universal Service Directive). Compliance with the cost accounting system is to be verified by a qualified independent body (Article 17(4), sentence 3 of the Universal Service Directive) which may also be the NRA itself.[465] The NRAs have to ensure that the statement concerning compliance with the cost accounting requirements is published annually (Article 17(4), sentence 4 of the Universal Service Directive).[466]

Obligations concerning the provision of a minimum set of leased lines and carrier (pre-)selection

1.190 The Citizens' Rights Directive repealed the requirement to provide a minimum set of leased lines at a retail level which was formerly included in Article 18 of the Universal Services Directive as it was found to be 'no longer necessary' due to market developments.[467]

1.191 Also repealed was Article 19 of the Universal Service Directive which provided for an obligation to provide access to the services of any interconnected provider of public telephone services, both on a call-by-call basis by dialling a carrier selection code and by means of pre-selection. It was concluded that an imposition of these obligations directly through EU legislation could 'hamper technological progress'[468]. Instead, NRAs may now impose these obligations as remedies under Article 12 of the Access Directive.[469]

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463 Recital 26, sentence 8 of the Universal Service Directive.
464 Recital 26, sentence 8 of the Universal Service Directive (emphasis added).
465 Cf the clarification in Recital 27 of the Universal Service Directive.
466 See also Art 13(4), sentence 3 of the Access Directive.
467 Recital 19 of the Citizens' Rights Directive; for details on the obligation concerning the provision of a minimum set of leased lines see 5th edition of this book, para 1.176 et seq.
468 Recital 20 of the Citizens' Rights Directive.
469 See para 1.154 above.

End user rights

1.192 Chapter IV of the Universal Service Directive establishes under the heading 'end-user interests and rights' a number of rights of 'consumers' and 'end-users',[470] which correspond to the obligations of providers of specific communications networks and services.

CONTRACTS: OBLIGATION TO CONTRACT AND MINIMUM STANDARDS

1.193 Any consumer, ie any natural person who uses or requests the publicly available electronic communications service for purposes which are outside his or her trade, business or profession (Article 2(i) of the Framework Directive) and any other end-user[471] upon request has a right to enter into a contract with operators when subscribing to services providing connection to a public communications network or publicly available electronic communications services (Article 20(1), sentence 1 of the Universal Service Directive).

1.194 In the interests of 'transparency of information and legal security',[472] Article 20(1), sentence 2 of the Universal Service Directive establishes a number of minimum requirements for the contracts with undertakings providing connection or access to the public telephone network which have to be specified 'in a clear, comprehensive and easily accessible form'. These minimum requirements were considerably expanded by the 2009 Regulatory Package and include:

- the identity and address of the undertaking,
- details on the services provided, including, inter alia, information on the availability of access to emergency services and caller location information and any restriction to the provision of emergency services, the minimum quality of service levels offered (including compensation or refunds offered where these levels are not met), any measures implemented by the undertaking to manage traffic, types of maintenance and customer support services offered as well as on any restrictions imposed by the undertaking regarding the use of terminal equipment supplied (eg SIM-locks);
- details on prices and tariffs;
- information on the duration of the contract and the conditions for the renewal and the termination of the service;
- information on the means to initiate dispute settlement proceedings; and
- information on the actions that may be taken by the undertaking in case of 'security or integrity incidents or threats and vulnerabilities'.

1.195 Subscribers (including consumers and end users) have a right to withdraw from their contracts without penalty, upon notice of proposed modifications in the contractual conditions. They must be given adequate notice of such proposed modifications, which shall be not shorter than one month ahead of any modification (Article 20(4) of the Universal Service Directive).

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470 See Art 2(i) and (n) of the Framework Directive. Consumer means 'any natural person who uses or requests a publicly available electronic communications service for purpose which are outside his or her trade, business or profession'; end-user means 'any user not providing public communications networks or publicly available electronic communications services'. The difference lies in the purpose of use.

471 This reference to 'other end-users' was included to serve in particular the interests of Small and Medium Enterprises ('SME'), cf Recital 21 of the Citizens' Rights Directive.

472 Cf Recital 30 of the Universal Service Directive.

Transparency obligations

1.196 The NRAs have the power to require undertakings providing publicly available electronic communications networks or services to publish 'transparent, comparable, adequate and up-to-date information' on applicable prices, tariffs, on any charges due in connection with contract termination and on standard terms and conditions regarding access to and use of services provided to end-users and consumers; this includes, among other things, a description of the service and information regarding the scope of the service offered, information regarding standard tariffs, compensation and refund policies, the type of maintenance service offered, the standard contract conditions, including any minimum contractual period as well as information on contract termination and, where relevant, portability charges, and dispute settlement mechanisms (Article 21(1) of the Universal Service Directive). NRAs must encourage the provision of 'comparable information' to afford end-users and consumers the possibility to independently evaluate the costs of alternative usage patterns making use of interactive guides or similar means (Article 21(1) of the Universal Service Directive).

1.197 Furthermore, Member States must ensure under the amended and expanded Article 21(3) of the Universal Service Directive that NRAs are able to require undertakings that provide publicly available electronic communications networks or services to, inter alia:

- provide applicable tariff information to subscribers – the NRA may require that such information is made available 'immediately prior to connecting a call';
- inform subscribers of any changes to emergency call access and transmission of caller location data;
- provide information on measures implemented to manage traffic; and
- inform subscribers on their right to decide whether their information is included in a directory and about the type of personal data concerned.

Furthermore, the NRAs may require the undertakings concerned to 'distribute public interest information' which has been provided, in a standardised format, by the relevant public authorities, free of charge to existing and new subscribers; such information shall, inter alia, concern the most common uses of electronic communications services for unlawful activities or to distribute harmful content (eg copyright infringements) and the means of protection against privacy and data security risks (Article 21(4) of the Universal Service Directive).

Quality of service: securing 'net neutrality'

1.198 The EU Regulatory Framework does not contain provisions specifically targeted at securing 'net neutrality'. In a broad sense, 'net neutrality' is a concept related to the objective of an open Internet which is defined in Article 8(4)(g) of the Framework Directive as 'promoting the ability of end-users to access and distribute information or run applications and services of their choice'.[473] Instead, the EU Regulatory Framework has so far relied on transparency rules and provisions and

473 See para 1.43 above. See also BEREC, A framework for Quality of Service in the scope of Net Neutrality (BoR(11) 53) (8 December 2011), p 3. For an assessment of the need for EU legislation on 'net neutrality', see Dods, Brisby et al, 'Reform of European electronic communications law: a special briefing on the radical changes of 2009' (2010) 16(4) CTLR 102. For an analysis of 'net neutrality' from an economic perspective, see Kruse and

provided for a right of the NRAs to impose quality of service obligations to ensure 'net neutrality'.

1.199 The Member States have to ensure that the NRAs are able to require providers of public electronic communications networks and services to publish information on their quality of service levels (Article 22(1) of the Universal Service Directive) based on criteria established by the NRAs (Article 22(2) of the Universal Service Directive). Furthermore, the NRAs may impose minimum quality of service requirements on providers of public electronic communications networks and services in order to prevent a 'degradation of service' and a slowing of network traffic (Article 22(3), sentence 1 of the Universal Service Directive) after having provided the Commission and BEREC with a reasoned and detailed advanced notice of their intended action (Article 22(3), sentence 2 of the Universal Service Directive). The Commission may issue comments or Recommendations with regard to the intended quality of service requirements, which the NRAs have to take into utmost account in their decision on the imposition of those requirements (Article 22(3), sentence 3 and 4 of the Universal Service Directive).

1.200 This power of the NRAs to mandate minimum quality of service levels under Article 22(3) of the Universal Service Directive[474] is seen as one of the main regulatory instruments available to the NRAs to secure 'net neutrality'.[475]

In its 'Declaration on Net Neutrality', the EU Commission stated that it will:

> 'attach high importance to preserving the open and neutral character of the Internet, taking full account of the will of the co-legislators now to enshrine net neutrality as a policy objective and regulatory principle to be promoted by national regulatory authorities, alongside the strengthening of related transparency requirements and the creation of safeguard powers for national regulatory authorities to prevent the degradation of services and the hindering or slowing down of traffic over public networks. The implementation of these provisions and the impact of market and technological developments on "net freedoms" shall be monitored closely.'[476]

As part of its contribution to consultations launched by the Commission[477] on the topic of 'net neutrality', BEREC has identified two types of web services which were targeted by blocking or throttling measures:

- the throttling of video streaming and peer-to-peer filesharing, those web services typically require the transmission of large amounts of data; and
- the blocking of VoIP services on mobile networks, or charging extra for enabling VoIP services.

Berger-Kögler, 'Net Neutrality regulation on the Internet?', (2011) 2(1) Int J Management and Network Economics 3.

474 Supported by the amendments to Article 21 of the Universal Service Directive establishing transparency obligations of the providers with regard to traffic management measures: see para 1.197 above.

475 BEREC, A framework for Quality of Service in the scope of Net Neutrality (BoR (11) 53) (8 December 2011).

476 [2009] OJ C308/2.

477 Questionnaire for the public consultation on the open Internet and net neutrality in Europe, Publication date: 30 June 2010, available at: http://ec.europa.eu/information_society/policy/ecomm/library/public_consult/net_neutrality/index_en.htm (accessed on 10 December 2012); Commission Communication of April 19, 2011, The open Internet and net neutrality in Europe, COM (2011) 222 final.

BEREC concluded that those observed cases of blocking or throttling of traffic in the EU could be handled by the NRAs by applying the existing regulatory toolset[478] and has published a guidance document setting out a framework for establishing minimum quality of service parameters by the NRAs under Article 22(3) of the Universal Service Directive as well as on quality evaluation methods.[479] Furthermore, the amended transparency obligations (Article 21 of the Universal Service Directive) as well as the facilitated changes of providers (Article 30 of the Universal Service Directive)[480] are seen to play an important role in promoting net neutrality by ensuring that users obtain adequate information on possible limitations or any relevant traffic management measure in order to make informed choices.[481] The BEREC, having investigated traffic management measures used by operators, confirmed its previous findings that, to date, no regulation beyond the instruments of transparency and quality of service was necessary to promote net neutrality[482] even though it had found that traffic management measures contravening net neutrality could be observed.[483]

The Commission does not rule out that further regulatory measures may have to be taken should the existing regulatory toolset under the EU Regulatory Framework eventually turn out to be insufficient for handling threats to the free and open character of the Internet.[484] The Commission is expected to issue a Recommendation on net neutrality addressing, among other things, traffic management, transparency, switching, and IP interconnection.[485]

Regulatory measures concerning the availability of services

1.201 The Member States must ensure the 'fullest possible availability' of publicly available telephone services provided over electronic communications networks in the event of catastrophic network breakdown or in cases of force majeure. To this end, undertakings providing publicly available telephone services at fixed locations must take all reasonable steps to ensure uninterrupted access to emergency services (Article 23 of the Universal Service Directive).

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478 BEREC Response to the European Commission's consultation on the open Internet and net neutrality in Europe, (BoR (10) 42), p. 3.

479 A framework for Quality of Service in the scope of Net Neutrality (BoR (11) 53) (8 December 2011);BEREC has advised that it will issue a more in-depth BEREC guidance document in the course of 2012.

480 Commission Communication of 19 April 2011, The open Internet and net neutrality in Europe, COM (2011) 222 final, p 9, see also para 1.208 et seq below.

481 Commission Communication of 19 April 2011, The open Internet and net neutrality in Europe, COM (2011) 222 final, p 4 et seq; BEREC, A framework for Quality of Service in the scope of Net Neutrality (BoR (11) 53), p 53.

482 BEREC draft Guidelines for Quality of Service in the scope of Net Neutrality (BoR(12)32) (29 May 2012); BEREC has consulted two further documents in the context of Net Neutrality, the draft report on differentiation practices and related competition issues in the scope of Net Neutrality (BoR(12)31) (29 May 2012), and the draft report on an assessment of IP-interconnection in the context of Net Neutrality (BoR(12)33) (29 May 2012). The public consultation closed on 31 July 2012. For future activities of BEREC with respect to net neutrality see BEREC, Draft Working Programme 2013 (BoR(12)92) (September 2012), p 11 et seq.

483 BEREC, A view of traffic management and other practices resulting in restrictions to the open Internet in Europe (BoR(12)30) (29 May 2012).

484 Commission Communication of 19 April 19 2011, The open Internet and net neutrality in Europe (COM (2011) 222 final), p 8 et seq.

485 See BEREC, Draft Working Programme 2013 (BoR(12)92) (September 2012), p 10 et seq.

Operator assistance and directory enquiry services

1.202 Subject to applicable data protection provisions,[486] subscribers[487] to publicly available telephone services have the right to have an entry in the publicly available directory and to have their information made available to providers of directory enquiry services and directories.[488] Undertakings which assign telephone numbers to subscribers must meet all reasonable requests to make available, for the purposes of the provision of publicly available directory enquiry services and directories, the relevant information in an agreed format on 'fair, objective, cost-oriented and non-discriminatory' terms.[489]

All end-users that are provided with a publicly available telephone service have a right to access directory enquiry services;[490] NRAs may impose obligations or conditions for the provision of directory enquiry services on undertakings controlling the access to end-users in accordance with Article 5 of the Access Directive.[491] Regulatory restrictions preventing end-users in one Member State from accessing directly the directory enquiry services in another Member State must be abolished.

European emergency call number

1.203 The rules regarding access to the single European emergency call number 112 are set out in Article 26 of the Universal Service Directive. All end-users provided with an electronic communications service for originating national calls to a number or numbers in the national numbering plan must be able to call the emergency services free of charge, making use of the European Emergency Call number 112 (Article 26(1) of the Universal Service Directive); the Member States must ensure equivalent access of disabled end-users to emergency services (Article 26(3), sentence 3 of the Universal Service Directive). Access to emergency services has to be provided by the undertakings providing electronic communications service for originating national calls to a number or numbers in the national numbering plan (Article 26(2) of the Universal Service Directive). Furthermore, the Directive establishes an obligation on 'the undertakings concerned' to make caller location information available to authorities handling emergency calls to the number 112. This obligation may be extended by the Member States to also cover calls to national emergency numbers (Article 26(5) of the Universal Service Directive). Article 26(6) of the Universal Service Directive requires Member States to ensure that citizens are 'adequately informed' about the existence and use of the single European emergency call number 112.

To provide for effective access to '112 services', the Commission may adopt technical implementing measures after consultation with BEREC (Article 26(7) of the Universal Service Directive).

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486 See Art 25(5) of the Universal Service Directive, which refers particularly to Art 12 of the e-Privacy Directive.

487 The concept of 'subscriber' (Art 2(k) of the Framework Directive) is not limited to persons or legal entities who have entered into a 'written' contract with a provider of public electronic communications services: see ECJ judgment of 22 January 2009 *Commission v Poland* (C-492/07) [2009] ECR I-0008 at [22] and [26–30].

488 Art 25(1) of the Universal Service Directive in conjunction with Art 5(1)(a) of the Universal Service Directive.

489 Art 25(2) of the Universal Service Directive.

490 Art 25 (3), sentence 1 of the Universal Service Directive.

491 Art 25 (3), sentence 2 of the Universal Service Directive, see also para 1.143 above.

European telephone access codes and harmonised numbers for harmonised services of social value

1.204 Member States must ensure that the '00' code is the standard international access code; for calls between adjacent locations across borders between Member States, special arrangements may be established or continued (Article 27(1) of the Universal Service Directive). Article 26(2) of the Universal Service Directive provides for the creation of a 'legal entity established within the Community' which is to be designated by the Community for the management and promotion of the European Telephony Numbering Space (Article 27(2) of the Universal Service Directive). Undertakings providing public telephone networks must handle all calls to the European telephone numbering space at rates that are 'similar to those applied to calls to and from other Member States' (Article 27(3) of the Universal Service Directive).

1.205 Article 27a of the Universal Service Directive requires Member States to promote the harmonised numbers for harmonised services of social value under the 116 numbering range,[492] ensure that citizens are adequately informed of the existence and use of these services and in addition to this, make 'every effort' to ascertain that citizens have access to the missing children hotline available under the number 116000; access to the hotline has not yet been implemented in all Member States[493]

Access to numbers and services

1.206 End-users from one Member State must be able to access non-geographic numbers (eg numbers for free phone or premium rate services) within the EU and to all numbers provided in the EU where technically and economically feasible, except where a called subscriber has chosen for commercial reasons to limit access by calling parties located in specific geographical areas (Article 28(1) of the Universal Service Directive). The recitals make it clear that tariffs charged to parties calling from outside the Member State concerned need not be the same as for those parties calling from inside that Member State.[494] Where justified due to misuse or fraud, Member States must provide the relevant authorities with the means to require providers of public electronic communications networks and services to block access to services on a case-by-case basis or to withhold interconnection or other service revenues (Article 28(1) of the Universal Service Directive)

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492 Cf Commission Decision 2007/116/EC of 15 February 2007 on reserving the national numbering range beginning with '116' for harmonised numbers for harmonised services of social value [2007] OJ L49/30, amended by Commission Decision 2007/698/EC [2009] OJ L284/31, and Commission Decision 2009/884/EC [2009] OJ L317/46.

493 For an overview on the implementation status see http://ec.europa.eu/justice/fundamental-rights/rights-child/hotline/implementation/index_en.htm (accessed on 10 December 2012); see also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Dial 116 000: The European hotline for missing children (COM(2010) 674 final) (17 November 2010) which is aimed at promoting the implementation of the hotline for missing children in the Member States.

494 Art 28 of the Universal Service Directive and Recital 38.

OBLIGATIONS TO PROVIDE ADDITIONAL FACILITIES

1.207 Member States must ensure that NRAs are able to require all undertakings providing public telephone services or access to public communication networks to make available to end-users, subject to technical feasibility and economic viability, tone dialling, or dual tone multi-frequency operation and calling-line identification.[495] Member States are not required to impose obligations to provide these facilities: a Member State may waive the obligation for all or part of its territory if it considers, after public consultation, that there is already 'sufficient access' to these facilities (Article 29(2) of the Universal Service Directive).

Obligations facilitating change of provider

1.208 The ability to change one's provider is a key factor in securing competition on a retail level.[496] The European legislator considers number portability, ie the ability of end-users to retain their numbers independently of the undertaking providing the service, as 'a key facilitator of consumer choice and effective competition in a competitive telecommunications environment'[497] and has significantly expanded and strengthened the rights of subscribers to retain their numbers through the 2009 Regulatory Package. Furthermore, the ability to easily switch providers is seen as a factor promoting 'net neutrality'.[498]

1.209 Article 30(1) of the Universal Service Directive allows all subscribers, upon request, to retain their numbers independently of the undertaking providing the service. In the case of geographic numbers, the numbers can be retained at a specific location, whereas in the case of non- geographic numbers, they can be retained at any location; this does not apply to the porting of numbers between networks providing services at fixed locations and mobile networks.[499] While the Directive does not directly provide for the porting of numbers between networks providing services at fixed locations and mobile networks, the recitals state that Member States are free to allow for the transfer of numbers between fixed and mobile networks.[500] Number portability requirements also apply in relation to VoIP service providers which make available to their customers numbers from the national telephone numbering plan.[501]

The porting of the number and its activation after the porting process must be performed 'in the shortest possible time'; at the longest, customers having concluded a number porting agreement have to have their number activated with their new provider within one working day (Article 30(4), sub-para 1 of the Universal Service Directive).

The NRAs must ensure that the charges between operators related to the provision of number portability is cost oriented, and that direct charges to subscribers do not

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495 Art 29(1) of the Universal Service Directive in conjunction with Annex I, Part B.

496 Recital 47 of the Citizens' Rights Directive.

497 See Recital 40 of the Universal Service Directive and Recital 47, sentence 3 of the Citizens' Rights Directive.

498 Commission Communication of 19 April 2011, The open Internet and net neutrality in Europe (COM (2011) 222 final), p 9: see also para 1.198 et seq above.

499 Annex I Part C of the Universal Service Directive.

500 Recital 40, sentence 3 of the Universal Service Directive.

501 This excludes, eg 'classical' peer-to-peer VoIP communications (such as 'Skype-to-Skype') which establishes Internet-based connections between the users' PCs without requiring the use of telephone numbers.

act as a disincentive for subscribers against changing their providers[502] (Article 30 of the Universal Service Directive).

1.210 Member States must ensure that contracts between consumers and providers of electronic communications services do not impose an initial contract term that exceeds 24 months and that undertakings enable users to enter into a contract with a maximum duration of 12 months; conditions and procedures for contract termination must not act as a disincentive against changing service provider (Article 30(5) and (6) of the Universal Service Directive).

1.211 Almost 25 years after the adoption of the first generation of EU Directives aimed at liberalising and harmonising the markets for telecommunications networks, services and equipment, the electronic communications markets remain subject to sector-specific regulation, which is based on principles of competition law and managed by a European network of regulatory governance.

This regulatory framework will continue to be adapted to changing market conditions, technological developments, and political circumstances – the next review is scheduled for 2014.

502 Cf on pricing rules for number portabilty which may include the ex ante setting of fixed maximum prices, ECJ judgment of 13 July 2006 *Mobistar SA* (C-438/04) [2006] ECR I-06675 at [20–30] and [32–37].

EU Competition Law in the Telecommunications Sector

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INTRODUCTION

2.1 As discussed in Chapter 1, competition law is at the core of the EU legal framework for the telecommunications sector. The European Commission sees the telecommunications regulatory framework as a significant means to further liberalise the sector, with competition law concepts being a central component. As the former Competition Commissioner, Mario Monti, noted when the new framework was introduced:

> 'the aim of regulatory remedies should be to allow antitrust remedies to be the only ones needed in the long term. While for those parts of the industry which can be characterised as natural monopolies, this may be difficult to achieve, as technology develops regulatory intervention will increasingly play a smaller role'.[1]

At the same time, the Commission has increasingly used competition law to attack abusive practices in the telecommunications sector, in addition to reviewing strategic alliances and arrangements under the merger control rules and Article 101 of the TFEU (ex Article 81 EC). Recent examples of enforcement action by for the European Commission ('Commission') include fining Polish Telecom (TeleKomunikacja Polska[2]) €127 million in June 2011 and Telefonica over €151 million in 2007[3] (contrast the amount with the fine on Deutsche Telekom of €12 million in 2003[4]) for abuse of dominance, a finding upheld by the General Court in March 2012. Deutsche Telekom (again) and its subsidiary Slovak Telekom are being investigated for abuse of dominance by way of margin squeeze in Slovakia[5]. There is an ongoing

1 See 'Remarks at the European Regulators Group Hearing on Remedies', 26 January 2004 (SPEECH/04/37).

2 COMP/39.525 *Telekomunikacja Polska*, 22 June 2011, summary decision [2011] OJ C324/7.

3 Case COMP/38.784 *Wanadoo España v Telefónica*, summary decision at [2008] OJ C83/5; on appeal, *Telefónica and Telefónica España v Commission* (T-336/07) judgment of 29 March 2012, not yet published.

4 Case COMP/37.451 *Deutsche Telekom AG*, 2003] OJ L263/9. On appeal, *Deutsche Telekom AG v Commission* (T-271/03) [2006] ECR II -477.

5 Case 39523 *Slovak Telekom*. See press release IP/12/462.