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Subject:	Proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communiations Code (Recast) - Examination of the Presidency text

Introduction

1. Following the discussions held during the WP TELE of 29/11/2016, and 13/2, 20/2, 22/2 and 28/2 in 2017, and the written comments provided, delegations will find in **annex A** an amended text of the elements of the proposed Directive concerning 'access'. These are Articles 22, 32-34, 43-44 and 57-78. Also included in this Annex are the corresponding recitals. For ease of reading the amendments have been made to a 'clean' version of the recast which does not include the text proposed for deletion by the Commission. Amendments are in **bold** and ~~strikethrough~~. Underline marks text that was deleted in the Commission proposal and that has been re-included.

2. Changes in respect of **the use of the terms 'National Regulatory Authority', 'Competent Authority' and 'Member States'** have not been included at this stage. The Presidency intends to present new text taking these issues into account once the institutional set-up will have been discussed in the Working Party.

3. The proposed changes are organised in five sections and explained below. They seek to improve clarity and provide the basis for further deliberation of these issues ahead of further revisions. **Each section ends with an explanation of what the Presidency would like to achieve in the Working Party meeting of 7 April 2017.**

A. GEOGRAPHICAL SURVEYS OF NETWORK DEPLOYMENT (ARTICLE 22)

4. **Article 22** has been amended in a number of places as described in the paragraphs below. The intention is to ensure national regulatory authorities have sufficient flexibility to allow them to gather relevant information that will be of value to the authority in discharging its duties, particularly in facilitating the development of networks, in a way that minimises burdens on operators. The text is now also clearer that sanctions could only apply in situations where an operator intentionally misleads or misinforms an authority.

5. **Article 22(1)** has been revised to make clear that the forecast element of the survey, which provides potentially valuable information for addressing areas of digital exclusion (Art. 81) and defining markets (Art. 62 and 65), is only required as far as is reasonable and is only to be used in ways that the national regulatory authority deems appropriate, providing the regulator with valuable information for addressing areas of digital exclusion and defining markets. The need for confidentiality has also been emphasised. **Article 22(2)** clarifies that it is for the national regulatory authority to determine the period for which the 'digital exclusion area' designation applies. **Recital 60 has been amended accordingly.**

6. **Article 22(3 and4)** further clarifies the process for addressing 'digital exclusion areas' by explaining that the invitation for declarations of intentions to deploy are only mandatory for those undertakings already providing networks within the digital exclusion area, and that enforcement against such an undertaking would only take place where there was deliberately misleading, erroneous or incomplete information provided, in line with Article 20. These changes have been reflected in **Recital 61**.

7. The term 'geographical survey' has been applied consistently throughout the article to make clear that it refers to both the current and forward looking elements of the survey.

8. **In the Working Party meeting of 7 April 2017, the Presidency would like to know whether delegations can now agree to the revised text.**

B. **INTERNAL MARKET PROCEDURES (ARTICLES 32-34)**

9. No changes have been made to **Articles 32 and 34**.

10. The proposed 'double lock' in **Article 33(5)** has been rejected. The text has reverted to reflect the situation under Article 7(5) of the current framework and **recital 78** has been updated to reflect this. In addition the word 'requiring' has been changed to 'inviting' to more accurately describe the legal status of the recommendation.

11. **In the Working Party meeting of 7 April 2017, the Presidency would like to know whether delegations can now agree to the revised text.**

C. **ACCESS TO LAND (ARTCLES 43-44)**

12. No changes have been made to **Article 43.**

13. **Article 44** has been amended to clarify the conditions under which competent authorities may impose co-location, to improve the language and to be more explicit about the role of the national regulatory authority in facilitating the process.

14. **In the Working Party meeting of 7 April 2017, the Presidency would like to know whether delegations can now agree to the revised text.**

D. **ACCESS PRINCIPLES AND MARKET ANALYSIS (ARTICLES 57-65)**

15. No changes have been made to **Articles 57 and 58**.

16. The repetition of the objectives set out in Article 3 have been removed from **Article 59(1)**. The terminology 'taking utmost account' has been used to ensure consistency with the rest of the Code and current application. The ability of national regulatory authorities to expand access obligations to the concentration point closest to end-users is clarified and strengthened in **Article 59(2)** and reflected in **Recitals 139-141.** This is intended to ensure that where such obligations are necessary and viable they should be enabled. **Recital 143** has also been updated to emphasise that obligations under this article need to be fully justified. **Article 59(2)** now clarifies that access may be either active or virtual, and the accidental use of 'and' rather than 'or' in setting the conditions that prevent the imposition of obligations has been rectified.

17. The power to adopt delegated acts in **Article 60(2)** has been removed. When governance is discussed, it is possible for this power to be included in Article 108.

18. Reference to the deleted paragraph 3 in **Article 61** is deleted.

19. **Article 62** now provides more detail about what the SMP guidelines will include. The deadline for the Commission guidelines for market analysis has been removed because there are guidelines in place that are currently being reviewed.

20. **Article 63** has been amended so that BEREC provides analysis regarding transnational markets on request, and that on this basis the Commission may adopt Decisions, rather than BEREC adopting decisions. **Recital 151** is now explicit that national circumstances should be taken into account.

21. In Article 64, Paragraph 2, giving the Commission the power to adopt Decisions regarding transnational demand, has been deleted. Correspondingly, **Recital 153** has been deleted.

22. **Article 65(2)(a)** has been amended to ensure national regulatory authorities are not unduly limited in what they consider in the market analysis. The period of time that a national regulatory authority has to carry out the analysis following the adoption of a revised Recommendation on relevant markets in **Article 65(5)(b)** is extended from two to three years.

23. **In the Working Party meeting of 7 April 2017, the Presidency would like to know whether delegations can now agree to the revised text, in particular whether Article 59 now provides sufficient powers for the national regulatory authorities to address barriers to replication. Presidency would also welcome views on the joint paper put forward by 7 delegations.**

E. **ACCESS REMEDIES AND SIGNIFICANT MARKET POWER (ARTICLES 66-78)**

24. **Article 66(4 and 6)** have been restructured and amended to clarify the principles for imposing obligations.

25. **Article 67** has been updated to ensure the national regulatory authority has sufficient powers regarding transparency of information.

26. **Article 68(2)** no longer limits the imposition of obligations regarding the supply of access products and services to deployment of new systems and the language has been made consistent throughout the paragraph. **Recital 170** has been updated to include consideration of proportionality.

27. No changes have been made to **Articles 69 and 70**

28. The process by which a national regulatory authority determines whether to impose obligations for access to civil engineering and specific network facilities in **Articles 70 and 71** is clarified. Access to civil engineering is to be preferred but where this will, in the view of the national authority, prove insufficient, access obligations can be imposed in relation to specific network facilities. To improve the text, the concept of 'contemplated' regulated access in **Article 71(2)** has been changed to 'planned'. **Recital 175** has been amended to emphasise the objective of permitting sustainable competitive outcomes for end users.

29. **Article 72** has been amended to clarify that price controls are only prevented in situations where national regulatory authorities have established that there is no reason to introduce them because there is effective price control and effective and non-discriminatory access is ensured.

30. The maximum termination rate to be set by the Commission in **Article 73** is no longer limited to operators designated as having significant market power. This rate would now be included as part of the guidelines issued by the Commission through an implementing act rather than adopted as a delegated act. Paragraphs 4, 5 and 6 have been streamlined as elements for inclusion in these guidelines. **Recitals 181 to 183** have been revised accordingly.

31. **Article 74** has been amended so that national regulatory authorities retain the possibility to impose obligations regarding new network developments and to make clear that the co-investment arrangements must be agreed in order for the network deployment to meet the necessary conditions. **Recital 184** has been amended to reflect this and to make clear that the provisions of this article do not affect competition law.

32. A notice period of three months has been included when a national regulatory authority is to be notified of an intended voluntary separation by an operator designated as a significant market power in **Article 76.**

33. **Article 77** has been revised to clarify in that only exclusivity downstream is relevant and to ensure that the national regulatory authority is able to consider future issues as well as the current situation. The ability of the national regulatory authority to consider problems likely to arise is also included. **Recital 190** reflects this amended text and clarifies the position in relation to price control.

34. **In the Working Party meeting of 7 April 2017, the Presidency would like to know whether delegations can now agree to the revised text, in particular whether Articles 70 and 71 are now sufficiently clear, and whether Articles 73 and 74 provide the right balance between flexibility and certainty.**

Conclusion

35. In addition, a small number of technical changes were made throughout the articles to improve the clarity of drafting, for example using 'providers of' rather than 'undertakings providing'.

36. **The Presidency intends to organise future discussions on these issues around the structure set out in this note. Delegations are invited to comment on these changes.**

(60) Electronic communications broadband networks are becoming increasingly diverse in terms of technology, topology, medium used and ownership, therefore, regulatory intervention must rely on detailed **current and forward looking** information ~~and forecasts~~ regarding network roll-out in order to be effective and to target the areas where it is needed. That information should include plans regarding both deployment of very high capacity networks, as well as significant upgrades or extensions of existing copper or other networks which might not match the performance characteristics of very high capacity networks in all respects, such as roll-out of fibre to the cabinet coupled with active technologies like vectoring. The level of detail and territorial granularity of the information that national regulatory authorities should gather should be guided by the specific regulatory objective, and should be adequate for the regulatory purposes that it serves. Therefore, the size of the territorial unit will also vary between Member States, depending on the regulatory needs in the specific national circumstances, and on the availability of local data. Level 3 in the Nomenclature of Territorial Units for Statistics (NUTS) is unlikely to be a sufficiently small territorial unit in most circumstances. National regulatory authorities should be guided by BEREC guidelines on best practice to approach such a task, and such guidelines will be able to rely on the existing experience of national regulatory authorities in conducting geographical surveys of networks roll-out. National regulatory authorities ~~should~~ **may** make available tools to end-users as regards quality of service to contribute towards the improvement of their awareness of the available connectivity services.

(61) In the case of specific and well defined digital exclusion areas, national regulatory authorities should have the possibility to **invite undertakings to declare their intention to deploy very high capacity networks,** ~~organise a call for declarations of interest~~ with the aim of identifying undertakings that are willing to invest in very high capacity networks **in these areas**. **Undertakings that are already present in the area and operate networks therein may be required by the national regulatory authority to declare whether or not they intend to invest. This procedure will create transparency for undertakings that have expressed their interest in deploying in these areas, so that when designing their business plans they can assess the likely competition that they will face from other networks. The positive effect of such transparency relies on market participants responding truthfully and in good faith. While market participants can change their deployment plans for unforeseen, objective and justifiable reasons, national regulatory authorities should be able to intervene and if appropriate impose a sanction if they have been deliberately misled by undertakings, with the objective of undermining other market participants that have taken the risk to deliver very high capacity networks in these areas.** In the interests of predictable investment conditions, national regulatory authorities should be able to share information with undertakings expressing interest in deploying very high-speed networks on whether other types of network upgrades, including those below 100 Mbps download speed, are present or foreseen in the area in question.

(75) The Commission should be able, after taking utmost account of the opinion of BEREC, to require a national regulatory authority to withdraw a draft measure where it concerns definition of relevant markets or the designation or not of undertakings with significant market power, and where such decisions would create a barrier to the single market or would be incompatible with Union law and in particular the policy objectives that national regulatory authorities should follow. This procedure is without prejudice to the notification procedure provided for in Directive 2015/1535/EU and the Commission's prerogatives under the Treaty in respect of infringements of Union law.

(76) The national consultation provided for under Article 24 should be conducted prior to the Union law consultation provided for under Articles 34 and 35 of this Directive, in order to allow the views of interested parties to be reflected in the Union law consultation. This would also avoid the need for a second Union law consultation in the event of changes to a planned measure as a result of the national consultation.

(77) It is important that the regulatory framework is implemented in a timely manner. When the Commission has taken a decision requiring a national regulatory authority to withdraw a planned measure, national regulatory authorities should submit a revised measure to the Commission. A deadline should be laid down for the notification of the revised measure to the Commission under Article 34 in order to allow market players to know the duration of the market review and in order to increase legal certainty.

(78) The Union mechanism allowing the Commission to require national regulatory authorities to withdraw planned measures concerning market definition and the designation of operators having significant market power has contributed significantly to a consistent approach in identifying the circumstances in which *ex ante* regulation may be applied and those in which the operators are subject to such regulation. The experience of the procedures under Article 7 and 7a of Directive 2002/21/EC (Framework Directive) has shown that inconsistencies in the national regulatory authorities' application of remedies under similar market conditions undermine the internal market in electronic communications. Therefore the Commission and BEREC should participate in ensuring, within their respective responsibilities, a higher level of consistency in the application of remedies concerning draft measures proposed by national regulatory authorities. ~~In addition, where BEREC shares the Commission's concerns, the Commission should be able to require a national regulatory authority to withdraw a draft measure.~~ In order to benefit from the expertise of national regulatory authorities on the market analysis, the Commission should consult BEREC prior to adoption of its decisions and/or recommendations.

(79) Having regard to the short time-limits in the Union consultation mechanism, powers should be conferred on the Commission to adopt recommendations and/or guidelines to simplify the procedures for exchanging information between the Commission and national regulatory authorities, for example in cases concerning stable markets, or involving only minor changes to previously notified measures. Powers should also be conferred on the Commission in order to allow for the introduction of a notification exemption so as to streamline procedures in certain cases.

(80) National regulatory authorities should be required to cooperate with each other, with BEREC and with the Commission in a transparent manner to ensure the consistent application, in all Member States, of the provisions of this Directive .

(81) The discretion of national regulatory authorities needs to be reconciled with the development of consistent regulatory practices and the consistent application of the regulatory framework in order to contribute effectively to the development and completion of the internal market. National regulatory authorities should therefore support the internal market activities of the Commission and those of BEREC.

(82) Measures that could affect trade between Member States are measures that may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in a manner which might create a barrier to the single market. They comprise measures that have a significant impact on operators or users in other Member States, which include, *inter alia*: measures which affect prices for users in other Member States; measures which affect the ability of an undertaking established in another Member State to provide an electronic communications service, and in particular measures which affect the ability to offer services on a transnational basis; and measures which affect market structure or access, leading to repercussions for undertakings in other Member States.

(83) In carrying out its review of the functioning of this Directive , the Commission should assess whether, in the light of developments in the market and with regard to both competition and consumer protection, there is a continued need for the provisions on sector-specific *ex ante* regulation or whether those provisions should be amended or repealed.

(97) It should be ensured that procedures exist for the granting of rights to install facilities that are timely, non-discriminatory and transparent, in order to guarantee the conditions for fair and effective competition. This Directive is without prejudice to national provisions governing the expropriation or use of property, the normal exercise of property rights, the normal use of the public domain, or to the principle of neutrality with regard to the rules in Member States governing the system of property ownership.

(98) Permits issued to undertakings providing electronic communications networks and services allowing them to gain access to public or private property are essential factors for the establishment of electronic communications networks or new network elements. Unnecessary complexity and delay in the procedures for granting rights of way may therefore represent important obstacles to the development of competition. Consequently, the acquisition of rights of way by authorised undertakings should be simplified. National regulatory authorities should be able to coordinate the acquisition of rights of way, making relevant information accessible on their websites.

(99) It is necessary to strengthen the powers of the Member States as regards holders of rights of way to ensure the entry or roll-out of a new network in a fair, efficient and environmentally responsible way and independently of any obligation on an operator with significant market power to grant access to its electronic communications network. Improving facility sharing can lower the environmental cost of deploying electronic communications infrastructure and serve public health, public security and meet town and country planning objectives. Competent authorities should be empowered to require that the undertakings which have benefitted from rights to install facilities on, over or under public or private property share such facilities or property (including physical co-location) after an appropriate period of public consultation, during which all interested parties should be given the opportunity to state their views, in the specific areas where such general interest reasons impose such sharing. That can be the case for instance where the subsoil is highly congested or where a natural barrier needs to be crossed. Competent authorities should in particular be able to impose the sharing of network elements and associated facilities, such as ducts, conduits, masts, manholes, cabinets, antennae, towers and other supporting constructions, buildings or entries into buildings, and a better coordination of civil works on environmental or other public-policy grounds. On the contrary, it should be for national regulatory authorities to define rules for apportioning the costs of the facility or property sharing, to ensure that there is an appropriate reward of risk for the undertakings concerned. In the light of the obligations imposed by Directive 2014/61/EU, the competent authorities, particularly local authorities, should also establish appropriate coordination procedures, in cooperation with national regulatory authorities, with respect to public works and other appropriate public facilities or property which may include procedures that ensure that interested parties have information concerning appropriate public facilities or property and ongoing and planned public works, that they are notified in a timely manner of such works, and that sharing is facilitated to the maximum extent possible.

(100) Where mobile operators are required to share towers or masts for environmental reasons, such mandated sharing may lead to a reduction in the maximum transmitted power levels allowed for each operator for reasons of public health, and this in turn may require operators to install more transmission sites to ensure national coverage. Competent authorities should seek to reconcile the environmental and public health considerations in question, taking due account of the precautionary approach set out in Council Recommendation No 1999/519/EC.

(129) The provisions of this Directive as regards access and interconnection apply to those networks that are used for the provision of publicly available electronic communications services. Non-public networks do not have access or interconnection obligations under this Directive except where, in benefiting from access to public networks, they may be subject to conditions laid down by Member States.

(130) The term ‘access’ has a wide range of meanings, and it is therefore necessary to define precisely how that term is used in this Directive, without prejudice to how it may be used in other Union measures. An operator may own the underlying network or facilities or may rent some or all of them.

(131) In an open and competitive market, there should be no restrictions that prevent undertakings from negotiating access and interconnection arrangements between themselves, in particular on cross-border agreements, subject to the competition rules of the Treaty. In the context of achieving a more efficient, truly pan-European market, with effective competition, more choice and competitive services to end-users, undertakings which receive requests for access or interconnection from other undertakings which are subject to general authorisation in order to provide electronic communications networks or services to the public should in principle conclude such agreements on a commercial basis, and negotiate in good faith.

(132) In markets where there continue to be large differences in negotiating power between undertakings, and where some undertakings rely on infrastructure provided by others for delivery of their services, it is appropriate to establish a framework to ensure that the market functions effectively. National regulatory authorities should have the power to secure, where commercial negotiation fails, adequate access and interconnection and interoperability of services in the interest of end-users. In particular, they can ensure end-to-end connectivity by imposing proportionate obligations on undertakings that are subject to the general authorisation and that control access to end-users. Control of means of access may entail ownership or control of the physical link to the end-user (either fixed or mobile), and/or the ability to change or withdraw the national number or numbers needed to access an end-user's network termination point. This would be the case for example if network operators were to restrict unreasonably end-user choice for access to Internet portals and services.

(133) In the light of the principle of non-discrimination, national regulatory authorities should ensure that all operators, irrespective of their size and business model, whether vertically integrated or separated, can interconnect on reasonable terms and conditions, with the view to providing end-to-end connectivity and access to the global Internet.

(134) National legal or administrative measures that link the terms and conditions for access or interconnection to the activities of the party seeking interconnection, and specifically to the degree of its investment in network infrastructure, and not to the interconnection or access services provided, may cause market distortion and may therefore not be compatible with competition rules.

(135) Network operators who control access to their own customers do so on the basis of unique numbers or addresses from a published numbering or addressing range. Other network operators need to be able to deliver traffic to those customers, and so need to be able to interconnect directly or indirectly to each other. It is therefore appropriate to lay down rights and obligations to negotiate interconnection .

(136) Interoperability is of benefit to end-users and is an important aim of this regulatory framework. Encouraging interoperability is one of the objectives for national regulatory authorities as set out in this framework, which also provides for the Commission to publish a list of standards and/or specifications covering the provision of services, technical interfaces and/or network functions, as the basis for encouraging harmonisation in electronic communications. Member States should encourage the use of published standards and/or specifications to the extent strictly necessary to ensure interoperability of services and to improve freedom of choice for users.

(137) Currently both end-to-end connectivity and access to emergency services depend on end-users adopting number-based interpersonal communications services. Future technological developments or an increased use of number-independent interpersonal communications services could entail a lack of sufficient interoperability between communications services. As a consequence significant barriers to market entry and obstacles to further onward innovation could emerge and appreciably threaten both effective end-to-end connectivity between end-users and effective access to emergency services.

(138) In case such interoperability issues arise, the Commission may request a BEREC report which should provide a factual assessment of the market situation at the Union and Member States level. On the basis of the BEREC report and other available evidence and taking into account the effects on the internal market, the Commission should decide whether there is a need for regulatory intervention by national regulatory authorities. If the Commission considers that such regulatory intervention should be considered by National Regulatory Authorities, it may adopt implementing measures specifying the nature and scope of possible regulatory interventions by NRAs, including in particular measures to impose the mandatory use of standards or specifications on all or specific providers. The terms 'European standards' and 'international standards' are defined in Article 2 of Regulation (EU) No 1025/2012.[1] National regulatory authorities should assess, in the light of the specific national circumstances, whether any intervention is necessary and justified to ensure end-to-end-connectivity or access to emergency services, and if so, impose proportionate obligations in accordance with the Commission implementing measures.

[1] Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council [OJ L 364 of 14.11.2012, p.12]

(139) In situations where undertakings are deprived of access to viable alternatives to non-replicable assets up to the first distribution point, national regulatory authorities should be empowered to impose access obligations to all operators, without prejudice to their respective market power. In this regard, national regulatory authorities should take into consideration all technical and economic barriers to future replication of networks. The mere fact that more than one such infrastructure already exists should not necessarily be interpreted as showing that its assets are replicable. The first distribution point should be identified by reference to objective criteria. **National regulatory authorities should be able to impose access to active network components used for service provision on such infrastructure if access to passive elements would be economically inefficient or physically impracticable, and if the national regulatory authority considers that, absent an intervention, access obligation would be frustrated. National regulatory authorities should not impose obligations beyond the first concentration or distribution point when access is already provided at a technical level that allows the access seeker the same functionality and ability to control and tailor its services and costs in a similar way as if they would have enjoyed access through symmetrical regulation.**

(140) It could be justified to extend access obligations to wiring and cables beyond the first concentration point in areas with lower population density, while confining such obligations to points as close as possible to end-users, where it is demonstrated that replication would also be ~~impossible~~ **impracticable** beyond that first concentration point **for an economically viable operator.**

(141) In such cases, in order to comply with the principle of proportionality, it can be appropriate for national regulatory authorities to exclude certain categories of owners or undertakings, or both, from obligations going beyond the first ~~distribution~~ **concentration** point, on the grounds that an access obligation not based on significant market power would risk compromising their business case for recently deployed network elements. Structurally separated undertakings should not be subject to such access obligations if they offer an effective alternative access on a commercial basis to a very high capacity network.

(142) Sharing of passive or active infrastructure used in the provision of wireless electronic communications services, or the joint roll-out of such infrastructures, in compliance with competition law principles can be particularly useful to maximise very high capacity connectivity throughout the Union, especially in less dense areas where replication is impracticable and end-users risk being deprived of such connectivity. National regulatory authorities should, exceptionally, be enabled to impose such sharing or joint roll-out, or localised roaming access, in compliance with Union law, if they demonstrate the benefits of such sharing or access in terms of overcoming very significant barriers to replication and of addressing otherwise severe restrictions on end-user choice or quality of service, or both, or on territorial coverage, and taking into account several elements, including in particular the need to maintain infrastructure roll-out incentives.

(143) While it is appropriate in some circumstances for a national regulatory authority to impose obligations on operators that do not have significant market power in order to achieve goals such as end-to-end connectivity or interoperability of services, it is however necessary to ensure that such obligations are imposed in conformity with the regulatory framework and, in particular, its notification procedures. **Such obligations must only be imposed where justified in order to secure the objectives of this Directive, and where they are objectively justified, transparent, proportionate and non-discriminatory for the purpose of promoting efficiency, sustainable competition, efficient investment and innovation, and giving the maximum benefit to end-users, and imposed in conformity with the relevant notification procedures.**

(144) Competition rules alone may not be sufficient to ensure cultural diversity and media pluralism in the area of digital television. Technological and market developments make it necessary to review obligations to provide conditional access on fair, reasonable and non-discriminatory terms on a regular basis, either by a Member State for its national market or the Commission for the Union, in particular to determine whether there is justification for extending obligations to electronic programme guides (EPGs) and application programme interfaces (APIs), to the extent that is necessary to ensure accessibility for end-users to specified digital broadcasting services. Member States may specify the digital broadcasting services to which access by end-users must be ensured by any legislative, regulatory or administrative means that they deem necessary.

(145) Member States may also permit their national regulatory authority to review obligations in relation to conditional access to digital broadcasting services in order to assess through a market analysis whether to withdraw or amend conditions for operators that do not have significant market power on the relevant market. Such withdrawal or amendment should not adversely affect access for end-users to such services or the prospects for effective competition.

(146) There is a need for *ex ante* obligations in certain circumstances in order to ensure the development of a competitive market, the conditions of which favour the deployment and take-up of very high capacity connectivity and the maximisation of end-user benefits. The definition of significant market power used in this Directive is equivalent to the concept of dominance as defined in the case law of the Court of Justice .

(147) Two or more undertakings can be found to enjoy a joint dominant position not only where there exist structural or other links between them but also where the structure of the relevant market is conducive to coordinated effects, that is, it encourages parallel or aligned anti-competitive behaviour on the market.

(148) It is essential that *ex ante* regulatory obligations should only be imposed on a wholesale market where there are one or more undertakings with significant market power, with a view to ensure sustainable competition on a related retail market, and where national and Union competition law remedies are not sufficient to address the problem. The Commission has drawn up guidelines at Union level in accordance with the principles of competition law for national regulatory authorities to follow in assessing whether competition is effective in a given market and in assessing significant market power. National regulatory authorities should analyse whether a given product or service market is effectively competitive in a given geographical area, which could be the whole or a part of the territory of the Member State concerned or neighbouring parts of territories of Member States considered together. An analysis of effective competition should include an analysis as to whether the market is prospectively competitive, and thus whether any lack of effective competition is durable. Those guidelines should also address the issue of newly emerging markets, where de facto the market leader is likely to have a substantial market share but should not be subjected to inappropriate obligations. The Commission should review the guidelines regularly, in particular on the occasion of a review of the existing legislation, taking into account evolving case law, economic thinking and actual market experience and with a view to ensuring that they remain appropriate in a rapidly developing market. National regulatory authorities will need to cooperate with each other where the relevant market is found to be transnational.

(149) In determining whether an undertaking has significant market power in a specific market, national regulatory authorities should act in accordance with Union law and take into the utmost account the Commission guidelines on market analysis and the assessment of significant market power.

(150) National regulatory authorities should define relevant geographic markets within their territory taking into utmost account the Commission Recommendation on Relevant Product and Service Markets adopted in accordance with this Directive and taking into account national and local circumstances. Therefore, national regulatory authorities should at least analyse the markets that are contained in the Recommendation, including those markets that are listed but no longer regulated in the specific national or local context. National regulatory authorities should also analyse markets that are not contained in that Recommendation, but are regulated within the territory of their jurisdiction on the basis of previous market analyses, or other markets, if they have sufficient grounds to consider that the three criteria test provided in this Directive may be met.

(151) Transnational markets can be defined when it is justified by the geographic market definition, taking into account all supply-side and demand-side factors in accordance with competition law principles. BEREC is the most appropriate body to undertake such analysis, benefiting from the extensive collective experience of national regulatory authorities when defining markets on a national level. **National circumstances should be taken into account when an analysis of potential transnational markets is undertaken**. If transnational markets are defined and warrant regulatory intervention, concerned national regulatory authorities should cooperate to identify the appropriate regulatory response, including in the process of notification to the Commission. They can also cooperate in the same manner where transnational markets are not identified but on their territories market conditions are sufficiently homogeneous to benefit from a coordinated regulatory approach, such as for example in terms of similar costs, market structures or operators or in case of transnational or comparable end-user demand.

(152) In some circumstances geographic markets are defined as national or sub-national, for example due to the national or local nature of network roll-out which determines the boundaries of undertakings' potential market power in respect of wholesale supply, but there still is a significant transnational demand from one or more categories of end-users. That can in particular be the case for demand from business end-users with multisite facility operations in different Member States. If that transnational demand is not sufficiently met by suppliers, for example if they are fragmented along national borders or locally, a potential internal market barrier arises. Therefore, BEREC should be empowered to provide guidelines to national regulatory authorities on common regulatory approaches to ensure that transnational demand can be met in a satisfactory way, permitting efficiencies and economies of scale despite the fragmented supply side. BEREC's guidelines should shape the choices of national regulatory authorities in pursuing the internal market objective when imposing regulatory obligations on SMP operators at the national level.

~~(153) If national regulatory authorities have not followed the common approach recommended by BEREC to meet the identified transnational demand, with the consequence that transnational end-user demand is not efficiently met, and that avoidable barriers to the internal market arise, it could be necessary to harmonise the technical specifications of wholesale access products capable of meeting a given transnational demand, taking into account the BEREC guidelines.~~

(154) The objective of any *ex ante* regulatory intervention is ultimately to produce benefits for end-users in terms of price, quality and choice by making retail markets effectively competitive on a sustainable basis. It is likely that national regulatory authorities will gradually be able to find many retail markets to be competitive even in the absence of wholesale regulation, especially taking into account expected improvements in innovation and competition.

(155) For national regulatory authorities the starting point for the identification of wholesale markets susceptible to *ex ante* regulation is the analysis of corresponding retail markets. The analysis of effective competition at the retail and at the wholesale level is conducted from a forward-looking perspective over a given time horizon, and is guided by competition law, including the relevant case-law of the Court of Justice, as appropriate. If it is concluded that a retail markets would be effectively competitive in the absence of *ex ante* wholesale regulation on the corresponding relevant market(s), this should lead the national regulatory authority to conclude that regulation is no longer needed at the relevant wholesale level.

(156) During the gradual transition to deregulated markets, commercial agreements between operators will gradually become more common, and if they are sustainable and improve competitive dynamics, they can contribute to the conclusion that a particular wholesale market does not warrant *ex ante* regulation. A similar logic would apply in reverse, to unforeseeable termination of commercial agreements on a deregulated market. The analysis of such agreements should take into account that the prospect of regulation can be a motive for network owners to enter into commercial negotiations. With a view to ensure adequate consideration of the impact of regulation imposed on related markets when determining whether a given market warrants *ex ante* regulation, national regulatory authorities should ensure markets are analysed in a coherent manner and where possible, at the same time or as close as possible to each other in time.

(157) When assessing wholesale regulation to solve problems at the retail level, national regulatory authorities should take into account that several wholesale markets can provide wholesale upstream inputs for a particular retail market, and conversely, one wholesale market can provide wholesale upstream inputs for a variety of retail markets. Furthermore, competitive dynamics in a particular market can be influenced by markets that are contiguous but not in a vertical relationship, such as can be the case between certain fixed and mobile markets. National regulatory authorities should conduct that assessment for each individual wholesale market considered for regulation, starting with remedies for access to civil infrastructure, as such remedies are usually conducive to more sustainable competition including infrastructure competition, and thereafter analysing any wholesale markets considered susceptible to *ex ante* regulation in order of their likely suitability to address identified competition problems at retail level. When deciding on the specific remedy to be imposed, national regulatory authorities should assess its technical feasibility and carry out a cost-benefit analysis, having regard to its degree of suitability to address the identified competition problems at retail level. National regulatory authorities should consider the consequences of imposing any specific remedy which, if feasible only on certain network topologies, could constitute a disincentive for the deployment of very high capacity networks in the interest of end-users. At each stage of the assessment, before the national regulatory authority determines whether any additional remedy should be imposed on the significant market power operator, it should seek to determine whether the retail market concerned would be effectively competitive in the light of any relevant commercial arrangements or other wholesale market circumstances, including other types of regulation already in force, such as for example general access obligations to non-replicable assets or obligations imposed pursuant to Directive 2014/61/EU, and of any regulation already deemed appropriate by the national regulatory authority for an operator with significant market power. Even if such differences do not result in the definition of distinct geographic markets, they may justify differentiation in the appropriate remedies imposed in the light of the ~~diferring~~ **differing** intensity of competitive constraints.

(158) *Ex ante* regulation imposed at the wholesale level, which is in principle less intrusive than retail regulation, is considered sufficient to tackle potential competition problems on the related downstream retail market or markets. The advances in the functioning of competition since the regulatory framework for electronic communications has been in place are demonstrated by the progressive deregulation of retail markets across the Union. Further, the rules relating to the imposition of *ex ante* remedies on undertakings with significant market power should be simplified and be made more predictable, where possible. Therefore, the power of imposition of *ex ante* regulatory controls based on significant market power in retail markets should be repealed.

(159) When a national regulatory authority withdraws wholesale regulation it should define an appropriate period of notice to ensure a sustainable transition to a de-regulated market. In defining such period, the national regulatory authority should take into account the existing agreements between access providers and access seekers that have been entered into on the basis of the imposed regulatory obligations. In particular, such agreements can provide a contractual legal protection to access seekers for a determined period of time. The national regulatory authority should also take into account the effective possibility for market participants to take up any commercial wholesale access or co-investment offers which can be present in the market and the need to avoid an extended period of possible regulatory arbitrage. Transition arrangements established by the national regulatory authority should consider the extent and timing of regulatory oversight of pre-existing agreements, once the notice period starts.

(160) In order to provide market players with certainty as to regulatory conditions, a time limit for market reviews is necessary. It is important to conduct a market analysis on a regular basis and within a reasonable and appropriate time frame. Failure by a national regulatory authority to analyse a market within the time limit may jeopardise the internal market, and normal infringement proceedings may not produce their desired effect on time. Alternatively, the national regulatory authority concerned should be able to request the assistance of BEREC to complete the market analysis. For instance, this assistance could take the form of a specific task force composed of representatives of other national regulatory authorities.

(161) Due to the high level of technological innovation and highly dynamic markets in the electronic communications sector, there is a need to adapt regulation rapidly in a coordinated and harmonised way at Union level, as experience has shown that divergence among the national regulatory authorities in the implementation of the regulatory framework may create a barrier to the development of the internal market.

(162) However, in the interest of greater stability and predictability of regulatory measures, the maximum period allowed between market analyses should be extended from three to five years, provided market changes in the intervening period do not require a new analysis. In determining whether a national regulatory authority has complied with its obligation to analyse markets and notified the corresponding draft measure at a minimum every five years, only a notification including a new assessment of the market definition and of significant market power will be considered as starting a new five-year market cycle. A mere notification of new or amended regulatory remedies, imposed on the basis of a previous and unrevised market analysis will not be considered to have satisfied that obligation.

(163) The imposition of a specific obligation on an undertaking with significant market power does not require an additional market analysis but a justification that the obligation in question is appropriate and proportionate in relation to the nature of the problem identified on the market in question, and on the related retail market.

(164) When assessing the proportionality of the obligations and conditions to be imposed, national regulatory authorities should take into account the different competitive conditions existing in the different areas within their Member States having regard in particular to the results of the geographical survey conducted in accordance with this Directive.

(165) When considering whether to impose remedies to control prices, and if so in what form, national regulatory authorities should seek to allow a fair return for the investor on a particular new investment project. In particular, there may be risks associated with investment projects specific to new access networks which support products for which demand is uncertain at the time the investment is made.

(166) Reviews of obligations imposed on operators designated as having significant market power during the timeframe of a market analysis should allow national regulatory authorities to take into account the impact on competitive conditions of new developments, for instance of newly concluded voluntary agreements between operators, such as access and co-investment agreements, thus providing the flexibility which is particularly necessary in the context of longer regulatory cycles. A similar logic should apply in case of unforeseeable termination of commercial agreements. If such termination occurs in a deregulated market, a new market analysis may be necessary.

(167) Transparency of terms and conditions for access and interconnection, including prices, serve to speed up negotiation, avoid disputes and give confidence to market players that a service is not being provided on discriminatory terms. Openness and transparency of technical interfaces can be particularly important in ensuring interoperability. Where a national regulatory authority imposes obligations to make information public, it may also specify the manner in which the information is to be made available, and whether or not it is free of charge, taking into account the nature and purpose of the information concerned.

(168) In light of the variety of network topologies, access products and market circumstance that have arisen since 2002, the objectives of Annex II of the Directive 2002/19/EC, concerning local loop unbundling, and access products for providers of digital television and radio services, can be better achieved and in a more flexible manner, by providing guidelines on the minimum criteria for a reference offer to be developed by and periodically updated by BEREC. Annex II of the Directive 2002/19/EC should therefore be removed.

(169) The principle of non-discrimination ensures that undertakings with market power do not distort competition, in particular where they are vertically integrated undertakings that supply services to undertakings with whom they compete on downstream markets.

(170) In order to address and prevent non-price related discriminatory behaviour, equivalence of inputs (EoI) is in principle the surest way to achieve effective protection from discrimination. On the other hand, providing regulated wholesale inputs on an EoI basis is likely to trigger higher compliance costs than other forms of non-discrimination obligations. Those higher compliance costs should be measured against the benefits of more vigorous competition downstream, and of the relevance of non-discrimination guarantees in circumstances where the operator with significant market power is not subject to direct price controls. In particular, national regulatory authorities might consider that the provision of wholesale inputs over new systems on an EoI basis is more likely to create sufficient net benefits, and thus be proportionate, given the comparatively lower incremental compliance costs to ensure that newly built systems are EoI-compliant. On the other hand, national regulatory authorities should also **consider whether obligations are proportionate taking into account the implementation costs for affected undertakings and** weigh up possible disincentives to the deployment of new systems, relative to more incremental upgrades, in the event that the former would be subject to more restrictive regulatory obligations. In Member States with a high number of small-scale SMP operators, the imposition of EoI on each of these operators can be disproportionate.

(171) Accounting separation allows internal price transfers to be rendered visible, and allows national regulatory authorities to check compliance with obligations for non-discrimination where applicable. In this regard the Commission published Recommendation 2005/698/EC of 19 September 2005 on accounting separation and cost accounting systems.

(172) Civil engineering assets that can host an electronic communications network are crucial for the successful roll-out of new very high capacity networks because of the high cost of duplicating them, and the significant savings that can be made when they can be reused. Therefore, in addition to the rules on physical infrastructure laid down in Directive 2014/61/EU, a specific remedy is necessary in those circumstances where civil engineering assets are owned by an operator designated with significant market power. Where civil engineering assets exist and are reusable, the positive effect of achieving effective access to them on the roll-out of competing infrastructure is very high, and it is therefore necessary to ensure that access to such assets can be used as a self-standing remedy for the improvement of competitive and deployment dynamics in any downstream market, to be considered before assessing the need to impose any other potential remedies, and not just as an ancillary remedy to other wholesale products or services or as a remedy limited to undertakings availing of such other wholesale products or services. National regulatory authorities should value reusable legacy civil engineering assets on the basis of the regulatory accounting value net of the accumulated depreciation at the time of calculation, indexed by an appropriate price index, such as the retail price index, and excluding those assets which are fully depreciated, over a period of not less than 40 years, but still in use.

(173) National regulatory authorities should, when imposing obligations for access to new and enhanced infrastructures, ensure that access conditions reflect the circumstances underlying the investment decision, taking into account, *inter alia*, the roll-out costs, the expected rate of take up of the new products and services and the expected retail price levels. Moreover, in order to provide planning certainty to investors, national regulatory authorities should be able to set, if applicable, terms and conditions for access which are consistent over appropriate review periods. In the event that price controls are deemed appropriate, such terms and conditions can include pricing arrangements which depend on volumes or length of contract in accordance with Union law and provided they have no discriminatory effect. Any access conditions imposed should respect the need to preserve effective competition in services to consumers and businesses.

(174) Mandating access to network infrastructure can be justified as a means of increasing competition, but national regulatory authorities need to balance 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.

(175) In geographic areas where two access networks can be expected on a forward-looking basis, end-users are more likely to benefit from improvements in network quality, by virtue of infrastructure-based competition, than in areas where only one network persists. The adequacy of competition on other parameters, such as price and choice, is likely to depend on the national and local competitive circumstances. Where at least one of the network operators offers wholesale access to any interested undertaking on reasonable commercial terms permitting sustainable ~~competition~~ **competitive outcomes for the end users** on the retail market, national regulatory authorities are unlikely to need to impose or maintain SMP-based wholesale access obligations, beyond access to civil infrastructure, therefore reliance can be placed on the application of general competition rules. This applies *a fortiori* if both network operators offer reasonable commercial wholesale access. In both such cases, it may be more appropriate for national regulatory authorities to rely on specific monitoring on an *ex post* basis. Where on a forward-looking basis, three access network operators are present or are expected to be present and to sustainably compete in the same retail and wholesale markets (e.g. as can be the case for mobile, and as can occur in some geographic areas for fixed-line networks, especially where there is effective access to civil infrastructure and/or co-investment, such that three or more operators have effective control over the necessary access network assets to meet retail demand), national regulatory authorities will be less likely to identify an operator as having SMP, unless they make a finding of collective dominance, or if each of the undertakings in question has significant market power in distinct wholesale markets, such as in the case of voice call termination markets. The application of general competition rules in such markets characterised by sustainable and effective infrastructure-based competition should be sufficient.

(176) Where obligations are imposed on operators that require them to meet reasonable requests for access to and use of networks elements and associated facilities, such requests should only be refused on the basis of objective criteria such as technical feasibility or the need to maintain network integrity. Where access is refused, the aggrieved party may submit the case to the dispute resolutions procedure referred to in Articles 27 and 28 . An operator with mandated access obligations cannot be required to provide types of access which it is not within its power to provide. The imposition by national regulatory authorities 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 sustainable competition and/or higher performance and end-user benefits in the long-term. National regulatory authorities may impose technical and operational conditions on the provider and/or beneficiaries of mandated access in accordance with Union law. In particular the imposition of technical standards should comply with Directive 1535/2015/EU .

(177) Price control may be necessary when market analysis in a particular market reveals inefficient competition. In particular, operators with significant market power should avoid a price squeeze whereby the difference between their retail prices and the interconnection and/or access prices charged to competitors who provide similar retail services is not adequate to ensure sustainable competition. When a national regulatory authority calculates costs incurred in establishing a service mandated under this Directive, it is appropriate to allow a reasonable return on the capital employed including appropriate labour and building costs, with the value of capital adjusted where necessary to reflect the current valuation of assets and efficiency of operations. The method of cost recovery should be appropriate to the circumstances taking account of the need to promote efficiency, sustainable competition and deployment of very high capacity networks and thereby maximise end-user benefits, and should take in account the need to have predictable and stable wholesale prices for the benefit of all operators seeking to deploy new and enhanced networks, in accordance with Commission guidance[2].

[2] Commission Recommendation 2013/466/EU of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment, OJ L 251, 21.9.2013, p. 13.

(178) Due to uncertainty regarding the rate of materialisation of demand for the provision of next-generation broadband services it is important in order to promote efficient investment and innovation to allow those operators investing in new or upgraded networks a certain degree of pricing flexibility. To prevent excessive prices in markets where there are operators designated as having significant market power, pricing flexibility should be accompanied by additional safeguards to protect competition and end-user interests, such as strict non-discrimination obligations, measures to ensure technical and economic replicability of downstream products, and a demonstrable retail price constraint resulting from infrastructure competition or a price anchor stemming from other regulated access products, or both. Those competitive safeguards do not prejudice the identification by national regulatory authorities of other circumstances under which it would be appropriate not to impose regulated access prices for certain wholesale inputs, such as where high price elasticity of end-user demand makes it unprofitable for the operator with significant market power to charge prices appreciably above the competitive level.

(179) Where a national regulatory authority imposes obligations to implement a cost accounting system in order to support price controls, it may itself undertake an annual audit to ensure compliance with that cost accounting system, provided that it has the necessary qualified staff, or it may require the audit to be carried out by another qualified body, independent of the operator concerned.

(180) The charging system in the Union for wholesale voice call termination is based on Calling Party Network Pays. An analysis of demand and supply substitutability shows that currently or in the foreseeable future, there are as yet no substitutes at wholesale level which might constrain the setting of charges for termination in a given network. Taking into account the two-way access nature of termination markets, further potential competition problems include cross-subsidisation between operators. These potential competition problems are common to both fixed and mobile voice call termination markets. Therefore, in the light of the ability and incentives of terminating operators to raise prices substantially above cost, cost orientation is considered the most appropriate intervention to address this concern over the medium term.

(181) In order to reduce the regulatory burden in addressing the competition problems relating to wholesale voice call termination coherently across the Union, this Directive should lay down a common approach as a basis for setting price control obligations, to be completed by a binding ~~common~~ **cost** methodology to be determined ~~by the Commission and by technical guidance which should be developed by BEREC~~ **in an implementing act**.

(182) In order to simplify their setting and facilitate their imposition where appropriate, a single maximum wholesale voice call termination rates in fixed and mobile markets in the Union ~~shall~~ **should** be set by means of ~~a~~ **an** ~~delegated~~ **implementing** act. This Directive should lay down the ~~detailed~~ criteria and parameters on the basis of which the values of voice call termination rates are set. ~~In applying that set of criteria and parameters, the Commission should take into account, *inter alia*, that only those costs which are incremental to the provision of wholesale call termination service should be covered; that spectrum fees are subscriber- and not traffic-driven and should therefore be excluded and that additional spectrum is mainly allocated for data and therefore not relevant for the call termination increment; that it is recognised that while in mobile networks a minimum efficient scale is estimated at the level of at least 20% market share, in the fixed networks smaller operators can achieve the same efficiencies and produce at the same unit costs as the efficient operator, independently of their size. When setting the exact maximum rate, the Commission should include appropriate weighting to take into account the total number of end-users in each Member State, where this is required on account of remaining cost divergences. When the Commission determines that rate, the experience of BEREC and the national regulatory authorities in building suitable cost models will be invaluable and should be taken into account.~~

~~(183) This Directive sets maximum wholesale voice call termination rates for fixed and mobile networks below which the initial delegated act will establish the exact rate to be applied by national regulatory authorities. The initial rate will be further updated. Based on the bottom-up pure LRIC models applied by national regulators to date and applying the above criteria the voice termination rates currently vary from 0.4045 €cent per minute to 1.226 €cent per minute in mobile networks and between 0.0430 €cent per minute and 0.1400 €cent per minute in fixed networks in the most local layer of interconnection (calculated as a weighted average between peak and off-peak rates). The variation in rates is due to different local conditions and relative price structures currently existing as well as to the different timing of the model calculations across Member States. In addition, in fixed networks the level of cost efficient termination rates depends also on the network layer where the termination service is provided.~~

(184) Due to current uncertainty regarding the rate of materialisation of demand for very high capacity broadband services as well as general economies of scale and density, co-investment agreements offer significant benefits in terms of pooling of costs and risks, enabling smaller-scale operators to invest on economically rational terms and thus promoting sustainable, long-term competition, including in areas where infrastructure-based competition might not be efficient. Where an operator with significant market power makes an open call for co-investment on fair, reasonable and non-discriminatory terms in new network elements which significantly contribute to the deployment of very high capacity networks, the national regulatory authority should ~~typically~~ **be able to** refrain from imposing obligations pursuant to this Directive on the new network elements, subject to further review in subsequent market analyses. Provided due account is taken of the prospective pro-competitive effects of the co-investment at wholesale and retail level, national regulatory authorities can still consider it appropriate, in light of the existing market structure and dynamics developed under regulated wholesale access conditions, and in the absence of a commercial offer to that effect, to safeguard the rights of access seekers who do not participate in a given co-investment through the maintenance of existing access products or – where legacy network elements are dismantled in due course – through imposition of access products with comparable functionality to those previously available on the legacy infrastructure. **Obligations in relation to co-investment agreements are without prejudice to the application of Union competition law.**

(185) The purpose of functional separation, whereby the vertically integrated operator is required to establish operationally separate business entities, is to ensure the provision of fully equivalent access products to all downstream operators, including the operator's own vertically integrated downstream divisions. Functional separation has the capacity to improve competition in several relevant markets by significantly reducing the incentive for discrimination and by making it easier to verify and enforce compliance with non-discrimination obligations. In exceptional cases, functional separation may be justified as a remedy where there has been persistent failure to achieve effective non-discrimination in several of the markets concerned, and where there is little or no prospect of infrastructure competition within a reasonable time frame after recourse to one or more remedies previously considered to be appropriate. However, it is very important to ensure that its imposition preserves the incentives of the concerned undertaking to invest in its network and that it does not entail any potential negative effects on consumer welfare. Its imposition requires a coordinated analysis of different relevant markets related to the access network, in accordance with the market analysis procedure set out in Article 67 . When undertaking the market analysis and designing the details of this remedy, national regulatory authorities should pay particular attention to the products to be managed by the separate business entities, taking into account the extent of network roll-out and the degree of technological progress, which may affect the substitutability of fixed and wireless services. In order to avoid distortions of competition in the internal market, proposals for functional separation should be approved in advance by the Commission.

(186) The implementation of functional separation should not prevent appropriate coordination mechanisms between the different separate business entities in order to ensure that the economic and management supervision rights of the parent company are protected.

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

(188) Binding commitments can add predictability and transparency to the process of voluntary separation by a vertically integrated undertaking which has been designated as having significant market power in one or more relevant markets, by setting out the process of implementation of the planned separation, for example by providing a roadmap for implementation with clear milestones and predictable consequences if certain milestones are not met. National regulatory authorities should consider the commitments made from a forward-looking perspective of sustainability, in particular when choosing the period for which they are made binding, and should have regard to the value placed by stakeholders in the public consultation on stable and predictable market conditions.

(189) The commitments can include the appointment of a monitoring trustee, whose identity and mandate should be approved by the national regulatory authority and the obligation on the operator offering them to provide periodic implementation reports.

(190) Network owners that do not have retail market activities and whose business model is therefore limited to the provision of wholesale services to others, can be beneficial to the creation of a thriving wholesale market, with positive effects on retail competition downstream. Furthermore, their business model can be attractive to potential financial investors in less volatile infrastructure assets and with longer term perspectives on deployment of very high capacity networks. Nevertheless, the presence of a wholesale-only operator does not necessarily lead to effectively competitive retail markets, and wholesale-only operators can be designated with significant market power in particular product and geographic markets. The competition risks arising from the behaviour of operators following wholesale-only business models might be lower than for vertically integrated operators, provided the wholesale-only model is genuine and no incentives to discriminate between downstream providers exist. The regulatory response should therefore be commensurately less intrusive**, but should preserve in particular the possibility to introduce obligations in relation to price**. On the other hand, national regulatory authorities must be able to intervene if competition problems have arisen to the detriment of end-users. **An undertaking active on a wholesale market which supplies services solely to retail markets other than households and SME's should not be regarded as vertically integrated with respect to the latter segment, and should therefore be regarded as a vertically separate undertaking.**

(191) To facilitate the migration from legacy copper networks to next-generation networks, which is in the interests of end-users, national regulatory authorities should be able to monitor network operators' own initiatives in this respect and to establish, where necessary, an appropriate migration process, for example by means of prior notice, transparency and acceptable comparable access products, once the intent and readiness by the network owner to switch off the copper network is clearly demonstrated. In order to avoid unjustified delays to the migration, national regulatory authorities should be empowered to withdraw access obligations relating to the copper network once an adequate migration process has been established.

Article 22

Geographical surveys of network deployments

1. National regulatory authorities shall conduct a geographical survey of the reach of electronic communications networks capable of delivering broadband ("broadband networks") within three years from [deadline for transposition of the Directive] and shall update it at least every three years .

This geographical survey shall consist of:

a) a survey of the current geographic reach of broadband networks within their territory, in particular for conducting the tasks required by Articles 62 and 65 and by Article 81, as well as for imposing obligations in accordance with Article 66 and for the surveys required for the application of State aid rules; and

b) a ~~three-year~~ forecast **of up to three years** of the reach of broadband networks within their territory relying **in particular** on the information gathered in accordance with point (a)~~,~~ where this is ~~available and~~ relevant.

This forecast shall reflect the economic prospects of the electronic communications networks sector and investment intentions of operators at the time when the data is gathered, in order to allow the identification of available connectivity in different areas. This forecast shall include information on planned deployments by any undertaking or public authority, in particular to include very high capacity networks and significant upgrades or extensions of legacy broadband networks to at least the performance of next-generation access networks. For this purpose, national regulatory authorities shall request undertakings to provide relevant information regarding planned deployments of such networks **to the extent that it is available and can be provided with reasonable effort. The national regulatory authority may decide to what extent it would be appropriate to rely on all or part of the information gathered in the context of such forecast for conducting the tasks required by Articles 62 and 65 and by Article 81, as well as for imposing obligations in accordance with Article 66.**

The information collected in the **geographical** survey shall be at an appropriate level of local detail and shall include sufficient information on the quality of service and parameters thereof. **National regulatory authorities shall ensure that confidential information gathered in the context of a geographical survey are treated in accordance with Article 20.**

2. National regulatory authorities may designate a "digital exclusion area" corresponding to an area with clear territorial boundaries where, on the basis of the information gathered pursuant to paragraph 1, it is determined that for the duration of the relevant forecast period **defined by the national regulatory authority**, no undertaking or public authority has deployed or is planning to deploy a very high capacity network or has significantly upgraded or extended its network to a performance of at least 100 Mbps download speeds, or is planning to do so. National regulatory authorities shall publish the designated digital exclusion areas.

3. Within a designated digital exclusion area, national regulatory authorities may **invite** ~~issue a call open to any~~ undertaking**s** to declare their intention to deploy very high capacity networks over the duration of the relevant forecast period **and directly require specific undertakings that already provide electronic communications networks in the designated digital exclusion area to declare their intention**. **The national regulatory authority shall do so where requested by the Member State in question.** The national regulatory authority shall specify the information to be included in such submissions, in order to ensure at least a similar level of detail as that taken into consideration in the forecast envisaged in paragraph 1(b). It shall also inform any undertaking expressing its interest whether the designated digital exclusion area is covered or likely to be covered by an NGA network offering download speeds below 100 Mbps on the basis of the information gathered pursuant to paragraph 1(b).

4. When national regulatory authorities take measures pursuant to paragraph 3, they shall do so according to an efficient, objective, transparent and non-discriminatory procedure, whereby no undertaking is a priori excluded. Failure **by an undertaking** ~~to provide information pursuant to paragraph 1(b) or~~ to respond to ~~the call for interest~~ **a direct request** pursuant to paragraph 3 may be considered as **deliberate provision of** misleading**, erroneous or incomplete** information pursuant to Article~~s~~ 20**, paragraph 1** ~~or 21.~~ **if, following network investment by another undertaking in response to the direct request for declarations of deployment intentions in a given digital exclusion area, the undertaking subsequently deploys or significantly upgrades network elements in that area within the forecast period defined by the national regulatory authority.**

5. Member States shall ensure that local, regional and national authorities with responsibility for the allocation of public funds for the deployment of electronic communications networks, for the design of national broadband plans, for defining coverage obligations attached to rights of use for radio spectrum and for verifying availability of services falling within the universal service obligation in their territory take into account the results of the **geographical** surveys and of the designated digital exclusion areas conducted in accordance with paragraphs 1, 2 and 3, and that national regulatory authorities supply such results subject to the receiving authority ensuring the same level of confidentiality and protection of business secrets as the originating authority. These results shall also be made available to BEREC and the Commission upon their request and under the same conditions.

6. National regulatory authorities may make available information tools to end-users, in order to assist them to determine the availability of connectivity in different areas, with a level of detail which is useful to support their choice in terms of connectivity services, in line with national regulatory authority´s obligations regarding the protection of confidential information and business secrets.

7. By [date] in order to contribute to the consistent application of geographical surveys and forecasts, BEREC shall, after consulting stakeholders and in close cooperation with the Commission, issue guidelines to assist national regulatory authorities on the consistent implementation of their obligations under this Article.

TITLE IV: INTERNAL MARKET PROCEDURES

Article 32

Consolidating the internal market for electronic communications

1. In carrying out their tasks under this Directive , national regulatory authorities shall take the utmost account of the objectives set out in Article 3, including in so far as they relate to the functioning of the internal market.

2. National regulatory authorities shall contribute to the development of the internal market by working with each other and with the Commission and BEREC in a transparent manner so as to ensure the consistent application, in all Member States, of the provisions of this Directive . To this end, they shall, in particular, work with the Commission and BEREC to identify the types of instruments and remedies best suited to address particular types of situations in the marketplace.

3. Except where otherwise provided in recommendations or guidelines adopted pursuant to Article 34 upon completion of the consultation referred to in Article 23, where a national regulatory authority intends to take a measure which:

   (a) falls within the scope of Articles 59, 62, 65 or 66 of this Directive; and

   (b) would affect trade between Member States;

   it shall make the draft measure accessible to the Commission, BEREC, and the national regulatory authorities in other Member States, at the same time, together with the reasoning on which the measure is based, in accordance with Article 20(3), and inform the Commission, BEREC and other national regulatory authorities thereof. National regulatory authorities, BEREC and the Commission may make comments to the national regulatory authority concerned only within one month. The one-month period may not be extended.

4. Where an intended measure covered by paragraph 3 aims at:

(a) defining a relevant market which differs from those defined in the Recommendation in accordance with Article 62(1); or

(b) deciding whether or not to designate an undertaking as having, either individually or jointly with others, significant market power, under Article 65(3) or (4);

and would affect trade between Member States, and the Commission has indicated to the national regulatory authority that it considers that the draft measure would create a barrier to the single market or if it has serious doubts as to its compatibility with Union law and in particular the objectives referred to in Article 3, the draft measure shall not be adopted for a further two months. This period may not be extended. The Commission shall inform other national regulatory authorities of its reservations in such a case.

5. Within the two-month period referred to in paragraph 4, the Commission may:

(a) take a decision requiring the national regulatory authority concerned to withdraw the draft measure; and/or

(b) take a decision to lift its reservations in relation to a draft measure referred to in paragraph 4.

The Commission shall take utmost account of the opinion of BEREC before issuing a decision. The decision shall be accompanied by a detailed and objective analysis of why the Commission considers that the draft measure should not be adopted, together with specific proposals for amending the draft measure.

6. Where the Commission has adopted a decision in accordance with paragraph 5, requiring the national regulatory authority to withdraw a draft measure, the national regulatory authority shall amend or withdraw the draft measure within six months of the date of the Commission's decision. When the draft measure is amended, the national regulatory authority shall undertake a public consultation in accordance with the procedures referred to in Article 23, and shall re-notify the amended draft measure to the Commission in accordance with the provisions of paragraph 3.

7. The national regulatory authority concerned shall take the utmost account of comments of other national regulatory authorities, BEREC and the Commission and may, except in cases covered by paragraphs 4 and 5(a), adopt the resulting draft measure and, where it does so, shall communicate it to the Commission.

8. The national regulatory authority shall communicate to the Commission and BEREC all adopted final measures which fall under paragraph (3)(a) and (b) of this Article.

9. In exceptional circumstances, where a national regulatory authority considers that there is an urgent need to act, in order to safeguard competition and protect the interests of users, by way of derogation from the procedure set out in paragraphs 3 and 4, it may immediately adopt proportionate and provisional measures. It shall, without delay, communicate those measures, with full reasons, to the Commission, the other national regulatory authority, and BEREC. A decision by the national regulatory authority to render such measures permanent or extend the time for which they are applicable shall be subject to the provisions of paragraphs 3 and 4.

Article 33

Procedure for the consistent application of remedies

1. Where an intended measure covered by Article 32(3) aims at imposing, amending or withdrawing an obligation on an operator in application of Article 65 in conjunction with Article 59 and Articles 67 to 74 , the Commission may, within the period of one month provided for by Article 32(3) , notify the national regulatory authority concerned and BEREC of its reasons for considering that the draft measure would create a barrier to the single market or its serious doubts as to its compatibility with Union law. In such a case, the draft measure shall not be adopted for a further three months following the Commission's notification.

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

2. Within the three month period referred to in paragraph 1, the Commission, BEREC and the national regulatory authority concerned shall cooperate closely to identify the most appropriate and effective measure in the light of the objectives laid down in Article 3, whilst taking due account of the views of market participants and the need to ensure the development of consistent regulatory practice.

3. Within six weeks from the beginning of the three month period referred to in paragraph 1, BEREC shall, acting by a majority of its component members, issue an opinion on the Commission's notification referred to in paragraph 1, indicating whether it considers that the draft measure should be amended or withdrawn and, where appropriate, provide specific proposals to that end. This opinion shall be reasoned and made public.

4. If in its opinion, BEREC shares the serious doubts of the Commission, it shall cooperate closely with the national regulatory authority concerned to identify the most appropriate and effective measure. Before the end of the three month period referred in paragraph 1, the national regulatory authority may:

   (a) amend or withdraw its draft measure taking utmost account of the Commission's notification referred to in paragraph 1 and of BEREC's opinion and advice;

   (b) maintain its draft measure.

5. Where BEREC does not share the serious doubts of the Commission or does not issue an opinion, or where the national regulatory authority amends or maintains its draft measure pursuant to paragraph 4, t~~T~~he Commission may, within one month following the end of the three month period referred to in paragraph 1 and taking utmost account of the opinion of BEREC if any:

   (a) issue a recommendation ~~requiring~~ **inviting** the national regulatory authority concerned to amend or withdraw the draft measure, including specific proposals to that end and providing reasons justifying its recommendation, in particular where BEREC does not share the serious doubts of the Commission;

   (b) take a decision to lift its reservations indicated in accordance with paragraph 1.

~~(c) take a decision requiring the national regulatory authority concerned to withdraw the draft measure, where BEREC shares the serious doubts of the Commission. The decision shall be accompanied by a detailed and objective analysis of why the Commission considers that the draft measure should not be adopted, together with specific proposals for amending the draft measure. In this case, the procedure referred to in Article 32 (6) shall apply *mutatis mutandis*.~~

6. Within one month of the Commission issuing the recommendation in accordance with paragraph 5(a) or lifting its reservations in accordance with paragraph 5(b) of this Article, the national regulatory authority concerned shall communicate to the Commission and BEREC the adopted final measure.

   This period may be extended to allow the national regulatory authority to undertake a public consultation in accordance with Article 23.

7. Where the national regulatory authority decides not to amend or withdraw the draft measure on the basis of the recommendation issued under paragraph 5(a), it shall provide a reasoned justification.

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

Article 34

Implementing provisions

After public consultation and consultation with national regulatory authorities and taking utmost account of the opinion of BEREC, the Commission may adopt recommendations and/or guidelines in relation to Article 32 that define the form, content and level of detail to be given in the notifications required in accordance with Article 32(3), the circumstances in which notifications would not be required, and the calculation of the time-limits.

ACCESS TO LAND

Article 43

Rights of way

1. Member States shall ensure that when a competent authority considers:

   – an application for the granting of rights to install facilities on, over or under public or private property to an undertaking authorised to provide public communications networks, or

   – an application for the granting of rights to install facilities on, over or under public property to an undertaking authorised to provide electronic communications networks other than to the public,

   the competent authority:

   – acts on the basis of simple, efficient, transparent and publicly available procedures, applied without discrimination and without delay, and in any event makes its decision within six months of the application, except in cases of expropriation, and

   – follows the principles of transparency and non-discrimination in attaching conditions to any such rights.

   The abovementioned procedures can differ depending on whether the applicant is providing public communications networks or not.

2. Member States shall ensure that where public or local authorities retain ownership or control of undertakings operating public electronic communications networks and/or publicly available electronic communications services, there is an effective structural separation of the function responsible for granting the rights referred to in paragraph 1 from the activities associated with ownership or control.

Article 44

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

1. Where an operator has **been granted rights of way pursuant to Article 43** ~~exercised the right under national legislation to install facilities on, over or under public or private property,~~ or has taken advantage of a procedure for the expropriation or use of property, competent authorities **may** ~~shall, be able to~~ impose co-location and sharing of the network elements and associated facilities installed, in order to protect the environment, public health, public security or to meet town and country planning objectives. Co-location or sharing of networks elements and facilities installed and sharing of property may only be imposed after an appropriate period of public consultation, during which all interested parties shall be given an opportunity to express their views and only in the specific areas where such sharing is deemed necessary in view of pursuing the objectives provided in this Article. Competent authorities **may** ~~shall be able to~~ impose the sharing of such facilities or property, including land, buildings, entries to buildings, building wiring, masts, antennae, towers and other supporting constructions, ducts, conduits, manholes, cabinets or measures facilitating the coordination of public works. Where necessary, national regulatory authorities shall **coordinate the procedure provided for in this article, act as a single point of contact and** provide rules for apportioning the costs of facility or property sharing and of civil works coordination.

2. Measures taken by a competent authority in accordance with this Article shall be objective, transparent, non-discriminatory, and proportionate. Where relevant, these measures shall be carried out in coordination with the national regulatory authorities.

CHAPTER I

GENERAL PROVISIONS, ACCESS PRINCIPLES

Article 57

General framework for access and interconnection

1. Member States shall ensure that there are no restrictions which prevent undertakings in the same Member State or in different Member States from negotiating between themselves agreements on technical and commercial arrangements for access and/or interconnection, in accordance with Union law. The undertaking requesting access or interconnection does not need to be authorised to operate in the Member State where access or interconnection is requested, if it is not providing services and does not operate a network in that Member State.

2. Without prejudice to Article 106 , Member States shall not maintain legal or administrative measures which oblige operators, when granting access or interconnection, to offer different terms and conditions to different undertakings for equivalent services and/or imposing obligations that are not related to the actual access and interconnection services provided without prejudice to the conditions fixed in Annex I of this Directive.

Article 58

Rights and obligations for undertakings

1. Operators of public communications networks shall have a right and, when requested by other undertakings so authorised in accordance with Article 15 of this Directive , an obligation to negotiate interconnection with each other for the purpose of providing publicly available electronic communications services, in order to ensure provision and interoperability of services throughout the Union. Operators shall offer access and interconnection to other undertakings on terms and conditions consistent with obligations imposed by the national regulatory authority pursuant to Articles 59, 60 and 66 .

2. Without prejudice to Article 21 of this Directive , Member States shall require that undertakings which acquire information from another undertaking before, during or after the process of negotiating access or interconnection arrangements use that information solely for the purpose for which it was supplied and respect at all times the confidentiality of information transmitted or stored. The received information shall not be passed on to any other party, in particular other departments, subsidiaries or partners, for whom such information could provide a competitive advantage.

CHAPTER II

ACCESS AND INTERCONNECTION

Article 59

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

1. National regulatory authorities shall, acting in pursuit of the objectives set out in Article 3 , encourage and where appropriate ensure, in accordance with the provisions of this Directive, adequate access and interconnection, and the interoperability of services~~, exercising their responsibility in a way that promotes efficiency, sustainable competition, the deployment of very high capacity networks, efficient investment and innovation, and gives the maximum benefit to end-users~~. They shall provide guidance and make publicly available the procedures applicable to gain access and interconnection to ensure that small and medium-sized enterprises and operators with a limited geographical reach can benefit from the obligations imposed.

In particular, without prejudice to measures that may be taken regarding undertakings with significant market power in accordance with Article 66, national regulatory authorities shall be able to impose:

(a) to the extent that is necessary to ensure end-to-end connectivity, obligations on those undertakings that are subject to general authorisation and that control access to end-users, including in justified cases the obligation to interconnect their networks where this is not already the case;

(b) in justified cases and to the extent that is necessary, obligations on those undertakings that are subject to general authorisation and that control access to end-users to make their services interoperable;

(c) in justified cases, obligations on providers of number-independent interpersonal communications services to make their services interoperable, namely where access to emergency services or end-to-end connectivity between end-users is endangered due to a lack of interoperability between interpersonal communications services.

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

The obligations referred to in point (c) of the second subparagraph may only be imposed:

(i) to the extent necessary to ensure interoperability of interpersonal communications services and may include obligations relating to the use and implementation of standards or specifications listed in Article 39(1) or of any other relevant European or international standards; and

(ii) where the Commission, ~~on the basis~~ **taking utmost account** of a report that it had requested from BEREC, has found an appreciable threat to effective access to emergency services or to end-to-end connectivity between end-users within one or several Member States or throughout the European Union and has adopted implementing measures specifying the nature and scope of any obligations that may be imposed, in accordance with the examination procedure referred to in Article 110(4).

2. National regulatory authorities shall impose obligations upon reasonable request to grant access to wiring and cables inside buildings or up to the first concentration or distribution point where that point is located outside the building, on the owners of such wiring and cable or on undertakings that have the right to use such wiring and cables, where this is justified on the grounds that replication of such network elements would be economically inefficient or physically impracticable. The access conditions imposed may include specific rules on access, transparency and non-discrimination and for apportioning the costs of access, which, where appropriate, are adjusted to take into account risk factors.

In areas with lower population density and to the extent strictly and objectively necessary to address economic or physical barriers to replication ~~N~~national regulatory authorities may extend to those owners or undertakings the imposition of such access obligations, on fair and reasonable terms and conditions, ~~beyond the first~~ **to the** concentration ~~or distribution~~ point **closest** ~~to a concentration point as close as possible~~ to end-users **that can host a sufficient number of end-user connections to be commercially viable for access seekers, but not beyond** ~~to the extent strictly necessary to address insurmountable economic or physical barriers to replication in areas with lower population density~~. **If justified on physical and economic grounds, national regulatory authorities may impose active or virtual access obligations.**

National regulatory authorities shall not impose obligations in accordance with the second subparagraph where:

(a) a viable and similar alternative means of access to end-users is made available to any undertaking, provided that the access is offered on fair and reasonable terms and conditions to a very high capacity network by an undertaking meeting the criteria listed in Article 77 paragraphs (a) and (b); ~~and~~ **or**

(b) in the case of recently deployed network elements, in particular by smaller local projects, the granting of that access would compromise the economic or financial viability of their deployment.

3. Member States shall ensure that national regulatory authorities have the power to impose on undertakings providing or authorised to provide electronic communications networks obligations in relation to the sharing of passive or active infrastructure, obligations to conclude localised roaming access agreements, or the joint roll-out of infrastructures directly necessary for the local provision of services which rely on the use of spectrum, in compliance with Union law, where it is justified on the grounds that,

(a) the replication of such infrastructure would be economically inefficient or physically impracticable, and

(b) the connectivity in that area, including along its main transport paths, would be severely deficient**,** or the local population would be subjected to severe restrictions on choice or quality of service, or on both.

National regulatory authorities shall have regard to:

(a) the need to maximise connectivity throughout the Union and in particular territorial areas;

(b) the efficient use of radio spectrum;

(c) the technical feasibility of sharing and associated conditions;

(d) the state of infrastructure-based as well as service-based competition;

(e) the possibility to significantly increase choice and higher quality of service for end-users;

(f) technological innovation;

(g) the overriding need to support the incentive of the host to roll out the infrastructure in the first place.

Such sharing, access or coordination obligations shall be subject to agreements concluded on the basis of fair and reasonable terms and conditions. In the event of dispute resolution, national regulatory authorities may inter alia impose on the beneficiary of the sharing or access obligation, the obligation to share its spectrum with the infrastructure host in the relevant area.

4. Obligations and conditions imposed in accordance with paragraph 1,2 and 3 shall be objective, transparent, proportionate and non-discriminatory, they shall be implemented in accordance with the procedures referred to in Articles 23, 32 and 33. National regulatory authorities shall assess the results of such obligations and conditions within five years from the adoption of the previous measure adopted in relation to the same operators and whether it would be appropriate to withdraw or amend them in the light of evolving conditions. National regulatory authorities shall notify the outcome of their assessment in accordance with the same procedures .

5. With regard to access and interconnection referred to in paragraph 1, Member States shall ensure that the national regulatory authority is empowered to intervene at its own initiative where justified in order to secure the policy objectives of Article 3 , in accordance with the provisions of this Directive and the procedures referred to in Articles 23 and 32, 26 and 27 .

6. By [entry into force plus 18 months] in order to contribute to a consistent definition of the location of network termination points by national regulatory authorities, BEREC shall, after consulting stakeholders and in close cooperation with the Commission, adopt guidelines on common approaches to the identification of the network termination point in different network topologies. National regulatory authorities shall take utmost account of those guidelines when defining the location of network termination points.

Article 60

Conditional access systems and other facilities

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

~~2. In the light of market and technological developments, the Commission shall be empowered to adopt delegated acts in accordance with Article 109 to amend Annex II.~~

3. Notwithstanding the provisions of paragraph 1, Member States may permit their national regulatory authority, as soon as possible after the entry into force of this Directive and periodically thereafter, to review the conditions applied in accordance with this Article, by undertaking a market analysis in accordance with the first paragraph of Article 65 to determine whether to maintain, amend or withdraw the conditions applied.

Where, as a result of this market analysis, a national regulatory authority finds that one or more operators do not have significant market power on the relevant market, it may amend or withdraw the conditions with respect to those operators, in accordance with the procedures referred to in Articles 23 and 32 , only to the extent that:

(a) accessibility for end-users to radio and television broadcasts and broadcasting channels and services specified in accordance with Article 106 would not be adversely affected by such amendment or withdrawal, and

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

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

(ii) conditional access systems and other associated facilities,

would not be adversely affected by such amendment or withdrawal.

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

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

CHAPTER III

MARKET ANALYSIS AND SIGNIFICANT MARKET POWER

Article 61

Undertakings with significant market power

1. Where this Directive requires national regulatory authorities to determine whether operators have significant market power in accordance with the procedure referred to in Article 65, paragraph~~s~~ 2 ~~and 3~~ of this Article shall apply.

2. 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.

   In particular, national regulatory authorities shall, when assessing whether two or more undertakings are in a joint dominant position in a market, act in accordance with Union law and take into the utmost account the guidelines on market analysis and the assessment of significant market power published by the Commission pursuant to Article 62.

Article 62

Procedure for the identification and definition of markets

1. After public consultation including with national regulatory authorities and taking the utmost account of the opinion of BEREC, the Commission shall adopt a Recommendation on Relevant Product and Service Markets (the Recommendation). The Recommendation shall identify those product and service markets within the electronic communications sector the characteristics of which may be such as to justify the imposition of regulatory obligations set out in this Directive, without prejudice to markets that may be defined in specific cases under competition law. The Commission shall define markets in accordance with the principles of competition law.

   The Commission shall include product and service markets in the Recommendation where, after observing overall trends in the Union, it finds that each of the criteria listed in paragraph 1 of Article 65 is met.

   The Commission shall regularly review the Recommendation.

2. The Commission shall publish~~, at the latest on the date of entry into force of this Directive,~~ guidelines for market analysis and the assessment of significant market power (hereinafter 'the SMP guidelines') which shall be in accordance with the principles of competition law **and include guidance to national regulatory authorities on the application of the concept of significant market power to the specific context of *ex ante* regulation of electronic communications markets.**

3. National regulatory authorities shall, taking the utmost account of the Recommendation and the SMP guidelines, define relevant markets appropriate to national circumstances, in particular relevant geographic markets within their territory, in accordance with the principles of competition law. National regulatory authorities shall take into account the results of the geographical survey conducted in accordance with Article 22(1). They shall follow the procedures referred to in Articles 23 and 32 before defining the markets that differ from those identified in the Recommendation.

Article 63

Procedure for the identification of transnational markets

1. **BEREC shall conduct an analysis of a potential transnational market if the Commission or at least two national regulatory authorities concerned submit a reasoned request including supporting evidence.** After consulting stakeholders and **taking utmost account of the analysis carried out by BEREC,** ~~in close cooperation with~~ the Commission~~, BEREC~~ may adopt ~~a~~ Decision**s** identifying transnational markets in accordance with the principles of competition law and taking utmost account of the Recommendation and SMP Guidelines adopted in accordance with Article 62. ~~BEREC shall conduct an analysis of a potential transnational market if the Commission or at least two national regulatory authorities concerned submit a reasoned request providing supporting evidence.~~

2. In the case of transnational markets identified in accordance with paragraph 1, the national regulatory authorities concerned shall jointly conduct the market analysis taking the utmost account of the SMP Guidelines and, in a concerted fashion, shall decide on any imposition, maintenance, amendment or withdrawal of regulatory obligations referred to in Article 65(4). The national regulatory authorities concerned shall jointly notify to the Commission with their draft measures regarding the market analysis and any regulatory obligations pursuant to Articles 32 and 33.

   Two or more national regulatory authorities may also jointly notify their draft measures regarding the market analysis and any regulatory obligations in the absence of transnational markets, where they consider that market conditions in their respective jurisdictions are sufficiently homogeneous.

Article 64

Procedure for the identification of transnational demand

1. BEREC shall conduct an analysis of transnational end-user demand for products and services that are provided within the Union in one or more of the markets listed in the Recommendation, if it receives a reasoned request providing supporting evidence from the Commission or from at least two of the national regulatory authorities concerned indicating that there is a serious demand problem to be addressed. BEREC may also conduct such analysis if it receives a reasoned request from market participants providing sufficient supporting evidence and considers there is a serious demand problem to be addressed. BEREC's analysis is without prejudice to any findings of transnational markets in accordance with Article 63(1) and to any findings of national or sub-national geographical markets by national regulatory authorities in accordance with Article 62(3).

   That analysis of transnational end-user demand may include products and services that are supplied within product or service markets that have been defined in different ways by one or more national regulatory authorities when taking into account national circumstances, provided that those products and services are substitutable to those supplied in one of the markets listed in the Recommendation.

   If BEREC concludes that a transnational end-user demand exists, is significant and is not sufficiently met by supply provided on a commercial or regulated basis, it shall, after consulting stakeholders and in close cooperation with the Commission, issue guidelines on common approaches for national regulatory authorities to meet the identified transnational demand, including, where appropriate, when they impose remedies in accordance with Article 66. National regulatory authorities shall take into utmost account these guidelines when performing their regulatory tasks within their jurisdiction.

~~2. On the basis of BEREC guidelines referred to in paragraph 1, the Commission may adopt a Decision pursuant to Article 38 to harmonise the technical specifications of wholesale access products capable of meeting such identified transnational demand, when they are imposed by national regulatory authorities on operators designated with significant market power in markets where such access products are supplied, as defined according to national circumstances. Article 38(3)(a) second subparagraph first indent shall not apply in such a case.~~

Article 65

Market analysis procedure

1. National regulatory authorities shall

determine whether a relevant market defined in accordance with Article 62(3) may be such as to justify the imposition of the regulatory obligations set out in this Directive. Member States shall ensure that an analysis is carried out, where appropriate, in collaboration with the national competition authorities. National regulatory authorities shall take utmost account of the SMP guidelines and shall follow the procedures referred to in Articles 23 and 32 when conducting such analysis.

A market may be such as to justify the imposition of regulatory obligations set out in this Directive if the following three criteria are cumulatively met:

(a) high and non-transitory structural, legal or regulatory barriers to entry are present;

(b) there is a market structure which does not tend towards effective competition within the relevant time horizon, having regard to the state of infrastructure-based competition and other sources of competition behind the barriers to entry;

(c) competition law alone is insufficient to adequately address the identified market failure(s).

Where a national regulatory authority conducts an analysis of a market that is included in the Recommendation, it shall consider that points (a), (b) and (c) of the second subparagraph have been met, unless the national regulatory authority determines that one or more of such criteria is not met in the specific national circumstances.

2. Where a national regulatory authority conducts the analysis required by paragraph 1, it shall consider developments from a forward-looking perspective in the absence of regulation imposed on the basis of this Article in that relevant market, and taking into account:

(a) the existence of market developments ~~which may increase the likelihood of the relevant market tending towards effective competition,~~ such as those commercial co-investment or access agreements between operators which benefit competitive dynamics sustainably;

(b) all relevant competitive constraints, including at retail level, irrespective of whether the sources of such constraints are deemed to be electronic communications networks, electronic communications services, or other types of services or applications which are comparable from the perspective of the end-user, and irrespective of whether such constraints are part of the relevant market;

(c) other types of regulation or measures imposed and affecting the relevant market or related retail market or markets throughout the relevant period, including, without limitation, obligations imposed in accordance with Articles 44, 58 and 59; and

(d) regulation imposed on other relevant markets on the basis of this Article.

3. Where a national regulatory authority concludes that a relevant market may not be such as to justify the imposition of regulatory obligations in accordance with the procedure in paragraphs 1 and 2 of this Article, or where the conditions in paragraph 4 of this Article are not met , it shall not impose or maintain any specific regulatory obligations in accordance with Article 66. In cases where there already are sector specific regulatory obligations imposed in accordance with Article 66, it shall withdraw such obligations placed on undertakings in that relevant market.

National regulatory authorities shall ensure that parties affected by such a withdrawal of obligations receive an appropriate period of notice, defined by balancing the need to ensure a sustainable transition for the beneficiaries of these obligations and end-users, end-user choice, and that regulation does not continue beyond what is necessary. When setting such period of notice, national regulatory authorities may determine specific conditions and notice periods in relation to existing access agreements.

4. Where a national regulatory authority determines that , in a relevant market the imposition of regulatory obligations in accordance with paragraphs 1 and 2 of this Article is justified, it shall identify any undertakings which individually or jointly have a significant market power on that relevant market in accordance with Article 61. The national regulatory authority shall impose on such undertakings appropriate specific regulatory obligations in accordance with Article 66 or maintain or amend such obligations where they already exist if it considers that one or more retail markets would not be effectively competitive in the absence of those obligations.

5. Measures taken in accordance with the provisions of paragraphs 3 and 4 shall be subject to the procedures referred to in Articles 23 and 32. National regulatory authorities shall carry out an analysis of the relevant market and notify the corresponding draft measure in accordance with Article 32:

(a) within five years from the adoption of a previous measure where the national regulatory authority has defined the relevant market and determined which undertakings have significant market power . Exceptionally, that five-year period may be extended for up to one additional year, where the national regulatory authority has notified a reasoned proposed extension to the Commission no later than four months before the expiry of the five years period, and the Commission has not objected within one month of the notified extension;

(b) within ~~two~~ **three** years from the adoption of a revised Recommendation on relevant markets, for markets not previously notified to the Commission; or

(c) within three years from their accession, for Member States which have newly joined the Union.

6. Where a national regulatory authority considers that it may not complete or has not completed its analysis of a relevant market identified in the Recommendation within the time limit laid down in paragraph 6, BEREC shall, upon request, provide assistance to the national regulatory authority concerned in completing the analysis of the specific market and the specific obligations to be imposed. With this assistance, the national regulatory authority concerned shall within six months of the limit laid down in paragraph 5 notify the draft measure to the Commission in accordance with Article 32.

CHAPTER IV

ACCESS REMEDIES AND SIGNIFICANT MARKET POWER

Article 66

Imposition, amendment or withdrawal of obligations

1. Member States shall ensure that national regulatory authorities are empowered to impose the obligations identified in Articles 67 to .

2. Where an operator is designated as having significant market power on a specific market as a result of a market analysis carried out in accordance with Article 65 of this Directive , national regulatory authorities shall be able to impose any of the obligations set out in Articles 67 to 75and 77 of this Directive as appropriate.

3. Without prejudice to:

   – the provisions of Articles 59 and 60,

   – the provisions of Articles 44 and 17 of this Directive , Condition 7 in Part D of Annex I as applied by virtue of Article 13(1) of this Directive, Articles 91 and 99 of this Directive and the relevant provisions of Directive 2002/58/EC[3] containing obligations on undertakings other than those designated as having significant market power, or

   – the need to comply with international commitments,

[3] OJ L 201, 31.7.2002, p. 37.

national regulatory authorities shall not impose the obligations set out in Articles 67 to 75 and 77 on operators that have not been designated in accordance with paragraph 2.

In exceptional circumstances, when a national regulatory authority intends to impose on operators with significant market power obligations for access or interconnection other than those set out in Articles 67 to 75 and 77, it shall submit this request to the Commission. The Commission shall take utmost account of the opinion of BEREC. The Commission, acting in accordance with the procedure referred to in Article 110(3), shall take a decision authorising or preventing the national regulatory authority from taking such measures.

4. Obligations imposed in accordance with this Article shall be**:**

a) based on the nature of the problem identified **by a national regulatory authority in its market analysis**, in particular at retail level and where appropriate taking into account the identification of transnational demand pursuant to Article 64~~.~~;

b) ~~They shall be~~ proportionate, having regard to the costs and benefits~~,~~; ~~and~~

c) justified in the light of the objectives laid down in Article 3 of this Directive; **and**~~. Such obligations shall only be~~

d) imposed following consultation in accordance with Articles 23 and 32.

5. In relation to the third indent of the first subparagraph of paragraph 3, national regulatory authorities shall notify decisions to impose, amend or withdraw obligations on market players to the Commission, in accordance with the procedure referred to in Article 32 .

6. National regulatory authorities shall consider the impact of new market developments, such as in relation to commercial agreements **influencing competitive dynamics**, including co-investment agreements, which have been concluded**,** ~~or unforeseeably~~ breached**,** ~~or~~ terminated**, or have affects that diverge from the expectations at the time of the market analysis.** ~~affecting competitive dynamics.~~ If these developments are not sufficiently important in order to determine the need to undertake a new market analysis in accordance with Article 65, the national regulatory authority shall assess whether it is necessary to review the obligations imposed on operators designated with significant market power in order to ensure that such obligations continue to meet the conditions in paragraph 4. Such amendments shall only be imposed following consultation in accordance with Articles 23 and 32.

Article 67

Obligation of transparency

1. National regulatory authorities may, in accordance with the provisions of Article 66, impose obligations for transparency in relation to interconnection and/or access, requiring operators to make public specified information, such as accounting information, technical specifications, network characteristics **and expected developments thereof**, terms and conditions for supply and use, including any conditions ~~limiting~~ **altering** access to and/or use of services and applications**, particularly with regard to migration from legacy infrastructure,** where such conditions are allowed by Member States in conformity with Union law, and prices.

2. In particular where an operator has obligations of non-discrimination, national regulatory authorities may require that operator to publish a reference offer, which shall be sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested, giving a description of the relevant offerings broken down into components according to market needs, and the associated terms and conditions including prices. The national regulatory authority shall, *inter alia*, be able to impose changes to reference offers to give effect to obligations imposed under this Directive.

3. National regulatory authorities may specify the precise information to be made available, the level of detail required and the manner of publication.

4. No later than [1 year after the adoption of this Directive], in order to contribute to the consistent application of transparency obligations, BEREC shall, after consulting stakeholders and in close cooperation with the Commission, issue guidelines on the minimum criteria for a reference offer and shall review them whenever necessary in order to adapt them to technological and market developments. In providing such minimum criteria, BEREC shall pursue the objectives in Article 3, and shall have regard for the needs of the beneficiaries of access obligations and end-users that are active in more than one Member State as well as to any BEREC guidelines identifying transnational demand in accordance with Article 64 and to any related Commission Decision.

   Notwithstanding paragraph 3, where an operator has obligations under Article 70 or 71 concerning wholesale network infrastructure access, national regulatory authorities shall ensure the publication of a reference offer taking utmost account of the ~~the~~ BEREC guidelines on the minimum criteria for a reference offer.

Article 68

Obligation of non-discrimination

1. A national regulatory authority may, in accordance with the provisions of Article 66, impose obligations of non-discrimination, in relation to interconnection and/or access.

2. Obligations of non-discrimination shall ensure, in particular, that the operator applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners. ~~In particular, in cases where the operator is deploying new systems, n~~**N**ational regulatory authorities may **also** impose ~~on that operator~~ obligations to supply access products and services to all undertakings, including to **its downstream arm** ~~itself,~~ on the same timescales, terms and conditions, including those relating to price and service levels, and by means of the same systems and processes, in order to ensure equivalence of access.

Article 69

Obligation of accounting separation

1. A national regulatory authority may, in accordance with the provisions of Article 66, impose obligations for accounting separation in relation to specified activities related to interconnection and/or access.

   In particular, a national regulatory authority may require a vertically integrated company to make transparent its wholesale prices and its internal transfer prices *inter alia* to ensure compliance where there is a requirement for non-discrimination under Article 68 or, where necessary, to prevent unfair cross-subsidy. National regulatory authorities may specify the format and accounting methodology to be used.

2. Without prejudice to Article 20 , to facilitate the verification of compliance with obligations of transparency and non-discrimination, national regulatory authorities shall have the power to require that accounting records, including data on revenues received from third parties, are provided on request. National regulatory authorities may publish such information as would contribute to an open and competitive market, while respecting national and Union rules on commercial confidentiality.

Article 70

Access to civil engineering

1. A national regulatory authority may, in accordance with Article 66, impose obligations on operators to meet reasonable requests for access to, and use of, civil engineering including, without limitation, buildings or entries to buildings, building cables including wiring, antennae, towers and other supporting constructions, poles, masts, ducts, conduits, inspection chambers, manholes, and cabinets, in situations where the market analysis indicates that denial of access or access given under unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level and would not be in the end-user's interest.

2. National regulatory authorities may impose obligations on an operator to provide access in accordance with this Article, irrespective of whether the assets that are affected by the obligation are part of the relevant market in accordance with the market analysis, provided that the obligation is necessary and proportionate to meet the objectives of Article 3.

Article 71

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

1. ~~Only where a~~ **A** national regulatory authority ~~concludes that the obligations imposed may, in accordance with Article 70 would not on their own lead to the achievement of the objectives set out in Article 3, it~~ may, in accordance with the provisions of Article 66, impose obligations on operators to meet reasonable requests for access to, and use of, specific network elements and associated facilities, in situations where the national regulatory authority considers that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, and would not be in the end-user's interest. **Prior to the imposition of such obligations, the national regulatory authority shall assess whether the sole imposition of obligations in accordance with Article 70 would be sufficient to achieve the objectives set out in Article 3.**

Operators may be required *inter alia*:

(a) to give third parties access to specified network elements and/or facilities, as appropriate including access to network elements which are either not active or physical and/or active or virtual unbundled access to the local loop;

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

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

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

(e) to provide co-location or other forms of associated facilities sharing;

(f) to provide specified services needed to ensure interoperability of end-to-end services to users, including facilities for software emulated networks or roaming on mobile networks;

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

(h) to interconnect networks or network facilities;

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

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

2. When national regulatory authorities are considering the appropriateness of imposing any of the possible specific obligations referred in paragraph 1, and in particular when assessing, in conformity with the principle of proportionality, whether and how such obligations should be imposed , they shall analyse whether other forms of access to wholesale inputs either on the same or a related wholesale market, would already be sufficient to address the identified problem at the retail level. The assessment shall include existing or prospective commercial access offers, regulated access pursuant to Article 59, or existing or ~~contemplated~~ **planned** regulated access to other wholesale inputs pursuant to this Article. They shall take account in particular of the following factors:

(a) the technical and economic viability of using or installing competing facilities, in the light of the rate of market development, taking into account the nature and type of interconnection and/or access involved, including the viability of other upstream access products such as access to ducts;

(b) the expected technological evolution affecting network design and management

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

(d) the initial investment by the facility owner, taking account of any public investment made and the risks involved in making the investment with particular regard to investments in and risk levels associated with very high capacity networks;

(e) the need to safeguard competition in the long term, with particular attention to economically efficient infrastructure-based competition and to sustainable competition based on co-investment in networks;

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

(g) the provision of pan-European services.

3. When imposing obligations on an operator to provide access in accordance with the provisions of this Article, national regulatory authorities may lay down technical or operational conditions to be met by the provider and/or beneficiaries of such access where necessary to ensure normal operation of the network. Obligations to follow specific technical standards or specifications shall be in compliance with the standards and specifications laid down in accordance with Article 39 .

Article 72

Price control and cost accounting obligations

1. A national regulatory authority may, in accordance with the provisions of Article 66, impose obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of interconnection and/or access, in situations where a market analysis indicates that a lack of effective competition means that the operator concerned may sustain prices at an excessively high level, or may apply a price squeeze, to the detriment of end-users.

In determining whether or not price control obligations would be appropriate, national regulatory authorities shall take into account long-term end-user interests related to the deployment and take-up of next-generation networks, and in particular of very high capacity networks. In particular, to encourage investments by the operator, including in next-generation networks, national regulatory authorities shall take into account the investment made by the operator. Where the national regulatory authorities deem price controls appropriate, they shall allow the operator a reasonable rate of return on adequate capital employed, taking into account any risks specific to a particular new investment network project.

~~National regulatory authorities shall not impose or maintain obligations pursuant to this Article, w~~**W**here ~~they~~ **national regulatory authorities** establish that a demonstrable retail price constraint is present and that ~~any obligations imposed~~ **effective and non-discriminatory access is ensured** in accordance with Articles 67 to 71**, they shall consider whether imposing or maintaining obligations pursuant to this Article may not be appropriate.**~~, including in particular any economic replicability test imposed in accordance with Article 68 ensures effective and non discriminatory access.~~

When national regulatory authorities consider it appropriate to impose price controls on access to existing network elements, they shall also take account of the benefits of predictable and stable wholesale prices in ensuring efficient entry and sufficient incentives for ~~all~~ operators to deploy new and enhanced networks.

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

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

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

Article 73

Termination rates

1. Where a national regulatory authority imposes obligations relating to cost recovery and price controls **pursuant to Article 72** on operators **active** ~~designated as having significant market power~~ on a market for wholesale voice call termination, it shall set maximum symmetric termination rates based on the costs incurred by an efficient operator. The evaluation of efficient costs shall be based on current cost values. The cost methodology to calculate efficient costs shall be based on a bottom-up modelling approach using long-run incremental traffic-related costs of providing the wholesale voice call termination service to third parties.

~~The details of the cost methodology shall be set by a Commission decision, adopted pursuant to Article 38.~~

2. By [date **of transposition**] the Commission shall, ~~after having consulted~~ **taking utmost account of the opinion of** BEREC, adopt **a Decision setting:** ~~delegated acts in accordance with Article 109 concerning~~

a) a single maximum termination rate to be imposed by national regulatory authorities **pursuant to paragraph 1;**

b) the details of the cost methodology referred to in Paragraph 1.

~~on undertakings designated as having significant market power in fixed and mobile voice termination markets respectively in the Union.~~

~~When adopting these delegated acts,~~

To that end the Commission shall**:**

a) follow the principles laid down in the first subparagraph of paragraph 1 and shall comply with the criteria and parameters provided in Annex III~~.~~**;**

~~4. In applying paragraph 2, the Commission shall ensure that the single voice call termination rate in mobile networks shall not exceed 1.23 €cent per minute and the single voice call termination rate in fixed networks shall not exceed 0.14 €cent per minute. The Commission shall~~

b) when setting the single maximum termination rate for the first time, take into account the weighted average of maximum termination rates in fixed and mobile networks established in accordance with the principles provided in the first subparagraph of paragraph 1 applied across the Union**;** ~~when setting the single maximum termination rate for the first time.~~

~~5. When adopting delegated acts pursuant to paragraph 2, the Commission shall~~

c) take into account the total number of end-users in each Member State, in order to ensure a proper weighting of the maximum termination rates, as well as national circumstances which result in significant differences between Member States when determining the maximum termination rates in the Union**; and**

~~6. The Commission may request BEREC to develop an economic model in order to assist the Commission in determining the maximum termination rates in the Union. The Commission shall~~

d) take into account market information provided by BEREC, national regulatory authorities or, directly, by undertakings providing electronic communications networks and services.

7. **The decision referred to in paragraphs 2 shall be adopted in accordance with the examination procedure referred to in Article 110(4).** The Commission shall review **it** ~~the delegated acts adopted pursuant this Article~~ every five years.

Article 74

Regulatory treatment of new network elements

1. A national regulatory authority ~~shall~~ **may determine** not **to** impose obligations as regards new network elements that are part of the relevant market on which it intends to impose or maintain obligations in accordance with Articles 66 ~~and Articles 67~~ to 72 and that the operator designated as **having** significant market power on that relevant market has deployed or is planning to deploy, if the following cumulative conditions are met:

(a) the deployment of the new network elements is open to co-investment offers according to a transparent process and on terms which favour sustainable competition in the long term including inter alia fair, reasonable and non-discriminatory terms offered to potential co-investors; flexibility in terms of the value and timing of the commitment provided by each co-investor; possibility to increase such commitment in the future; reciprocal rights awarded by the co-investors after the deployment of the co-invested infrastructure;

(aa) at least one co-investment agreement based on an offer made pursuant to (a) has been concluded;

(b) the deployment of the new network elements contributes significantly to the deployment of very high capacity networks; **and**

(c) access seekers not participating in the co-investment can benefit from the same quality, speed, conditions and end-user reach as was available before the deployment, either through commercial agreements based on fair and reasonable terms or by means of regulated access maintained or adapted by the national regulatory authority~~;~~**.**

When assessing co-investment offers and ~~processes~~ **agreements** referred to in point (a) of the first subparagraph, national regulatory authorities shall ensure that those offers and ~~processes~~ **agreements** comply with the criteria set out in Annex IV.

Article 75

Functional separation

1. Where the national regulatory authority concludes that the appropriate obligations imposed under Articles 67 to 72 have failed to achieve effective competition and that there are important and persisting competition problems and/or market failures identified in relation to the wholesale provision of certain access product markets, it may, as an exceptional measure, in accordance with the provisions of the second subparagraph of Article 66(3), impose an obligation on vertically integrated undertakings to place activities related to the wholesale provision of relevant access products in an independently operating business entity.

That business entity shall supply access products and services to all undertakings, including to other business entities within the parent company, on the same timescales, terms and conditions, including those relating to price and service levels, and by means of the same systems and processes.

2. When a national regulatory authority intends to impose an obligation for functional separation, it shall submit a proposal to the Commission that includes:

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

(b) a reasoned assessment that there is no or little prospect of effective and sustainable infrastructure-based competition within a reasonable time frame;

(c) an analysis of the expected impact on the regulatory authority, on the undertaking, in particular on the workforce of the separated undertaking and on the electronic communications sector as a whole, and on incentives to invest in a sector as a whole, particularly with regard to the need to ensure social and territorial cohesion, and on other stakeholders including, in particular, the expected impact on competition and any potential consequential effects on consumers;

(d) an analysis of the reasons justifying that this obligation would be the most efficient means to enforce remedies aimed at addressing the competition problems/markets failures identified.

3. The draft measure shall include the following elements:

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

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

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

(d) rules for ensuring compliance with the obligations;

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

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

4. Following the Commission's decision on the draft measure taken in accordance with Article 66(3), the national regulatory authority shall conduct a coordinated analysis of the different markets related to the access network in accordance with the procedure set out in Article 65 . On the basis of its assessment, the national regulatory authority shall impose, maintain, amend or withdraw obligations, in accordance with Articles 23 and 32 of this Directive.

5. An undertaking on which functional separation has been imposed may be subject to any of the obligations identified in Articles 67 to 72 in any specific market where it has been designated as having significant market power in accordance with Article 65 , or any other obligations authorised by the Commission pursuant to Article 66(3).

Article 76

Voluntary separation by a vertically integrated undertaking

1. Undertakings which have been designated as having significant market power in one or several relevant markets in accordance with Article 65of this Directive shall inform the national regulatory authority **at least three months** in advance ~~and in a timely manner~~, in order to allow the national regulatory authority to assess the effect of the intended transaction, when they intend to transfer their local access network assets or a substantial part thereof to a separate legal entity under different ownership, or to establish a separate business entity in order to provide to all retail providers, including its own retail divisions, fully equivalent access products.

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

   Undertakings may also offer commitments regarding access conditions that will apply to their network during an implementation period and after the proposed form of separation is implemented, with a view to ensuring effective and non-discriminatory access by third parties. The offer of commitments shall include sufficient details, including in terms of timing of implementation and duration, so as to allow the national regulatory authority to conduct its tasks in accordance with paragraph 2 of this Article. Such commitments may extend beyond the maximum period for market reviews established in Article 65(6).

2. The national regulatory authority shall assess the effect of the intended transaction together with the proposed commitments where applicable on existing regulatory obligations under this Directive .

For that purpose, the national regulatory authority shall conduct an analysis of the different markets related to the access network in accordance with the procedure set out in Article 65 .

The national regulatory authority shall take into account any commitments offered by the undertaking, having regard in particular to the objectives in Article 3. In so doing, the national regulatory authority shall consult third parties in accordance with Article 23, and shall address in particular, without limitation, those third parties which are directly affected by the intended transaction.

On the basis of its assessment, the national regulatory authority shall impose, maintain, amend or withdraw obligations, in accordance with Articles 23 and 32 , applying, if appropriate, the provisions of Article 77. In its decision, the national regulatory authority may make the commitments binding, wholly or in part. By way of exception to Article 65(6), the national regulatory authority may make some or all commitments binding for the entire period for which they are offered.

3. Without prejudice to the provisions of Article 77, the legally and/or operationally separate business entity may be subject as appropriate to any of the obligations identified in Articles 67 to 72 in any specific market where it has been designated as having significant market power in accordance with Article 65 , or any other obligations authorised by the Commission pursuant to Article 66(3) and where any commitments offered are insufficient to meet the objectives of Article 3.

4. The national regulatory authority shall monitor the implementation of the commitments offered by the undertakings that it has made binding in accordance with paragraph 2 of this Article and shall consider their extension when the period of time for which they are initially offered has expired.

Article 77

Vertically separate undertakings

1. A national regulatory authority that designates an undertaking which is absent from any retail markets for electronic communications services as having significant market power in one or several wholesale markets in accordance with Article 65 shall consider whether that undertaking has the following characteristics:

   (a) all companies and business units within the undertaking, including all companies that are controlled but not necessarily wholly owned by the same ultimate owner(s), only have activities, current and planned for the future, in wholesale markets for electronic communications services and therefore do not have activities in any retail market for electronic communications services provided to end-users in the Union;

   (b) the undertaking **is not bound to deal with a single and separate undertaking operating downstream that is active in any retail market for electronic communications services provided to private or commercial end-users, because of** ~~does not hold~~ an exclusive agreement~~, or an agreement which de facto amounts to an exclusive agreement, with a single and separate undertaking operating downstream that is active in any retail market for electronic communications services provided to private or commercial end-users~~.

2. If the national regulatory authority **considers** ~~concludes~~ that the conditions laid down in points (a) and (b) of paragraph 1 of this Article are fulfilled, it may ~~only~~ impose on that undertaking obligations pursuant to Articles ~~70 or~~ 71 **or obligations relative to fair and reasonable pricing if justified on the basis of a market analysis including a prospective assessment of the SMP operator's likely behaviour**.

3. The national regulatory authority shall review obligations imposed on the undertaking in accordance with this Article at any time if it concludes that the conditions laid down in points (a) and (b) of paragraph 1 of this Article are no longer met and shall apply Articles 65 to 72, as appropriate.

4. The national regulatory authority shall also review obligations imposed on the undertaking in accordance with this Article if on the basis of evidence of terms and conditions offered by the undertaking to its downstream customers, the authority concludes that competition problems have arisen **or are likely to arise** to the detriment of end-users which require the imposition of one or more obligations provided in Articles 67, 68, 69**, 70** or 72, or the modification of the obligations imposed in accordance with paragraph 2.

5. The imposition of obligations and their review in accordance with this Article shall be implemented in accordance with the procedures referred to in Articles 23, 32 and 33.

Article 78

Migration from legacy infrastructure

1. Undertakings which have been designated as having significant market power in one or several relevant markets in accordance with Article 65 shall inform the national regulatory authority in advance and in a timely manner when they plan to ~~decommission~~ **replace with a new infrastructure** parts of the network, including legacy infrastructure necessary to operate a copper network, which are subject to obligations pursuant to Articles 66 to 77.

2. The national regulatory authority shall ensure that the ~~decommissioning~~ **replacement** process includes a transparent timetable and conditions, including inter alia an appropriate period of notice and for transition, and establishes the availability of alternative comparable products providing access to network elements substituting the ~~decommissioned~~ **replaced** infrastructure if necessary to safeguard competition and the rights of end-users.

   With regard to assets which are proposed for ~~decommissioning~~ **replacement**, the national regulatory authority may withdraw the obligations after having ascertained:

   (a) the access provider has demonstrably established the appropriate conditions for migration, including making available a comparable alternative access product enabling to reach the same end-users, as was available using the legacy infrastructure; and

   (b) the access provider has complied with the conditions and process provided to the national regulatory authority in accordance with the present Article.

Such withdrawal shall be implemented in accordance with the procedures referred to in Articles 23, 32 and 33.

ANNEX IV

CRITERIA FOR ASSESSING CO-INVESTMENT OFFERS

When assessing a co-investment offer pursuant to Article 74 (1) (d), the national regulatory authority shall verify whether the following criteria have been met:

(a) The co-investment offer shall be open to any undertaking over the lifetime of the network built under a co-investment offer on a non-discriminatory basis. The SMP operator may include in the offer reasonable conditions regarding the financial capacity of any undertaking, so that for instance potential co-investors need to demonstrate their ability to deliver phased payments on the basis of which the deployment is planned, the acceptance of a strategic plan on the basis of which medium-term deployment plans are prepared, etc.

(b) The co-investment offer shall be transparent:

- the offer is available and easily identified on the website of the SMP operator;
- full detailed terms must be made available without undue delay to any potential bidder that has expressed an interest, including the legal form of the co-investment agreement and - when relevant - the heads of term of the governance rules of the co-investment vehicle; and
- The process, like the road map for the establishment and development of the co-investment project must be set in advance, it must clearly explained in writing to any potential co-investor, and all significant milestones be clearly communicated to all undertakings without any discrimination.

(c) The co-investment offer shall include terms to potential co-investors which favour sustainable competition in the long term, in particular:

- All undertakings have to be offered fair, reasonable and non-discriminatory terms and conditions for participation in the co-investment agreement relative to the time they join, including in terms of financial consideration required for the acquisition of specific rights, in terms of the protection awarded to the co-investors by those rights both during the building phase and during the exploitation phase, for example by granting indefeasible rights of use (IRUs) for the expected lifetime of the co-invested network and in terms of the conditions for joining and potentially terminating the co-investment agreement. Non-discriminatory terms in this context do not entail that all potential co-investors must be offered exactly the same terms, including financial terms, but that all variations of the terms offered must be justified on the basis of the same objective, transparent, non-discriminatory and predictable criteria such as the number of end user lines committed for.

– The offer must allow flexibility in terms of the value and timing of the commitment provided by each co-investor, for example by means of an agreed and potentially increasing percentage of the total end user lines in a given area, to which co-investors have the possibility to commit gradually and which shall be set at a unit level enabling smaller co-investors to gradually increase their participation while ensuring adequate levels of initial commitment. The determination of the financial consideration to be provided by each co-investor needs to reflect the fact that early investors accept greater risks and engage capital sooner.

– A premium increasing over time has to be considered as justified for commitments made at later stages and for new co-investors entering the co-investment after the commencement of the project, to reflect diminishing risks and to counteract any incentive to withhold capital in the earlier stages.

– The co-investment agreement has to allow the assignment of acquired rights by co-investors to other co-investors, or to third parties willing to enter into the co-investment agreement subject to the transferee undertaking being obliged to fulfil all original obligations of the transferor under the co-investment agreement.

– Co-investors have to grant each other reciprocal rights on fair and reasonable terms and conditions to access the co-invested infrastructure for the purposes of providing services downstream, including to end-users, according to transparent conditions which have to be made transparent in the co-investment offer and subsequent agreement, in particular where co-investors are individually and separately responsible for the deployment of specific parts of the network. If a co-investment vehicle is created, it has to provide access to the network to all co-investors, whether directly or indirectly, on an equivalence of inputs basis and according to fair and reasonable terms and conditions, including financial conditions that reflect the different levels of risk accepted by the individual co-investors.

(d) The co-investment offer shall ensure a sustainable investment likely to meet future needs, by deploying new network elements that contribute significantly to the deployment of very high capacity networks.

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