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► **B** **DIRECTIVE 2002/19/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**
 of 7 March 2002
 on access to, and interconnection of, electronic communications networks and associated facilities
 (Access Directive)
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**DIRECTIVE 2002/19/EC OF THE EUROPEAN PARLIAMENT
AND OF THE COUNCIL**

of 7 March 2002

**on access to, and interconnection of, electronic communications
networks and associated facilities (Access Directive)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE
EUROPEAN UNION,

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

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the Economic and Social Committee ⁽²⁾,

Acting in accordance with the procedure laid down in Article 251 of the
Treaty ⁽³⁾,

Whereas:

- (1) Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) ⁽⁴⁾ lays down the objectives of a regulatory framework to cover electronic communications networks and services in the Community, including fixed and mobile telecommunications networks, cable television networks, networks used for terrestrial broadcasting, satellite networks and Internet networks, whether used for voice, fax, data or images. Such networks may have been authorised by Member States under Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) ⁽⁵⁾ or have been authorised under previous regulatory measures. The provisions of this Directive apply to those networks that are used for the provision of publicly available electronic communications services. This Directive covers access and interconnection arrangements between service suppliers. Non-public networks do not have obligations under this Directive except where, in benefiting from access to public networks, they may be subject to conditions laid down by Member States.
- (2) Services providing content such as the offer for sale of a package of sound or television broadcasting content are not covered by the common regulatory framework for electronic communications networks and services.
- (3) The term ‘access’ has a wide range of meanings, and it is therefore necessary to define precisely how that term is used in

⁽¹⁾ OJ C 365 E, 19.12.2000, p. 215 and OJ C 270 E, 25.9.2001, p. 161.

⁽²⁾ OJ C 123, 25.4.2001, p. 50.

⁽³⁾ Opinion of the European Parliament of 1 March 2001 (OJ C 277, 1.10.2001, p. 72), Council Common Position of 17 September 2001 (OJ C 337, 30.11.2001, p. 1) and Decision of the European Parliament of 12 December 2001 (not yet published in the Official Journal). Council Decision of 14 February 2002.

⁽⁴⁾ See page 33 of this Official Journal.

⁽⁵⁾ See page 21 of this Official Journal.

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this Directive, without prejudice to how it may be used in other Community measures. An operator may own the underlying network or facilities or may rent some or all of them.

- (4) Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals⁽¹⁾ did not mandate any specific digital television transmission system or service requirement, and this opened up an opportunity for the market actors to take the initiative and develop suitable systems. Through the Digital Video Broadcasting Group, European market actors have developed a family of television transmission systems that have been adopted by broadcasters throughout the world. These transmission systems have been standardised by the European Telecommunications Standards Institute (ETSI) and have become International Telecommunication Union recommendations. In relation to wide-screen digital television, the 16:9 aspect ratio is the reference format for wide-format television services and programmes, and is now established in Member States' markets as a result of Council Decision 93/424/EEC of 22 July 1993 on an action plan for the introduction of advanced television services in Europe⁽²⁾.
- (5) 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 consumers, undertakings which receive requests for access or interconnection should in principle conclude such agreements on a commercial basis, and negotiate in good faith.
- (6) 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 may ensure end-to-end connectivity by imposing proportionate obligations on undertakings 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.
- (7) 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

⁽¹⁾ OJ L 281, 23.11.1995, p. 51.

⁽²⁾ OJ L 196, 5.8.1993, p. 48.

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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.

- (8) 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. The existing rights and obligations to negotiate interconnection should therefore be maintained. It is also appropriate to maintain the obligations formerly laid down in Directive 95/47/EC requiring fully digital electronic communications networks used for the distribution of television services and open to the public to be capable of distributing wide-screen television services and programmes, so that users are able to receive such programmes in the format in which they were transmitted.
- (9) 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.
- (10) Competition rules alone may not be sufficient to ensure cultural diversity and media pluralism in the area of digital television. Directive 95/47/EC provided an initial regulatory framework for the nascent digital television industry which should be maintained, including in particular the obligation to provide conditional access on fair, reasonable and non-discriminatory terms, in order to make sure that a wide variety of programming and services is available. Technological and market developments make it necessary to review these obligations on a regular basis, either by a Member State for its national market or the Commission for the Community, in particular to determine whether there is justification for extending obligations to new gateways, such as electronic programme guides (EPGs) and application program 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.
- (11) 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.

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- (12) In order to ensure continuity of existing agreements and to avoid a legal vacuum, it is necessary to ensure that obligations for access and interconnection imposed under Articles 4, 6, 7, 8, 11, 12, and 14 of Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of open network provision (ONP)⁽¹⁾, obligations on special access imposed under Article 16 of Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment⁽²⁾, and obligations concerning the provision of leased line transmission capacity under Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines⁽³⁾, are initially carried over into the new regulatory framework, but are subject to immediate review in the light of prevailing market conditions. Such a review should also extend to those organisations covered by Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop⁽⁴⁾.
- (13) The review should be carried out using an economic market analysis based on competition law methodology. The aim is to reduce *ex ante* sector specific rules progressively as competition in the market develops. However the procedure also takes account of transitional problems in the market such as those related to international roaming and of the possibility of new bottlenecks arising as a result of technological development, which may require *ex ante* regulation, for example in the area of broadband access networks. It may well be the case that competition develops at different speeds in different market segments and in different Member States, and national regulatory authorities should be able to relax regulatory obligations in those markets where competition is delivering the desired results. In order to ensure that market players in similar circumstances are treated in similar ways in different Member States, the Commission should be able to ensure harmonised application of the provisions of this Directive. National regulatory authorities and national authorities entrusted with the implementation of competition law should, where appropriate, coordinate their actions to ensure that the most appropriate remedy is applied. The Community and its Member States have entered into commitments on interconnection of telecommunications networks in the context of the World Trade Organisation agreement on basic telecommunications and these commitments need to be respected.
- (14) Directive 97/33/EC laid down a range of obligations to be imposed on undertakings with significant market power, namely transparency, non-discrimination, accounting separation, access, and price control including cost orientation. This range of possible obligations should be maintained but, in addition, they should be established as a set of maximum obligations that can

⁽¹⁾ OJ L 199, 26.7.1997, p. 32. Directive as last amended by Directive 98/61/EC (OJ L 268, 3.10.1998, p. 37).

⁽²⁾ OJ L 101, 1.4.1998, p. 24.

⁽³⁾ OJ L 165, 19.6.1992, p. 27. Directive as last amended by Commission Decision No 98/80/EC (OJ L 14, 20.1.1998, p. 27).

⁽⁴⁾ OJ L 366, 30.12.2000, p. 4.

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be applied to undertakings, in order to avoid over-regulation. Exceptionally, in order to comply with international commitments or Community law, it may be appropriate to impose obligations for access or interconnection on all market players, as is currently the case for conditional access systems for digital television services.

- (15) 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.
- (16) 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, covering for example the type of publication (paper and/or electronic) and whether or not it is free of charge, taking into account the nature and purpose of the information concerned.
- (17) 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.
- (18) 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 98/322/EC of 8 April 1998 on interconnection in a liberalised telecommunications market (Part 2 — accounting separation and cost accounting) ⁽¹⁾.
- (19) 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. 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 20 and 21 of Directive 2002/21/EC (Framework Directive). An operator with mandated access obligations cannot be required to provide types of access which are not within its

⁽¹⁾ OJ L 141, 13.5.1998, p. 6.

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powers 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 competition in the long-term. The Commission has published a Notice on the application of the competition rules to access agreements in the telecommunications sector ⁽¹⁾ which addresses these issues. National regulatory authorities may impose technical and operational conditions on the provider and/or beneficiaries of mandated access in accordance with Community law. In particular the imposition of technical standards should comply with Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules of Information Society Services ⁽²⁾.

- (20) Price control may be necessary when market analysis in a particular market reveals inefficient competition. The regulatory intervention may be relatively light, such as an obligation that prices for carrier selection are reasonable as laid down in Directive 97/33/EC, or much heavier such as an obligation that prices are cost oriented to provide full justification for those prices where competition is not sufficiently strong to prevent excessive pricing. In particular, operators with significant market power should avoid a price squeeze whereby the difference between their retail prices and the interconnection 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 and sustainable competition and maximise consumer benefits.
- (21) 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.
- (22) Publication of information by Member States will ensure that market players and potential market entrants understand their rights and obligations, and know where to find the relevant detailed information. Publication in the national gazette helps interested parties in other Member States to find the relevant information.

⁽¹⁾ OJ C 265, 22.8.1998, p. 2.

⁽²⁾ OJ L 204, 21.7.1998, p. 37. Directive as amended by Directive 98/48/EC (OJ L 217, 5.8.1998, p. 18).

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- (23) In order to ensure that the pan-European electronic communications market is effective and efficient, the Commission should monitor and publish information on charges which contribute to determining prices to end-users.
- (24) The development of the electronic communications market, with its associated infrastructure, could have adverse effects on the environment and the landscape. Member States should therefore monitor this process and, if necessary, take action to minimise any such effects by means of appropriate agreements and other arrangements with the relevant authorities.
- (25) In order to determine the correct application of Community law, the Commission needs to know which undertakings have been designated as having significant market power and what obligations have been placed upon market players by national regulatory authorities. In addition to national publication of this information, it is therefore necessary for Member States to send this information to the Commission. Where Member States are required to send information to the Commission, this may be in electronic form, subject to appropriate authentication procedures being agreed.
- (26) Given the pace of technological and market developments, the implementation of this Directive should be reviewed within three years of its date of application to determine if it is meeting its objectives.
- (27) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission ⁽¹⁾.
- (28) Since the objectives of the proposed action, namely establishing a harmonised framework for the regulation of access to and interconnection of electronic communications networks and associated facilities, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

SCOPE, AIM AND DEFINITIONS

Article 1

Scope and aim

1. Within the framework set out in Directive 2002/21/EC (Framework Directive), this Directive harmonises the way in which Member States regulate access to, and interconnection of, electronic communications networks and associated facilities. The aim is to

⁽¹⁾ OJ L 184, 17.7.1999, p. 23.

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establish a regulatory framework, in accordance with internal market principles, for the relationships between suppliers of networks and services that will result in sustainable competition, interoperability of electronic communications services and consumer benefits.

2. This Directive establishes rights and obligations for operators and for undertakings seeking interconnection and/or access to their networks or associated facilities. It sets out objectives for national regulatory authorities with regard to access and interconnection, and lays down procedures to ensure that obligations imposed by national regulatory authorities are reviewed and, where appropriate, withdrawn once the desired objectives have been achieved. Access in this Directive does not refer to access by end-users.

*Article 2***Definitions**

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

The following definitions shall also apply:

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

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- (b) ‘interconnection’ means the physical and logical linking of public communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking, or to access services provided by another undertaking. Services may be provided by the parties involved or other parties who have access to the network. Interconnection is a specific type of access implemented between public network operators;
- (c) ‘operator’ means an undertaking providing or authorised to provide a public communications network or an associated facility;
- (d) ‘wide-screen television service’ means a television service that consists wholly or partially of programmes produced and edited

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to be displayed in a full height wide-screen format. The 16:9 format is the reference format for wide-screen television services;

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- (e) 'local loop' means the physical circuit connecting the network termination point to a distribution frame or equivalent facility in the fixed public electronic communications network.

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CHAPTER II

GENERAL PROVISIONS

*Article 3***General framework for access and interconnection**

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

2. Without prejudice to Article 31 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) ⁽¹⁾, Member States shall not maintain legal or administrative measures which oblige operators, when granting access or interconnection, to offer different terms and conditions to different undertakings for equivalent services and/or imposing obligations that are not related to the actual access and interconnection services provided without prejudice to the conditions fixed in the Annex of Directive 2002/20/EC (Authorisation Directive).

*Article 4***Rights and obligations for undertakings****▼M1**

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

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

⁽¹⁾ See page 51 of this Official Journal.

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

*Article 5***Powers and responsibilities of the national regulatory authorities with regard to access and interconnection****▼M1**

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

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

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

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- (ab) in justified cases and to the extent that is necessary, obligations on undertakings that control access to end-users to make their services interoperable;

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

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

3. 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 8 of Directive 2002/21/EC (Framework Directive), in accordance with the provisions of this Directive and the procedures referred to in Articles 6 and 7, 20 and 21 of Directive 2002/21/EC (Framework Directive).

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CHAPTER III

OBLIGATIONS ON OPERATORS AND MARKET REVIEW PROCEDURES*Article 6***Conditional access systems and other facilities**

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

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

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

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

- (a) accessibility for end-users to radio and television broadcasts and broadcasting channels and services specified in accordance with Article 31 of Directive 2002/22/EC (Universal Service Directive) would not be adversely affected by such amendment or withdrawal, and
- (b) the prospects for effective competition in the markets for:
 - (i) retail digital television and radio broadcasting services, and
 - (ii) conditional access systems and other associated facilities,

would not be adversely affected by such amendment or withdrawal.

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

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

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▼B*Article 8***Imposition, amendment or withdrawal of obligations**

1. Member States shall ensure that national regulatory authorities are empowered to impose the obligations identified in ►**M1** Articles 9 to 13a ◀.

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

3. Without prejudice to:

- the provisions of ►**M1** Articles 5(1) and 6 ◀,
- the provisions of Articles 12 and 13 of Directive 2002/21/EC (Framework Directive), Condition 7 in Part B of the Annex to Directive 2002/20/EC (Authorisation Directive) as applied by virtue of Article 6(1) of that Directive, Articles 27, 28 and 30 of Directive 2002/22/EC (Universal Service Directive) and the relevant provisions of ►**M1** Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)⁽¹⁾ ◀ containing obligations on undertakings other than those designated as having significant market power, or
- the need to comply with international commitments,

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

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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 9 to 13 in this Directive, it shall submit this request to the Commission. The Commission shall take utmost account of the opinion of the Body of European Regulators for Electronic Communications (BEREC)⁽²⁾. The Commission, acting in accordance with Article 14(2), shall take a decision authorising or preventing the national regulatory authority from taking such measures.

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

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

⁽¹⁾ OJ L 201, 31.7.2002, p. 37.

⁽²⁾ Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office.

▼B*Article 9***Obligation of transparency****▼M1**

1. National regulatory authorities may, in accordance with the provisions of Article 8, impose obligations for transparency in relation to interconnection and/or access, requiring operators to make public specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, including any conditions limiting access to and/or use of services and applications where such conditions are allowed by Member States in conformity with Community law, and prices.

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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.

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4. Notwithstanding paragraph 3, where an operator has obligations under Article 12 concerning wholesale network infrastructure access, national regulatory authorities shall ensure the publication of a reference offer containing at least the elements set out in Annex II.

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

▼B*Article 10***Obligation of non-discrimination**

1. A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations of non-discrimination, in relation to interconnection and/or access.

2. Obligations of non-discrimination shall ensure, in particular, that the operator applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners.

▼B*Article 11***Obligation of accounting separation**

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

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

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

*Article 12***Obligations of access to, and use of, specific network facilities**

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

Operators may be required *inter alia*:

▼M1**▼C1**

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

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- (b) to negotiate in good faith with undertakings requesting access;
- (c) not to withdraw access to facilities already granted;
- (d) to provide specified services on a wholesale basis for resale by third parties;
- (e) to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services;

▼M1

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

▼ B

- (g) to provide specified services needed to ensure interoperability of end-to-end services to users, including facilities for intelligent network services or roaming on mobile networks;
- (h) to provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services;
- (i) to interconnect networks or network facilities;

▼ M1

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

▼ B

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

▼ M1

2. When national regulatory authorities are considering the obligations referred in paragraph 1, and in particular when assessing how such obligations would be imposed proportionate to the objectives set out in Article 8 of Directive 2002/21/EC (Framework Directive), they shall take account in particular of the following factors:

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

▼ B

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

▼ M1

- (c) the initial investment by the facility owner, taking account of any public investment made and the risks involved in making the investment;
- (d) the need to safeguard competition in the long term, with particular attention to economically efficient infrastructure-based competition;

▼ B

- (e) where appropriate, any relevant intellectual property rights;
- (f) the provision of pan-European services.

▼ M1

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

▼ B*Article 13***Price control and cost accounting obligations****▼ M1**

1. A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations relating to cost recovery

▼ M1

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. To encourage investments by the operator, including in next generation networks, national regulatory authorities shall take into account the investment made by the operator, and allow him a reasonable rate of return on adequate capital employed, taking into account any risks specific to a particular new investment network project.

▼ B

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

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

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

▼ M1*Article 13a***Functional separation**

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

▼ M1

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, ► **C1** 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 8(3), the national regulatory authority shall conduct a coordinated analysis of the different markets related to the access network in accordance with the procedure set out in Article 16 of Directive 2002/21/EC (Framework Directive). On the basis of its assessment, the national regulatory authority shall impose, maintain, amend or withdraw obligations, in accordance with Articles 6 and 7 of Directive 2002/21/EC (Framework Directive).

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

▼ **M1***Article 13b***Voluntary separation by a vertically integrated undertaking**

1. Undertakings which have been designated as having significant market power in one or several relevant markets in accordance with Article 16 of Directive 2002/21/EC (Framework Directive) shall inform the national regulatory authority in advance and in a timely manner, in order to allow the national regulatory authority to assess the effect of the intended transaction, when they intend to transfer their local access network assets or a substantial part 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.

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

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

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

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

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CHAPTER IV

PROCEDURAL PROVISIONS*Article 14***Committee**

1. The Commission shall be assisted by the Communications Committee set up by Article 22 of Directive 2002/21/EC (Framework Directive).

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

▼ **M1**

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

*Article 15***Publication of, and access to, information**

1. Member States shall ensure that the specific obligations imposed on undertakings under this Directive are published and that the specific product/service and geographical markets are identified. They shall ensure that up-to-date information, provided that the information is not confidential and, in particular, does not comprise business secrets, is made publicly available in a manner that guarantees all interested parties easy access to that information.

2. Member States shall send to the Commission a copy of all such information published. The Commission shall make this information available in a readily accessible form, and shall distribute the information to the Communications Committee as appropriate.

*Article 16***Notification**

1. Member States shall notify to the Commission by at the latest the date of application referred to in Article 18(1) second subparagraph the national regulatory authorities responsible for the tasks set out in this Directive.

2. National regulatory authorities shall notify to the Commission the names of operators deemed to have significant market power for the purposes of this Directive, and the obligations imposed upon them under this Directive. Any changes affecting the obligations imposed upon undertakings or of the undertakings affected under the provisions of this Directive shall be notified to the Commission without delay.

*Article 17***Review procedures**

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

*Article 18***Transposition**

1. Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive by not later than 24 July 2003. They shall forthwith inform the Commission thereof.

They shall apply those measures from 25 July 2003.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field governed by this Directive and of any subsequent amendments to those provisions.

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Article 19

Entry into force

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Article 20

Addressees

This Directive is addressed to the Member States.

*ANNEX I***CONDITIONS FOR ACCESS TO DIGITAL TELEVISION AND RADIO SERVICES BROADCAST TO VIEWERS AND LISTENERS IN THE COMMUNITY****Part I: Conditions for conditional access systems to be applied in accordance with Article 6(1)**

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

- (a) conditional access systems operated on the market in the Community are to have the necessary technical capability for cost-effective transcontrol allowing the possibility for full control by network operators at local or regional level of the services using such conditional access systems;
- (b) all operators of conditional access services, irrespective of the means of transmission, who provide access services to digital television and radio services and whose access services broadcasters depend on to reach any group of potential viewers or listeners are to:
 - offer to all broadcasters, on a fair, reasonable and non-discriminatory basis compatible with Community competition law, technical services enabling the broadcasters' digitally-transmitted services to be received by viewers or listeners authorised by means of decoders administered by the service operators, and comply with Community competition law,
 - keep separate financial accounts regarding their activity as conditional access providers.
- (c) when granting licences to manufacturers of consumer equipment, holders of industrial property rights to conditional access products and systems are to ensure that this is done on fair, reasonable and non-discriminatory terms. Taking into account technical and commercial factors, holders of rights are not to subject the granting of licences to conditions prohibiting, deterring or discouraging the inclusion in the same product of:
 - a common interface allowing connection with several other access systems, or
 - means specific to another access system, provided that the licensee complies with the relevant and reasonable conditions ensuring, as far as he is concerned, the security of transactions of conditional access system operators.

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

- (a) Access to application program interfaces (APIs);
- (b) Access to electronic programme guides (EPGs).

▼B*ANNEX II***▼M1****MINIMUM LIST OF ITEMS TO BE INCLUDED IN A REFERENCE OFFER FOR WHOLESALE NETWORK INFRASTRUCTURE ACCESS, INCLUDING SHARED OR FULLY UNBUNDLED ACCESS TO THE LOCAL LOOP AT A FIXED LOCATION TO BE PUBLISHED BY NOTIFIED OPERATORS WITH SIGNIFICANT MARKET POWER (SMP)****▼B**

For the purposes of this Annex the following definitions apply:

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(a) ‘local sub-loop’ means a partial local loop connecting the network termination point to a concentration point or a specified intermediate access point in the fixed public electronic communications network;

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(b) ‘unbundled access to the local loop’ means full unbundled access to the local loop and shared access to the local loop; it does not entail a change in ownership of the local loop;

▼M1

(c) ‘full unbundled access to the local loop’ means the provision to a beneficiary of access to the local loop or local sub-loop of the SMP operator allowing the use of the full capacity of the network infrastructure;

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

▼B**A. Conditions for unbundled access to the local loop****▼M1**

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

- (a) unbundled access to local loops (full and shared);
- (b) unbundled access to local sub-loops (full and shared), including, when relevant, access to network elements which are not active for the purpose of roll-out of backhaul networks;
- (c) where relevant, duct access enabling the roll out of access networks.

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

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

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4. Ordering and provisioning procedures, usage restrictions.

▼B**B. Co-location services****▼M1**

1. Information on the SMP operator's existing relevant sites or equipment locations and planned update thereof ⁽¹⁾.

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2. Co-location options at the sites indicated under point 1 (including physical co-location and, as appropriate, distant co-location and virtual co-location).
3. Equipment characteristics: restrictions, if any, on equipment that can be co-located.
4. Security issues: measures put in place by notified operators to ensure the security of their locations.
5. Access conditions for staff of competitive operators.
6. Safety standards.
7. Rules for the allocation of space where co-location space is limited.
8. Conditions for beneficiaries to inspect the locations at which physical co-location is available, or sites where co-location has been refused on grounds of lack of capacity.

C. Information systems

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

D. Supply conditions

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

⁽¹⁾ Availability of this information may be restricted to interested parties only, in order to avoid public security concerns.