Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) (Text with EEA relevance)

PART II

NETWORKS

TITLE I

MARKET ENTRY AND DEPLOYMENT

CHAPTER I

Fees

Article 42

Fees for rights of use for radio spectrum and rights to install facilities

1 Member States may allow the competent authority to impose fees for the rights of use for radio spectrum or rights to install facilities on, over or under public or private property that are used for the provision of electronic communications networks or services and associated facilities which ensure the optimal use of those resources. Member States shall ensure that such fees are objectively justified, transparent, non-discriminatory and proportionate in relation to their intended purpose and shall take into account the general objectives of this Directive.

2 With respect to rights of use for radio spectrum, Member States shall seek to ensure that applicable fees are set at a level which ensures efficient assignment and use of radio spectrum, including by:

a setting reserve prices as minimum fees for rights of use for radio spectrum by having regard to the value of those rights in their possible alternative uses;

b taking into account costs entailed by conditions attached to those rights; and

c applying, to the extent possible, payment arrangements linked to the actual availability for use of the radio spectrum.

CHAPTER II

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 electronic communications networks, or

— to install facilities on, over or under public property to an undertaking authorised to provide electronic communications networks other than to the public,

that competent authority:

(a) 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 the case of expropriation; and

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

The procedures referred to in points (a) and (b) may differ depending on whether the applicant is providing public electronic communications networks or not.

2 Member States shall ensure that, where public or local authorities retain ownership or control of undertakings providing public electronic communications networks 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 exercised the right under national law 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 impose co-location and sharing of the network elements and associated facilities installed on that basis, in order to protect the environment, public health, public security or to meet town- and country-planning objectives.

Co-location or sharing of network elements and facilities installed and sharing of property may be imposed only 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 considered to be necessary with a view to pursuing the objectives provided in the first subparagraph. Competent authorities may 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, a Member State may designate a national regulatory or other competent authority for one or more of the following tasks:

a coordinating the process provided for in this Article;

b acting as a single information point;

c setting down 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 III

Access to radio spectrum

Section 1

Authorisations

Article 45

Management of radio spectrum

1 Taking due account of the fact that radio spectrum is a public good that has an important social, cultural and economic value, Member States shall ensure the effective management of radio spectrum for electronic communications networks and services in their territory in accordance with Articles 3 and 4. They shall ensure that the allocation of, the issuing of general authorisations in respect of, and the granting of individual rights of use for radio spectrum for electronic communications networks and services by competent authorities are based on objective, transparent, pro-competitive, non-discriminatory and proportionate criteria.

In applying this Article, Member States shall respect relevant international agreements, including the ITU Radio Regulations and other agreements adopted in the framework of the ITU applicable to radio spectrum, such as the agreement reached at the Regional Radiocommunications Conference of 2006, and may take public policy considerations into account.

2 Member States shall promote the harmonisation of use of radio spectrum by electronic communications networks and services across the Union, consistent with the need to ensure effective and efficient use thereof and in pursuit of benefits for the consumer such as competition, economies of scale and interoperability of networks and services. In so doing, they shall act in accordance with Article 4 of this Directive and with Decision No 676/2002/EC, inter alia, by:

a pursuing wireless broadband coverage of their national territory and population at high quality and speed, as well as coverage of major national and European transport paths, including trans-European transport network as referred to in Regulation (EU) No 1315/2013 of the European Parliament and of the Council[(1)];

b facilitating the rapid development in the Union of new wireless communications technologies and applications, including, where appropriate, in a cross-sectoral approach;

c ensuring predictability and consistency in the granting, renewal, amendment, restriction and withdrawal of rights of use for radio spectrum in order to promote long-term investments;

d ensuring the prevention of cross-border or national harmful interference in accordance with Articles 28 and 46 respectively, and taking appropriate pre-emptive and remedial measures to that end;

e promoting the shared use of radio spectrum between similar or different uses of radio spectrum in accordance with competition law;

f applying the most appropriate and least onerous authorisation system possible in accordance with Article 46 in such a way as to maximise flexibility, sharing and efficiency in the use of radio spectrum;

g applying rules for the granting, transfer, renewal, modification and withdrawal of rights of use for radio spectrum that are clearly and transparently laid down in order to guarantee regulatory certainty, consistency and predictability;

h pursuing consistency and predictability throughout the Union regarding the way the use of radio spectrum is authorised in protecting public health taking into account Recommendation 1999/519/EC.

For the purpose of the first subparagraph, and in the context of the development of technical implementing measures for a radio spectrum band under Decision No 676/2002/EC, the Commission may request the RSPG to issue an opinion recommending the most appropriate authorisation regimes for the use of radio spectrum in that band or parts thereof. Where appropriate and taking utmost account of such opinion, the Commission may adopt a recommendation with a view to promoting a consistent approach in the Union with regard to the authorisation regimes for the use of that band.

Where the Commission is considering the adoption of measures in accordance with Article 39(1), (4), (5) and (6), it may request the opinion of the RSPG with regard to the implications of any such standard or specification for the coordination, harmonisation and availability of radio spectrum. The Commission shall take utmost account of the RSPG's opinion in taking any subsequent steps.

3 In the case of a national or regional lack of market demand for the use of a band in the harmonised radio spectrum, Member States may allow an alternative use of all or part of that band, including the existing use, in accordance with paragraphs 4 and 5 of this Article, provided that:

a the finding of a lack of market demand for the use of such a band is based on a public consultation in accordance with Article 23, including a forward-looking assessment of market demand;

b such alternative use does not prevent or hinder the availability or the use of such a band in other Member States; and

c the Member State concerned takes due account of the long-term availability or use of such a band in the Union and the economies of scale for equipment resulting from using the harmonised radio spectrum in the Union.

Any decision to allow alternative use on an exceptional basis shall be subject to a regular review and shall in any event be reviewed promptly upon a duly justified request by a prospective user to the competent authority for use of the band in accordance with the technical implementing measure. The Member State shall inform the Commission and the other Member States of the decision taken, together with the reasons therefor, as well as of the outcome of any review.

4 Without prejudice to the second subparagraph, Member States shall ensure that all types of technology used for the provision of electronic communications networks or services may be used in the radio spectrum declared available for electronic communications services in their National Frequency Allocation Plan in accordance with Union law.

Member States may, however, provide for proportionate and non-discriminatory restrictions to the types of radio network or wireless access technology used for electronic communications services where this is necessary to:

a avoid harmful interference;

b protect public health against electromagnetic fields, taking utmost account of Recommendation 1999/519/EC;

c ensure technical quality of service;

d ensure maximisation of radio spectrum sharing;

e safeguard efficient use of radio spectrum; or

f ensure the fulfilment of a general interest objective in accordance with paragraph 5.

5 Without prejudice to the second subparagraph, Member States shall ensure that all types of electronic communications services may be provided in the radio spectrum declared available for electronic communications services in their National Frequency Allocation Plan in accordance with Union law. Member States may, however, provide for proportionate and non-discriminatory restrictions to the types of electronic communications services to be provided, including, where necessary, to fulfil a requirement under the ITU Radio Regulations.

Measures that require an electronic communications service to be provided in a specific band available for electronic communications services shall be justified in order to ensure the fulfilment of a general interest objective as laid down by the Member States in accordance with Union law, including, but not limited to:

a safety of life;

b the promotion of social, regional or territorial cohesion;

c the avoidance of inefficient use of radio spectrum; or

d the promotion of cultural and linguistic diversity and media pluralism, for example the provision of radio and television broadcasting services.

A measure which prohibits the provision of any other electronic communications service in a specific band may be provided for only where justified by the need to protect the safety of life services. Member States may, on an exceptional basis, also extend such a measure in order to fulfil other general interest objectives as laid down by the Member States in accordance with Union law.

6 Member States shall regularly review the necessity of the restrictions referred to in paragraphs 4 and 5, and shall make the results of those reviews public.

7 Restrictions established prior to 25 May 2011 shall comply with paragraphs 4 and 5 by 20 December 2018.

Article 46

Authorisation of the use of radio spectrum

1 Member States shall facilitate the use of radio spectrum, including shared use, under general authorisations and limit the granting of individual rights of use for radio spectrum to situations where such rights are necessary to maximise efficient use in light of demand and taking into account the criteria set out in the second subparagraph. In all other cases, they shall set out the conditions for the use of radio spectrum in a general authorisation.

To that end, Member States shall decide on the most appropriate regime for authorising the use of radio spectrum, taking account of:

a the specific characteristics of the radio spectrum concerned;

b the need to protect against harmful interference;

c the development of reliable conditions for radio spectrum sharing, where appropriate;

d the need to ensure technical quality of communications or service;

e objectives of general interest as laid down by Member States in accordance with Union law;

f the need to safeguard efficient use of radio spectrum.

When considering whether to issue general authorisations or to grant individual rights of use for the harmonised radio spectrum, taking into account technical

implementing measures adopted in accordance with Article 4 of Decision No 676/2002/EC, Member States shall seek to minimise problems of harmful interference, including in cases of shared use of radio spectrum on the basis of a combination of general authorisation and individual rights of use.

Where appropriate, Member States shall consider the possibility to authorise the use of radio spectrum based on a combination of general authorisation and individual rights of use, taking into account the likely effects of different combinations of general authorisations and individual rights of use and of gradual transfers from one category to the other on competition, innovation and market entry.

Member States shall seek to minimise restrictions on the use of radio spectrum by taking appropriate account of technological solutions for managing harmful interference in order to impose the least onerous authorisation regime possible.

2 When taking a decision pursuant to paragraph 1 with a view to facilitating the shared use of radio spectrum, the competent authorities shall ensure that the conditions for the shared use of radio spectrum are clearly set out. Such conditions shall facilitate efficient use of radio spectrum, competition and innovation.

Article 47

Conditions attached to individual rights of use for radio spectrum

1 Competent authorities shall attach conditions to individual rights of use for radio spectrum in accordance with Article 13(1) in such a way as to ensure optimal and the most effective and efficient use of radio spectrum. They shall, before the assignment or renewal of such rights, clearly establish any such conditions, including the level of use required and the possibility to fulfil that requirement through trading or leasing, in order to ensure the implementation of those conditions in accordance with Article 30. Conditions attached to renewals of right of use for radio spectrum shall not provide undue advantages to existing holders of those rights.

Such conditions shall specify the applicable parameters, including any deadline for exercising the rights of use, the non-fulfilment of which would entitle the competent authority to withdraw the right of use or impose other measures.

Competent authorities shall, in a timely and transparent manner, consult and inform interested parties regarding conditions attached to individual rights of use before their imposition. They shall determine in advance and inform interested parties, in a transparent manner, of the criteria for the assessment of the fulfilment of those conditions.

2 When attaching conditions to individual rights of use for radio spectrum, competent authorities may, in particular with a view to ensuring effective and efficient use of radio spectrum or promoting coverage, provide for the following possibilities:

a sharing passive or active infrastructure which relies on radio spectrum or radio spectrum;

b commercial roaming access agreements;

c joint roll-out of infrastructures for the provision of networks or services which rely on the use of radio spectrum.

Competent authorities shall not prevent the sharing of radio spectrum in the conditions attached to the rights of use for radio spectrum. Implementation by undertakings of conditions attached pursuant to this paragraph shall remain subject to competition law.

Section 2

Rights of use

Article 48

Granting of individual rights of use for radio spectrum

1 Where it is necessary to grant individual rights of use for radio spectrum, Member States shall grant such rights, upon request, to any undertaking for the provision of electronic communications networks or services under the general authorisation referred to in Article 12, subject to Article 13, to point (c) of Article 21(1) and to Article 55 and to any other rules ensuring the efficient use of those resources in accordance with this Directive.

2 Without prejudice to specific criteria and procedures adopted by Member States to grant individual rights of use for radio spectrum to providers of radio or television broadcast content services with a view to pursuing general interest objectives in accordance with Union law, the individual rights of use for radio spectrum shall be granted through open, objective, transparent, non-discriminatory and proportionate procedures, and in accordance with Article 45.

3 An exception to the requirement of open procedures may apply where the granting of individual rights of use for radio spectrum to the providers of radio or television broadcast content services is necessary to achieve a general interest objective as laid down by Member States in accordance with Union law.

4 Competent authorities shall consider applications for individual rights of use for radio spectrum in the context of selection procedures pursuant to objective, transparent, proportionate and non-discriminatory eligibility criteria that are set out in advance and reflect the conditions to be attached to such rights. Competent authorities shall be able to request all necessary information from applicants in order to assess, on the basis of those criteria, their ability to comply with those conditions. Where the competent authority concludes that an applicant does not possess the required ability, it shall provide a duly reasoned decision to that effect.

5 When granting individual rights of use for radio spectrum, Member States shall specify whether those rights can be transferred or leased by the holder of the rights, and under which conditions. Articles 45 and 51 shall apply.

6 The competent authority shall take, communicate and make public the decisions on the granting of individual rights of use for radio spectrum as soon as possible after the receipt of the complete application and within six weeks in the case of radio spectrum declared available for electronic communications services in their National Frequency Allocation Plan. That time limit shall be without prejudice to Article 55(7) and to any applicable international agreements relating to the use of radio spectrum or of orbital positions.

Article 49

Duration of rights

1 Where Member States authorise the use of radio spectrum through individual rights of use for a limited period, they shall ensure that the right of use is granted for a period that is appropriate in light of the objectives pursued in accordance with Article 55(2), taking due account of the need to ensure competition, as well as, in particular, effective and efficient use

of radio spectrum, and to promote innovation and efficient investments, including by allowing for an appropriate period for investment amortisation.

2 Where Member States grant individual rights of use for radio spectrum for which harmonised conditions have been set by technical implementing measures in accordance with Decision No 676/2002/EC in order to enable its use for wireless broadband electronic communications services ('wireless broadband services') for a limited period, they shall ensure regulatory predictability for the holders of the rights over a period of at least 20 years regarding conditions for investment in infrastructure which relies on the use of such radio spectrum, taking account of the requirements referred to in paragraph 1 of this Article. This Article is subject, where relevant, to any modification of the conditions attached to those rights of use in accordance with Article 18.

To that end, Member States shall ensure that such rights are valid for a duration of at least 15 years and include, where necessary to comply with the first subparagraph, an adequate extension thereof, under the conditions laid down in this paragraph.

Member States shall make available the general criteria for an extension of the duration of rights of use, in a transparent manner, to all interested parties in advance of granting rights of use, as part of the conditions laid down under Article 55(3) and (6). Such general criteria shall relate to:

a the need to ensure the effective and efficient use of the radio spectrum concerned, the objectives pursued in points (a) and (b) of Article 45(2), or the need to fulfil general interest objectives related to ensuring safety of life, public order, public security or defence; and

b the need to ensure undistorted competition.

At the latest two years before the expiry of the initial duration of an individual right of use, the competent authority shall conduct an objective and forward-looking assessment of the general criteria laid down for extension of the duration of that right of use in light of point (c) of Article 45(2). Provided that the competent authority has not initiated enforcement action for non-compliance with the conditions of the rights of use pursuant to Article 30, it shall grant the extension of the duration of the right of use unless it concludes that such an extension would not comply with the general criteria laid down in point (a) or (b) of the third subparagraph of this paragraph.

On the basis of that assessment, the competent authority shall notify the holder of the right as to whether the extension of the duration of the right of use is to be granted.

If such extension is not to be granted, the competent authority shall apply Article 48 for granting rights of use for that specific radio spectrum band.

Any measure under this paragraph shall be proportionate, non-discriminatory, transparent and reasoned.

By way of derogation from Article 23, interested parties shall have the opportunity to comment on any draft measure pursuant to the third and the fourth subparagraphs of this paragraph for a period of at least three months.

This paragraph is without prejudice to the application of Articles 19 and 30.

When establishing fees for rights of use, Member States shall take account of the mechanism provided for under this paragraph.

3 Where duly justified, Member States may derogate from paragraph 2 of this Article in the following cases:

a in limited geographical areas, where access to high-speed networks is severely deficient or absent and this is necessary to ensure achievement of the objectives of Article 45(2);

b for specific short-term projects;

c for experimental use;

d for uses of radio spectrum which, in accordance with Article 45(4) and (5), can coexist with wireless broadband services; or

e for alternative use of radio spectrum in accordance with Article 45(3).

4 Member States may adjust the duration of rights of use laid down in this Article to ensure the simultaneous expiry of the duration of rights in one or several bands.

Article 50

Renewal of individual rights of use for harmonised radio spectrum

1 National regulatory or other competent authorities shall take a decision on the renewal of individual rights of use for harmonised radio spectrum in a timely manner before the duration of those rights expired, except where, at the time of assignment, the possibility of renewal has been explicitly excluded. For that purpose, those authorities shall assess the need for such renewal at their own initiative or upon request by the holder of the right, in the latter case not earlier than five years prior to expiry of the duration of the rights concerned. This shall be without prejudice to renewal clauses applicable to existing rights.

2 In taking a decision pursuant to paragraph 1 of this Article, competent authorities shall consider, inter alia:

a the fulfilment of the objectives set out in Article 3, Article 45(2) and Article 48(2), as well as public policy objectives under Union or national law;

b the implementation of a technical implementing measure adopted in accordance with Article 4 of Decision No 676/2002/EC;

c the review of the appropriate implementation of the conditions attached to the right concerned;

d the need to promote, or avoid any distortion of, competition in line with Article 52;

e the need to render the use of radio spectrum more efficient in light of technological or market evolution;

f the need to avoid severe service disruption.

3 When considering possible renewal of individual rights of use for harmonised radio spectrum for which the number of rights of use is limited pursuant to paragraph 2 of this Article, competent authorities shall conduct an open, transparent and non-discriminatory procedure, and shall, inter alia:

a give all interested parties the opportunity to express their views through a public consultation in accordance with Article 23; and

b clearly state the reasons for such possible renewal.

The national regulatory or other competent authority shall take into account any evidence arising from the consultation pursuant to the first subparagraph of this paragraph of market demand from undertakings other than those holding rights of use for radio spectrum in the band concerned when deciding whether to renew the rights of use or to organise a new selection procedure in order to grant the rights of use pursuant to Article 55.

4 A decision to renew the individual rights of use for harmonised radio spectrum may be accompanied by a review of the fees as well as of the other terms and conditions attached thereto. Where appropriate, national regulatory or other competent authorities may adjust the fees for the rights of use in accordance with Article 42.

Article 51

Transfer or lease of individual rights of use for radio spectrum

1 Member States shall ensure that undertakings may transfer or lease to other undertakings individual rights of use for radio spectrum.

Member States may determine that this paragraph does not apply where the undertaking's individual right of use for radio spectrum was initially granted free of charge or assigned for broadcasting.

2 Member States shall ensure that an undertaking's intention to transfer or lease rights of use for radio spectrum, as well as the effective transfer thereof is notified in accordance with national procedures to the competent authority and is made public. In the case of harmonised radio spectrum, any such transfer shall comply with such harmonised use.

3 Member States shall allow the transfer or lease of rights of use for radio spectrum where the original conditions attached to the rights of use are maintained. Without prejudice to the need to ensure the absence of a distortion of competition, in particular in accordance with Article 52, Member States shall:

a submit transfers and leases to the least onerous procedure possible;

b not refuse the lease of rights of use for radio spectrum where the lessor undertakes to remain liable for meeting the original conditions attached to the rights of use;

c not refuse the transfer of rights of use for radio spectrum unless there is a clear risk that the new holder is unable to meet the original conditions for the right of use.

Any administrative charge imposed on undertakings in connection with processing an application for the transfer or lease of rights of use for radio spectrum shall comply with Article 16.

Points (a), (b) and (c) of the first subparagraph are without prejudice to the Member States' competence to enforce compliance with the conditions attached to the rights of use at any time, both with regard to the lessor and the lessee, in accordance with their national law.

Competent authorities shall facilitate the transfer or lease of rights of use for radio spectrum by giving consideration to any request to adapt the conditions attached to the rights in a timely manner and by ensuring that those rights or the relevant radio spectrum may to the best extent be partitioned or disaggregated.

In light of any transfer or lease of rights of use for radio spectrum, competent authorities shall make relevant details relating to tradable individual rights publicly available in a standardised electronic format when the rights are created and keep those details for as long as the rights exist.

The Commission may adopt implementing acts specifying those relevant details.

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 118(4).

Article 52

Competition

1 National regulatory and other competent authorities shall promote effective competition and avoid distortions of competition in the internal market when deciding to grant,

amend or renew rights of use for radio spectrum for electronic communications networks and services in accordance with this Directive.

2 When Member States grant, amend or renew rights of use for radio spectrum, their national regulatory or other competent authorities upon the advice provided by national regulatory authority may take appropriate measures such as:

a limiting the amount of radio spectrum bands for which rights of use are granted to any undertaking, or, in justified circumstances, attaching conditions to such rights of use, such as the provision of wholesale access, national or regional roaming, in certain bands or in certain groups of bands with similar characteristics;

b reserving, if appropriate and justified with regard to a specific situation in the national market, a certain part of a radio spectrum band or group of bands for assignment to new entrants;

c refusing to grant new rights of use for radio spectrum or to allow new radio spectrum uses in certain bands, or attaching conditions to the grant of new rights of use for radio spectrum or to the authorisation of new uses of radio spectrum, in order to avoid the distortion of competition by any assignment, transfer or accumulation of rights of use;

d including conditions prohibiting, or imposing conditions on, transfers of rights of use for radio spectrum, not subject to Union or national merger control, where such transfers are likely to result in significant harm to competition;

e amending the existing rights in accordance with this Directive where this is necessary to remedy ex post a distortion of competition by any transfer or accumulation of rights of use for radio spectrum.

National regulatory and other competent authorities shall, taking into account market conditions and available benchmarks, base their decisions on an objective and forward-looking assessment of the market competitive conditions, of whether such measures are necessary to maintain or achieve effective competition, and of the likely effects of such measures on existing and future investments by market participants in particular for network roll-out. In doing so, they shall take into account the approach to market analysis as set out in Article 67(2).

3 When applying paragraph 2 of this Article, national regulatory and other competent authorities shall act in accordance with the procedures provided in Articles 18, 19, 23 and 35.

Section 3

Procedures

Article 53

Coordinated timing of assignments

1 Member States shall cooperate in order to coordinate the use of harmonised radio spectrum for electronic communications networks and services in the Union taking due account of the different national market situations. This may include identifying one, or, where appropriate, several common dates by which the use of specific harmonised radio spectrum is to be authorised.

2 Where harmonised conditions have been set by technical implementing measures in accordance with Decision No 676/2002/EC in order to enable the radio spectrum use for wireless broadband networks and services, Member States shall allow the use of that radio spectrum, as

soon as possible and at the latest 30 months after the adoption of that measure, or as soon as possible after the lifting of any decision to allow alternative use on an exceptional basis pursuant to Article 45(3) of this Directive. This is without prejudice to Decision (EU) 2017/899 and to the Commission's right of initiative to propose legislative acts.

3 A Member State may delay the deadline provided for in paragraph 2 of this Article for a specific band under the following circumstances:

a to the extent justified by a restriction to the use of that band based on the general interest objective provided in point (a) or (d) of Article 45(5);

b in the case of unresolved cross-border coordination issues resulting in harmful interference with third countries, provided the affected Member State has, where appropriate, requested Union assistance pursuant to Article 28(5);

c safeguarding national security and defence; or

d force majeure.

The Member State concerned shall review such a delay at least every two years.

4 A Member State may delay the deadline provided for in paragraph 2 for a specific band to the extent necessary and up to 30 months in the case of:

a unresolved cross-border coordination issues resulting in harmful interference between Member States, provided that the affected Member State takes all necessary measures in a timely manner pursuant to Article 28(3) and (4);

b the need to ensure, and the complexity of ensuring, the technical migration of existing users of that band.

5 In the event of a delay under paragraph 3 or 4, the Member State concerned shall inform the other Member States and the Commission in a timely manner, stating the reasons.

Article 54

Coordinated timing of assignments for specific 5G bands

1 By 31 December 2020, for terrestrial systems capable of providing wireless broadband services, Member States shall, where necessary in order to facilitate the roll-out of 5G, take all appropriate measures to:

a reorganise and allow the use of sufficiently large blocks of the 3,4-3,8 GHz band;

b allow the use of at least 1 GHz of the 24,25-27,5 GHz band, provided that there is clear evidence of market demand and of the absence of significant constraints for migration of existing users or band clearance.

2 Member States may, however, extend the deadline laid down in paragraph 1 of this Article, where justified, in accordance with Article 45(3) or Article 53(2), (3) or (4).

3 Measures taken pursuant paragraph 1 of this Article shall comply with the harmonised conditions set by technical implementing measures in accordance with Article 4 of Decision No 676/2002/EC.

Article 55

Procedure for limiting the number of rights of use to be granted for radio spectrum

1 Without prejudice to Article 53, where a Member State concludes that a right to use radio spectrum cannot be subject to a general authorisation and where it considers whether to limit the number of rights of use to be granted for radio spectrum, it shall, inter alia:

a clearly state the reasons for limiting the rights of use, in particular by giving due weight to the need to maximise benefits for users and to facilitate the development of competition, and review, as appropriate, the limitation at regular intervals or at the reasonable request of affected undertakings;

b give all interested parties, including users and consumers, the opportunity to express their views on any limitation through a public consultation in accordance with Article 23.

2 When a Member State concludes that the number of rights of use is to be limited, it shall clearly establish, and give reasons for, the objectives pursued by means of a competitive or comparative selection procedure under this Article, and where possible quantify them, giving due weight to the need to fulfil national and internal market objectives. The objectives that the Member State may set out with a view to designing the specific selection procedure shall, in addition to promoting competition, be limited to one or more of the following:

a promoting coverage;

b ensuring the required quality of service;

c promoting efficient use of radio spectrum, including by taking into account the conditions attached to the rights of use and the level of fees;

d promoting innovation and business development.

The national regulatory or other competent authority shall clearly define and justify the choice of the selection procedure, including any preliminary phase to access the selection procedure. It shall also clearly state the outcome of any related assessment of the competitive, technical and economic situation of the market and provide reasons for the possible use and choice of measures pursuant to Article 35.

3 Member States shall publish any decision on the selection procedure chosen and the related rules, clearly stating the reasons therefor. It shall also publish the conditions that are to be attached to the rights of use.

4 After having determined the selection procedure, the Member State shall invite applications for rights of use.

5 Where a Member State concludes that additional rights of use for radio spectrum or a combination of general authorisation and individual rights of use can be granted, it shall publish that conclusion and initiate the process of granting such rights.

6 Where the granting of rights of use for radio spectrum needs to be limited, Member States shall grant such rights on the basis of selection criteria and a selection procedure which are objective, transparent, non-discriminatory and proportionate. Any such selection criteria shall give due weight to the achievement of the objectives and requirements of Articles 3, 4, 28 and 45.

7 Where competitive or comparative selection procedures are to be used, Member States may extend the maximum period of six weeks referred to in Article 48(6) for as long as necessary to ensure that such procedures are fair, reasonable, open and transparent to all interested parties,

but by no longer than eight months, subject to any specific timetable established pursuant to Article 53.

Those time limits shall be without prejudice to any applicable international agreements relating to the use of radio spectrum and satellite coordination.

8 This Article is without prejudice to the transfer of rights of use for radio spectrum in accordance with Article 51.

CHAPTER IV

Deployment and use of wireless network equipment

Article 56

Access to radio local area networks

1 Competent authorities shall allow the provision of access through RLANs to a public electronic communications network, as well as the use of the harmonised radio spectrum for that provision, subject only to applicable general authorisation conditions relating to radio spectrum use as referred to in Article 46(1).

Where that provision is not part of an economic activity or is ancillary to an economic activity or a public service which is not dependent on the conveyance of signals on those networks, any undertaking, public authority or end-user providing such access shall not be subject to any general authorisation for the provision of electronic communications networks or services pursuant to Article 12, to obligations regarding end-users rights pursuant to Title II of Part III, or to obligations to interconnect their networks pursuant to Article 61(1).

2 Article 12 of Directive 2000/31/EC shall apply.

3 Competent authorities shall not prevent providers of public electronic communications networks or publicly available electronic communications services from allowing access to their networks to the public, through RLANs, which may be located at an end-user's premises, subject to compliance with the applicable general authorisation conditions and the prior informed agreement of the end-user.

4 In accordance in particular with Article 3(1) of Regulation (EU) 2015/2120, competent authorities shall ensure that providers of public electronic communications networks or publicly available electronic communications services do not unilaterally restrict or prevent end-users from:

a accessing RLANs of their choice provided by third parties; or

b allowing reciprocally or, more generally, accessing the networks of such providers by other end-users through RLANs, including on the basis of third-party initiatives which aggregate and make publicly accessible the RLANs of different end-users.

5 Competent authorities shall not limit or prevent end-users from allowing access, reciprocally or otherwise, to their RLANs by other end-users, including on the basis of third-party initiatives which aggregate and make the RLANs of different end-users publicly accessible.

6 Competent authorities shall not unduly restrict the provision of access to RLANs to the public:

a by public sector bodies or in public spaces close to premises occupied by such public sector bodies, when that provision is ancillary to the public services provided on those premises;

b by initiatives of non-governmental organisations or public sector bodies to aggregate and make reciprocally or more generally accessible the RLANs of different end-users, including, where applicable, the RLANs to which public access is provided in accordance with point (a).

Article 57

Deployment and operation of small-area wireless access points

1 Competent authorities shall not unduly restrict the deployment of small-area wireless access points. Member States shall seek to ensure that any rules governing the deployment of small-area wireless access points are nationally consistent. Such rules shall be published in advance of their application.

In particular, competent authorities shall not subject the deployment of small-area wireless access points complying with the characteristics laid down pursuant to paragraph 2 to any individual town planning permit or other individual prior permits.

By way of derogation from the second subparagraph of this paragraph, competent authorities may require permits for the deployment of small-area wireless access points on buildings or sites of architectural, historical or natural value protected in accordance with national law or where necessary for public safety reasons. Article 7 of Directive 2014/61/EU shall apply to the granting of those permits.

2 The Commission shall, by means of implementing acts, specify the physical and technical characteristics, such as maximum size, weight, and where appropriate emission power of small-area wireless access points.

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 118(4).

The first such implementing act shall be adopted by 30 June 2020.

3 This Article is without prejudice to the essential requirements laid down in Directive 2014/53/EU and to the authorisation regime applicable for the use of the relevant radio spectrum.

4 Member States shall, by applying, where relevant, the procedures adopted in accordance with Directive 2014/61/EU, ensure that operators have the right to access any physical infrastructure controlled by national, regional or local public authorities, which is technically suitable to host small-area wireless access points or which is necessary to connect such access points to a backbone network, including street furniture, such as light poles, street signs, traffic lights, billboards, bus and tramway stops and metro stations. Public authorities shall meet all reasonable requests for access on fair, reasonable, transparent and non-discriminatory terms and conditions, which shall be made public at a single information point.

5 Without prejudice to any commercial agreements, the deployment of small-area wireless access points shall not be subject to any fees or charges going beyond the administrative charges in accordance with Article 16.

Article 58

Technical regulations on electromagnetic fields

The procedures laid down in Directive (EU) 2015/1535 shall apply with respect to any draft measure by a Member State that would impose on the deployment of small-area wireless access points different requirements with respect to electromagnetic fields than those provided for in Recommendation 1999/519/EC.

TITLE II

ACCESS

CHAPTER I

General provisions, access principles

Article 59

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 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 114, Member States shall not maintain legal or administrative measures which require undertakings, when granting access or interconnection, to offer different terms and conditions to different undertakings for equivalent services or measures imposing obligations that are not related to the actual access and interconnection services provided without prejudice to the conditions set out in Annex I.

Article 60

Rights and obligations of undertakings

1 Operators of public electronic communications networks shall have a right and, when requested by other undertakings so authorised in accordance with Article 15, an obligation to negotiate with each other interconnection 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 61, 62 and 68.

2 Without prejudice to Article 21, 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. Such undertakings shall not pass on the received information to any other party, in particular other departments, subsidiaries or partners, for whom such information could provide a competitive advantage.

3 Member States may provide for negotiations to be conducted through neutral intermediaries when conditions of competition so require.

CHAPTER II

Access and interconnection

Article 61

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

[[X1]1 National regulatory authorities or, in the case of points (b) and (c) of the first subparagraph of paragraph 2 of this Article, national regulatory authorities or other competent authorities shall, acting in pursuit of the objectives set out in Article 3, encourage and, where appropriate, ensure, in accordance with 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.

[[X1]2 In particular, without prejudice to measures that may be taken regarding undertakings designated as having significant market power in accordance with Article 68, national regulatory authorities or, in the case of points (b) and (c) of this subparagraph, national regulatory authorities or other competent authorities shall be able to impose:**]**

(a) to the extent necessary to ensure end-to-end connectivity, obligations on undertakings subject to general authorisation 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 necessary, obligations on undertakings subject to general authorisation that control access to end-users to make their services interoperable;

(c) in justified cases, where end-to-end connectivity between end-users is endangered due to a lack of interoperability between interpersonal communications services, and to the extent necessary to ensure end-to-end connectivity between end-users, obligations on relevant providers of number-independent interpersonal communications services which reach a significant level of coverage and user uptake, to make their services interoperable;

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

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

(i) to the extent necessary to ensure interoperability of interpersonal communications services and may include proportionate obligations on providers of those services to publish and allow the use, modification and redistribution of relevant information by the authorities and other providers, or to use and implement standards or specifications listed in Article 39(1) or of any other relevant European or international standards;

(ii) where the Commission, after consulting BEREC and taking utmost account of its opinion, has found an appreciable threat to end-to-end connectivity between end-users throughout the Union or in at least three Member States and has adopted implementing measures specifying the nature and scope of any obligations that may be imposed.

The implementing measures referred to in point (ii) of the second subparagraph shall be adopted in accordance with the examination procedure referred to in Article 118(4).

3 In particular, and without prejudice to paragraphs 1 and 2, national regulatory authorities may impose obligations, upon reasonable request, to grant access to wiring and cables and associated facilities inside buildings or up to the first concentration or distribution point as determined by the national regulatory authority, where that point is located outside the building. Where it is justified on the grounds that replication of such network elements would be economically inefficient or physically impracticable, such obligations may be imposed on providers of electronic communications networks or on the owners of such wiring and cables and associated facilities, where those owners are not providers of electronic communications networks. The access conditions imposed may include specific rules on access to such network elements and to associated facilities and associated services, on transparency and non-discrimination and on apportioning the costs of access, which, where appropriate, are adjusted to take into account risk factors.

Where a national regulatory authority concludes, having regard, where applicable, to the obligations resulting from any relevant market analysis, that the obligations imposed in accordance with the first subparagraph do not sufficiently address high and non-transitory economic or physical barriers to replication which underlie an existing or emerging market situation significantly limiting competitive outcomes for end-users, it may extend the imposition of such access obligations, on fair and reasonable terms and conditions, beyond the first concentration or distribution point, to a point that it determines to be the closest to end-users, capable of hosting a sufficient number of end-user connections to be commercially viable for efficient access seekers. In determining the extent of the extension beyond the first concentration or distribution point, the national regulatory authority shall take utmost account of relevant BEREC guidelines. If justified on technical or 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 on providers of electronic communications networks where they determine that:

a the provider has the characteristics listed in Article 80(1) and makes available a viable and similar alternative means of reaching end-users by providing access to a very high capacity network to any undertaking, on fair, non-discriminatory and reasonable terms and conditions; national regulatory authorities may extend that exemption to other providers offering, on fair, non-discriminatory and reasonable terms and conditions, access to a very high capacity network; or

b the imposition of obligations would compromise the economic or financial viability of a new network deployment, in particular by small local projects.

By way of derogation from point (a) of the third subparagraph, national regulatory authorities may impose obligations on providers of electronic communications networks fulfilling the criteria laid down in that point where the network concerned is publicly funded.

By 21 December 2020, BEREC shall publish guidelines to foster a consistent application of this paragraph, by setting out the relevant criteria for determining:

a the first concentration or distribution point;

b the point, beyond the first concentration or distribution point, capable of hosting a sufficient number of end-user connections to enable an efficient undertaking to overcome the significant replicability barriers identified;

c which network deployments can be considered to be new;

d which projects can be considered to be small; and

e which economic or physical barriers to replication are high and non-transitory.

4 Without prejudice to paragraphs 1 and 2, Member States shall ensure that competent authorities have the power to impose on undertakings providing or authorised to provide electronic communications networks obligations in relation to the sharing of passive infrastructure or obligations to conclude localised roaming access agreements, in both cases if directly necessary for the local provision of services which rely on the use of radio spectrum, in accordance with Union law and provided that no viable and similar alternative means of access to end-users is made available to any undertaking on fair and reasonable terms and conditions. Competent authorities may impose such obligations only where this possibility is clearly provided for when granting the rights of use for radio spectrum and where justified on the grounds that, in the area subject to such obligations, the market-driven deployment of infrastructure for the provision of networks or services which rely on the use of radio spectrum is subject to insurmountable economic or physical obstacles and therefore access to networks or services by end-users is severely deficient or absent. In those circumstances where access and sharing of passive infrastructure alone does not suffice to address the situation, national regulatory authorities may impose obligations on sharing of active infrastructure.

Competent authorities shall have regard to:

a the need to maximise connectivity throughout the Union, along major transport paths and in particular territorial areas, and to the possibility to significantly increase choice and higher quality of service for end-users;

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 technological innovation;

f the overriding need to support the incentive of the host to roll out the infrastructure in the first place.

In the event of dispute resolution, competent authorities may, inter alia, impose on the beneficiary of the sharing or access obligation, the obligation to share radio spectrum with the infrastructure host in the relevant area.

5 Obligations and conditions imposed in accordance with paragraphs 1 to 4 of this Article 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. The national regulatory and other competent authorities which have imposed such obligations and conditions shall assess the results thereof by five years after the adoption of the previous measure adopted in relation to the same undertakings and assess whether it would be appropriate to withdraw or amend them in light of evolving conditions. Those authorities shall notify the

outcome of their assessment in accordance with the procedures referred to in Articles 23, 32 and 33.

6 For the purpose of paragraphs 1 and 2 of this Article, Member States shall ensure that the national regulatory authority is empowered to intervene on its own initiative where justified in order to secure the policy objectives of Article 3, in accordance with this Directive and, in particular, with the procedures referred to in Articles 23 and 32.

7 By 21 June 2020 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.

Editorial Information

X1 Substituted by Corrigendum to Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Official Journal of the European Union L 321 of 17 December 2018).

Article 62

Conditional access systems and other facilities

1 Member States shall ensure that the conditions laid down in Part I of Annex II 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 Where, as a result of a market analysis carried out in accordance with Article 67(1), a national regulatory authority finds that one or more undertakings do not have significant market power on the relevant market, it may amend or withdraw the conditions with respect to those undertakings, 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 114 would not be adversely affected by such amendment or withdrawal; and

b the prospects for effective competition in the following markets would not be adversely affected by such amendment or withdrawal:

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

(ii) conditional access systems and other associated facilities.

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

3 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 EPGs and similar listing and navigation facilities.

4 Notwithstanding paragraph 1 of this Article, Member States may allow their national regulatory authority, as soon as possible after 20 December 2018 and periodically thereafter, to review the conditions applied in accordance with this Article, by undertaking a market analysis

in accordance with Article 67(1) to determine whether to maintain, amend or withdraw the conditions applied.

CHAPTER III

Market analysis and significant market power

Article 63

Undertakings with significant market power

1 Where this Directive requires national regulatory authorities to determine whether undertakings have significant market power in accordance with the procedure referred to in Article 67, paragraph 2 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, namely 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 64.

3 Where an undertaking has significant market power on a specific market, it may also be designated as having significant market power on a closely related market, where the links between the two markets allow the market power held on the specific market to be leveraged into the closely related market, thereby strengthening the market power of the undertaking. Consequently, remedies aiming to prevent such leverage may be applied in the closely related market pursuant to Articles 69, 70, 71 and 74.

Article 64

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 three criteria listed in Article 67(1) is met.

The Commission shall review the Recommendation by 21 December 2020 and regularly thereafter.

2 After consulting BEREC, the Commission shall publish guidelines for market analysis and the assessment of significant market power ('the SMP guidelines') which shall be in accordance with the relevant principles of competition law. The SMP guidelines shall 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, taking account of the three criteria listed in Article 67(1).

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 by taking into account, inter alia, the degree of infrastructure competition in those areas, in accordance with the principles of competition law. National regulatory authorities shall, where relevant, also 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 65

Procedure for the identification of transnational markets

1 If the Commission or at least two national regulatory authorities concerned submit a reasoned request, including supporting evidence, BEREC shall conduct an analysis of a potential transnational market. After consulting stakeholders and taking utmost account of the analysis carried out by BEREC, the Commission may adopt decisions 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 64.

2 In the case of transnational markets identified in accordance with paragraph 1 of this Article, 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 67(4). The national regulatory authorities concerned shall jointly notify to the Commission 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 66

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 that 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 65(1)

and to any findings of national or sub-national geographical markets by national regulatory authorities in accordance with Article 64(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.

2 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 68. National regulatory authorities shall take into utmost account those guidelines when performing their regulatory tasks within their jurisdiction. Those guidelines may provide the basis for interoperability of wholesale access products across the Union and may include guidance for the harmonisation of technical specifications of wholesale access products capable of meeting such identified transnational demand.

Article 67

Market analysis procedure

1 National regulatory authorities shall determine whether a relevant market defined in accordance with Article 64(3) is 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 considered to justify the imposition of regulatory obligations set out in this Directive if all of the following criteria are 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 all of the following:

a market developments affecting the likelihood of the relevant market tending towards effective competition;

b all relevant competitive constraints, at the wholesale and retail levels, irrespective of whether the sources of such constraints are considered 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, 60 and 61;

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

3 Where a national regulatory authority concludes that a relevant market does not justify the imposition of regulatory obligations in accordance with the procedure in paragraphs 1 and 2 of this Article, or where the conditions set out in paragraph 4 of this Article are not met, it shall not impose or maintain any specific regulatory obligations in accordance with Article 68. Where there already are sector specific regulatory obligations imposed in accordance with Article 68, 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 notice period, defined by balancing the need to ensure a sustainable transition for the beneficiaries of those obligations and end-users, end-user choice, and that regulation does not continue for longer than necessary. When setting such a notice period, 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 63. The national regulatory authority shall impose on such undertakings appropriate specific regulatory obligations in accordance with Article 68 or maintain or amend such obligations where they already exist if it considers that the outcome for end-users would not be effectively competitive in the absence of those obligations.

5 Measures taken in accordance with paragraphs 3 and 4 of this Article 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; that five-year period may, on an exceptional basis, be extended for up to one year, where the national regulatory authority has notified a reasoned proposal for an extension to the Commission no later than four months before the expiry of the five-year period, and the Commission has not objected within one month of the notified extension;

b within 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 5 of this Article, 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 of this Article, notify the draft measure to the Commission in accordance with Article 32.

CHAPTER IV

Access remedies imposed on undertakings with significant market power

Article 68

Imposition, amendment or withdrawal of obligations

1 Member States shall ensure that national regulatory authorities are empowered to impose the obligations set out in Articles 69 to 74 and Articles 76 to 81.

2 Where an undertaking is designated as having significant market power on a specific market as a result of a market analysis carried out in accordance with Article 67, national regulatory authorities shall, as appropriate, impose any of the obligations set out in Articles 69 to 74 and Articles 76 and 80. In accordance with the principle of proportionality, a national regulatory authority shall choose the least intrusive way of addressing the problems identified in the market analysis.

3 National regulatory authorities shall impose the obligations set out in Articles 69 to 74 and Articles 76 and 80 only on undertakings that have been designated as having significant market power in accordance with paragraph 2 of this Article, without prejudice to:

a Articles 61 and 62;

b 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 97 and 106 of this Directive and the relevant provisions of Directive 2002/58/EC containing obligations on undertakings other than those designated as having significant market power; or

c the need to comply with international commitments.

In exceptional circumstances, where a national regulatory authority intends to impose on undertakings designated as having significant market power obligations for access or interconnection other than those set out in Articles 69 to 74 and Articles 76 and 80, it shall submit a request to the Commission.

The Commission shall, taking utmost account of the opinion of BEREC, adopt decisions by means of implementing acts, authorising or preventing the national regulatory authority from taking such measures.

Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 118(3).

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, where appropriate taking into account the identification of transnational demand pursuant to Article 66;

b proportionate, having regard, where possible, to the costs and benefits;

c justified in light of the objectives laid down in Article 3; and

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

5 In relation to the need to comply with international commitments referred to in paragraph 3 of this Article, national regulatory authorities shall notify decisions to impose, amend or withdraw obligations on undertakings 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, including co-investment agreements, influencing competitive dynamics.

If those developments are not sufficiently important to require a new market analysis in accordance with Article 67, the national regulatory authority shall assess without delay whether it is necessary to review the obligations imposed on undertakings designated as having significant market power and amend any previous decision, including by withdrawing obligations or imposing new obligations, in order to ensure that such obligations continue to meet the conditions set out in paragraph 4 of this Article. Such amendments shall be imposed only after consultations in accordance with Articles 23 and 32.

Article 69

Obligation of transparency

1 National regulatory authorities may, in accordance with Article 68, impose obligations of transparency in relation to interconnection or access, requiring undertakings to make public specific information, such as accounting information, prices, technical specifications, network characteristics and expected developments thereof, as well as terms and conditions for supply and use, including any conditions altering access to or use of services and applications, in particular with regard to migration from legacy infrastructure, where such conditions are allowed by Member States in accordance with Union law.

2 In particular, where an undertaking has obligations of non-discrimination, national regulatory authorities may require that undertaking 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. That offer shall contain 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 may, inter alia, 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 By 21 December 2019, 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 where 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 to the needs of the beneficiaries of access obligations and of 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 66 and to any related decision of the Commission.

Notwithstanding paragraph 3 of this Article, where an undertaking has obligations under Article 72 or 73 concerning wholesale access to network infrastructure, national regulatory authorities shall ensure the publication of a reference offer taking utmost account of the BEREC guidelines on the minimum criteria for a reference offer, shall ensure that key performance indicators are specified, where relevant, as well as corresponding service levels, and closely monitor and ensure compliance with them. In addition, national regulatory authorities may, where necessary, predetermine the associated financial penalties in accordance with Union and national law.

Article 70

Obligations of non-discrimination

1 A national regulatory authority may, in accordance with Article 68, impose obligations of non-discrimination, in relation to interconnection or access.

2 Obligations of non-discrimination shall ensure, in particular, that the undertaking applies equivalent conditions in equivalent circumstances to other providers of 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. National regulatory authorities may impose on that undertaking obligations to supply access products and services to all undertakings, including to 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 71

Obligation of accounting separation

1 A national regulatory authority may, in accordance with Article 68, impose obligations for accounting separation in relation to specified activities related to interconnection or access.

In particular, a national regulatory authority may require a vertically integrated undertaking to make transparent its wholesale prices and its internal transfer prices, inter alia to ensure compliance where there is an obligation of non-discrimination under Article 70 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 information that would contribute to an open and competitive market, while complying with Union and national rules on commercial confidentiality.

Article 72

Access to civil engineering

1 A national regulatory authority may, in accordance with Article 68, impose obligations on undertakings to meet reasonable requests for access to, and use of, civil engineering including, but not limited to, 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, having considered the market analysis, the national regulatory authority concludes 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 and would not be in the end-user's interest.

2 National regulatory authorities may impose obligations on an undertaking 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 73

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

1 National regulatory authorities may, in accordance with Article 68, impose obligations on undertakings to meet reasonable requests for access to, and use of, specific network elements and associated facilities, in situations where the national regulatory authorities consider 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.

National regulatory authorities may require undertakings inter alia:

a to give third parties access to, and use of, specific physical network elements and associated facilities, as appropriate, including unbundled access to the local loop and sub-loop;

b to give third parties access to specific active or virtual network elements and services;

c to negotiate in good faith with undertakings requesting access;

d not to withdraw access to facilities already granted;

e to provide specific services on a wholesale basis for resale by third parties;

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

g to provide co-location or other forms of associated facilities sharing;

h to provide specific services needed to ensure interoperability of end-to-end services to users, or roaming on mobile networks;

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

j to interconnect networks or network facilities;

k to provide access to associated services such as identity, location and presence service.

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

2 Where national regulatory authorities consider the appropriateness of imposing any of the possible specific obligations referred to in paragraph 1 of this Article, and in particular where they assess, in accordance with the principle of proportionality, whether and how such obligations are to be imposed, they shall analyse whether other forms of access to wholesale inputs, either on the same or on a related wholesale market, would be sufficient to address the identified problem in the end-user's interest. That assessment shall include commercial access offers, regulated access pursuant to Article 61, or existing or planned regulated access to other wholesale inputs pursuant to this Article. National regulatory authorities shall take account in particular of the following factors:

a the technical and economic viability of using or installing competing facilities, in light of the rate of market development, taking into account the nature and type of interconnection 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 need to ensure technology neutrality enabling the parties to design and manage their own networks;

d the feasibility of providing the access offered, in relation to the capacity available;

e 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;

f the need to safeguard competition in the long term, with particular attention to economically efficient infrastructure-based competition and innovative business models that support sustainable competition, such as those based on co-investment in networks;

g where appropriate, any relevant intellectual property rights;

h the provision of pan-European services.

Where a national regulatory authority considers, in accordance with Article 68, imposing obligations on the basis of Articles 72 or of this Article, it shall examine whether the imposition of obligations in accordance with Article 72 alone would be a proportionate means by which to promote competition and the end-user's interest.

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

Article 74

Price control and cost accounting obligations

1 A national regulatory authority may, in accordance with Article 68, impose obligations relating to cost recovery and price control, including obligations for cost orientation of prices and obligations concerning cost-accounting systems, for the provision of specific types of interconnection or access, in situations where a market analysis indicates that a lack of effective competition means that the undertaking concerned may sustain prices at an excessively high level, or may apply a price squeeze, to the detriment of end-users.

In determining whether price control obligations would be appropriate, national regulatory authorities shall take into account the need to promote competition and 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 undertaking, including in next-generation networks, national regulatory authorities shall take into account the investment made by the undertaking. Where the national regulatory authorities consider price control obligations to be appropriate, they shall allow the undertaking 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 consider not imposing or maintaining obligations pursuant to this Article, where they establish that a demonstrable retail price constraint is present and that any obligations imposed in accordance with Articles 69 to 73, including, in particular, any economic replicability test imposed in accordance with Article 70, ensures effective and non-discriminatory access.

When national regulatory authorities consider it appropriate to impose price control obligations on access to existing network elements, they shall also take account of the benefits of predictable and stable wholesale prices in ensuring efficient market entry and sufficient incentives for all undertakings 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 maximises sustainable end-user benefits. In this regard, national regulatory authorities may also take account of prices available in comparable competitive markets.

3 Where an undertaking 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 undertaking 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 undertaking 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 control, 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. A qualified independent body shall verify compliance with the cost-accounting system and shall publish annually a statement concerning compliance.

Article 75

Termination rates

1 By 31 December 2020, the Commission shall, taking utmost account of the opinion of BEREC, adopt a delegated act in accordance with Article 117 supplementing this Directive by setting a single maximum Union-wide mobile voice termination rate and a single maximum Union-wide fixed voice termination rate (together referred to as ‘the Union-wide voice termination rates’), which are imposed on any provider of mobile voice termination or fixed voice termination services, respectively, in any Member State.

To that end, the Commission shall:

a comply with the principles, criteria and parameters provided in Annex III;

b when setting the Union-wide voice termination rates for the first time, take into account the weighted average of efficient costs in fixed and mobile networks established in accordance with the principles provided in Annex III, applied across the Union; the Union-wide voice termination rates in the first delegated act shall not be higher than the highest rate among the rates that were in force six months before the adoption of that delegated act in all Member States, after any necessary adjustment for exceptional national circumstances;

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;

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

e consider the need to allow for a transitional period of no longer than 12 months in order to allow adjustments in Member States where this is necessary on the basis of rates previously imposed.

2 Taking utmost account of the opinion of BEREC, the Commission shall review the delegated act adopted pursuant to this Article every five years and shall consider on each such occasion, by applying the criteria listed in Article 67(1), whether setting Union-wide voice termination rates continue to be necessary. Where the Commission decides, following its review in accordance with this paragraph, not to impose a maximum mobile voice termination rate or a maximum fixed voice termination rate, or neither, national regulatory authorities may conduct market analyses of voice termination markets in accordance with Article 67, to assess whether the imposition of regulatory obligations is necessary. If a national regulatory authority imposes, as a result of such analysis, cost-oriented termination rates in a relevant market, it shall follow the principles, criteria and parameters set out in Annex III and its draft measure shall be subject to the procedures referred to in Articles 23, 32 and 33.

3 National regulatory authorities shall closely monitor, and ensure compliance with, the application of the Union-wide voice termination rates by providers of voice termination services. National regulatory authorities may, at any time, require a provider of voice termination services to amend the rate it charges to other undertakings if it does not comply with the delegated act referred to in paragraph 1. National regulatory authorities shall annually report to the Commission and to BEREC with regard to the application of this Article.

Article 76

Regulatory treatment of new very high capacity network elements

1 Undertakings which have been designated as having significant market power in one or several relevant markets in accordance with Article 67 may offer commitments, in accordance with the procedure set out in Article 79 and subject to the second subparagraph of this paragraph, to open the deployment of a new very high capacity network that consists of optical fibre elements up to the end-user premises or base station to co-investment, for example by offering co-ownership or long-term risk sharing through co-financing or through purchase agreements giving rise to specific rights of a structural character by other providers of electronic communications networks or services.

When the national regulatory authority assesses those commitments, it shall determine, in particular, whether the offer to co-invest complies with all of the following conditions:

a it is open at any moment during the lifetime of the network to any provider of electronic communications networks or services;

b it would allow other co-investors which are providers of electronic communications networks or services to compete effectively and sustainably in the long term in downstream markets in which the undertaking designated as having significant market power is active, on terms which include:

(i) fair, reasonable and non-discriminatory terms allowing access to the full capacity of the network to the extent that it is subject to co-investment;

(ii) flexibility in terms of the value and timing of the participation of each co-investor;

(iii) the possibility to increase such participation in the future; and

(iv) reciprocal rights awarded by the co-investors after the deployment of the co-invested infrastructure;

c it is made public by the undertaking in a timely manner and, if the undertaking does not have the characteristics listed in Article 80(1), at least six months before the start

of the deployment of the new network; that period may be prolonged based on national circumstances;

d access seekers not participating in the co-investment can benefit from the outset from the same quality, speed, conditions and end-user reach as were available before the deployment, accompanied by a mechanism of adaptation over time confirmed by the national regulatory authority in light of developments on the related retail markets, that maintains the incentives to participate in the co-investment; such mechanism shall ensure that access seekers have access to the very high capacity elements of the network at a time, and on the basis of transparent and non-discriminatory terms, which reflect appropriately the degrees of risk incurred by the respective co-investors at different stages of the deployment and take into account the competitive situation in retail markets;

e it complies at a minimum with the criteria set out in Annex IV and is made in good faith.

2 If the national regulatory authority concludes, taking into account the results of the market test conducted in accordance with Article 79(2), that the co-investment commitment offered complies with the conditions set out in paragraph 1 of this Article, it shall make that commitment binding pursuant to Article 79(3), and shall not impose any additional obligations pursuant to Article 68 as regards the elements of the new very high capacity network that are subject to the commitments, if at least one potential co-investor has entered into a co-investment agreement with the undertaking designated as having significant market power.

The first subparagraph shall be without prejudice to the regulatory treatment of circumstances that do not comply with the conditions set out in paragraph 1 of this Article, taking into account the results of any market test conducted in accordance with Article 79(2), but that have an impact on competition and are taken into account for the purposes of Articles 67 and 68.

By way of derogation from the first subparagraph of this paragraph, a national regulatory authority may, in duly justified circumstances, impose, maintain or adapt remedies in accordance with Articles 68 to 74 as regards new very high capacity networks in order to address significant competition problems on specific markets, where the national regulatory authority establishes that, given the specific characteristics of these markets, those competition problems would not otherwise be addressed.

3 National regulatory authorities shall, on an ongoing basis, monitor compliance with the conditions set out in paragraph 1 and may require the undertaking designated as having significant market power to provide it with annual compliance statements.

This Article shall be without prejudice to the power of a national regulatory authority to take decisions pursuant to Article 26(1) in the event of a dispute arising between undertakings in connection with a co-investment agreement considered by it to comply with the conditions set out in paragraph 1 of this Article.

4 BEREC, after consulting stakeholders and in close cooperation with the Commission, shall publish guidelines to foster the consistent application by national regulatory authorities of the conditions set out in paragraph 1, and the criteria set out in Annex IV.

Article 77

Functional separation

1 Where the national regulatory authority concludes that the appropriate obligations imposed under Articles 69 to 74 have failed to achieve effective competition and that there

are important and persisting competition problems or market failures identified in relation to the wholesale provision of certain access product markets, it may, on an exceptional basis, in accordance with the second subparagraph of Article 68(3), impose an obligation on vertically integrated undertakings to place activities related to the wholesale provision of relevant access products in a business entity operating independently.

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 of functional separation, it shall submit a request 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 concluding 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 national 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 therein, in particular 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 resulting 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 or the 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.

Following the Commission's decision taken in accordance with Article 68(3) on that draft measure, 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 67. On the basis of that analysis, the national regulatory authority shall impose, maintain, amend or withdraw obligations, in accordance with the procedures set out in Articles 23 and 32.

4 An undertaking on which functional separation has been imposed may be subject to any of the obligations referred to in Articles 69 to 74 in any specific market where it has been designated as having significant market power in accordance with Article 67, or any other obligations authorised by the Commission pursuant to Article 68(3).

Article 78

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 67 shall inform the national regulatory authority at least three months before any intended transfer of their local access network assets or a substantial part thereof to a separate legal entity under different ownership, or establishment of a separate business entity in order to provide all retail providers, including its own retail divisions, with fully equivalent access products.

Those 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.

Such undertakings may also offer commitments regarding access conditions that are to apply to their network during an implementation period 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, in order 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 set out in Article 67(5).

2 The national regulatory authority shall assess the effect of the intended transaction, together with the commitments offered, 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 67.

The national regulatory authority shall take into account any commitments offered by the undertaking, having regard in particular to the objectives set out in Article 3. In so doing, the national regulatory authority shall consult third parties in accordance with Article 23, and shall address, in particular, those third parties which are directly affected by the intended transaction.

On the basis of its analysis, the national regulatory authority shall impose, maintain, amend or withdraw obligations, in accordance with the procedures set out in Articles 23 and 32, applying, if appropriate, Article 80. In its decision, the national regulatory authority may make the commitments binding, wholly or in part. By way of derogation from Article 67(5), the national regulatory authority may make the commitments binding, wholly or in part, for the entire period for which they are offered.

3 Without prejudice to Article 80, the legally or operationally separate business entity that has been designated as having significant market power in any specific market in accordance with Article 67 may be subject, as appropriate, to any of the obligations referred to in Articles 69 to 74 or any other obligations authorised by the Commission pursuant to Article 68(3), where any commitments offered are insufficient to meet the objectives set out in 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 and shall consider their extension when the period for which they are initially offered has expired.

Article 79

Commitments procedure

1 Undertakings designated as having significant market power may offer to the national regulatory authority commitments regarding conditions for access, co-investment, or both, applicable to their networks in relation, inter alia, to:

a cooperative arrangements relevant to the assessment of appropriate and proportionate obligations pursuant to Article 68;

b co-investment in very high capacity networks pursuant to Article 76; or

c effective and non-discriminatory access by third parties pursuant to Article 78, both during an implementation period of voluntary separation by a vertically integrated undertaking and after the proposed form of separation is implemented.

The offer for commitments shall be sufficiently detailed including as to the timing and scope of their implementation and their duration, to allow the national regulatory authority to undertake its assessment pursuant to paragraph 2 of this Article. Such commitments may extend beyond the periods for carrying out market analysis provided in Article 67(5).

2 In order to assess any commitments offered by an undertaking pursuant to paragraph 1 of this Article, the national regulatory authority shall, except where such commitments clearly do not fulfil one or more relevant conditions or criteria, perform a market test, in particular on the offered terms, by conducting a public consultation of interested parties, in particular third parties which are directly affected. Potential co-investors or access seekers may provide views on the compliance of the commitments offered with the conditions provided, as applicable, in Article 68, 76 or 78 and may propose changes.

As regards the commitments offered under this Article, the national regulatory authority shall, when assessing obligations pursuant to Article 68(4), have particular regard to:

a evidence regarding the fair and reasonable character of the commitments offered;

b the openness of the commitments to all market participants;

c the timely availability of access under fair, reasonable and non-discriminatory conditions, including to very high capacity networks, before the launch of related retail services; and

d the overall adequacy of the commitments offered to enable sustainable competition on downstream markets and to facilitate cooperative deployment and take-up of very high capacity networks in the interest of end-users.

Taking into account all the views expressed in the consultation, and the extent to which such views are representative of different stakeholders, the national regulatory authority shall communicate to the undertaking designated as having significant market power its preliminary conclusions whether the commitments offered comply with the objectives, criteria and procedures set out in this Article and, as applicable, in Article 68, 76 or 78, and under which conditions it may consider making the commitments binding. The undertaking may revise its initial offer to take account of the preliminary conclusions of the national regulatory authority and with a view to satisfying the criteria set out in this Article and, as applicable, in Article 68, 76 or 78.

3 Without prejudice to first subparagraph of Article 76(2), the national regulatory authority may issue a decision to make the commitments binding, wholly or in part.

By way of derogation from Article 67(5), the national regulatory authority may make some or all commitments binding for a specific period, which may be the entire period for which they are offered, and in the case of co-investment commitments made binding pursuant to first subparagraph of Article 76(2), it shall make them binding for a period of minimum seven years.

Subject to Article 76, this Article is without prejudice to the application of the market analysis procedure pursuant to Article 67 and the imposition of obligations pursuant to Article 68.

Where the national regulatory authority makes commitments binding pursuant to this Article, it shall assess under Article 68 the consequences of that decision for market development and the appropriateness of any obligation that it has imposed or would, absent those commitments, have considered imposing pursuant to that Article or Articles 69 to 74. When notifying the relevant draft measure under Article 68 in accordance with Article 32, the national regulatory authority shall accompany the notified draft measure with the commitments decision.

4 The national regulatory authority shall monitor, supervise and ensure compliance with the commitments that it has made binding in accordance with paragraph 3 of this Article in the same way in which it monitors, supervises and ensures compliance with obligations imposed under Article 68 and shall consider the extension of the period for which they have been made binding when the initial period expires. If the national regulatory authority concludes that an undertaking has not complied with the commitments that have been made binding in accordance with paragraph 3 of this Article, it may impose penalties on such undertaking in accordance with Article 29. Without prejudice to the procedure for ensuring compliance of specific obligations under Article 30, the national regulatory authority may reassess the obligations imposed in accordance with Article 68(6).

Article 80

Wholesale-only 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 67 shall consider whether that undertaking has the following characteristics:

a all companies and business units within the undertaking, all companies that are controlled but not necessarily wholly owned by the same ultimate owner, and any shareholder capable of exercising control over the undertaking, 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 end-users, because of an exclusive agreement, or an agreement which de facto amounts to an exclusive agreement.

2 If the national regulatory authority concludes that the conditions laid down in paragraph 1 of this Article are fulfilled, it may impose on that undertaking only obligations pursuant to Articles 70 and 73 or relative to fair and reasonable pricing if justified on the basis of a market analysis including a prospective assessment of the likely behaviour of the undertaking designated as having significant market power.

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 paragraph 1 of this Article are no longer met and it shall, as appropriate, apply Articles 67 to 74. The undertakings shall, without undue delay, inform the national regulatory authority of any change of circumstance relevant to points (a) and (b) of paragraph 1 of this Article.

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 Article 69, 71, 72 or 74, or the amendment of the obligations imposed in accordance with paragraph 2 of this Article.

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 81

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 67 shall notify the national regulatory authority in advance and in a timely manner when they plan to decommission or 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 68 to 80.

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

With regard to assets which are proposed for decommissioning or replacement, the national regulatory authority may withdraw the obligations after having ascertained that the access provider:

a has established the appropriate conditions for migration, including making available an alternative access product of at least comparable quality as was available using the legacy infrastructure enabling the access seekers to reach the same end-users; and

b has complied with the conditions and process notified to the national regulatory authority in accordance with this Article.

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

3 This Article shall be without prejudice to the availability of regulated products imposed by the national regulatory authority on the upgraded network infrastructure in accordance with the procedures set out in Articles 67 and 68.

Article 82

BEREC guidelines on very high capacity networks

By 21 December 2020, BEREC shall, after consulting stakeholders and in close cooperation with the Commission, issue guidelines on the criteria that a network is to

fulfil in order to be considered a very high capacity network, in particular in terms of down- and uplink bandwidth, resilience, error-related parameters, and latency and its variation. The national regulatory authorities shall take those guidelines into utmost account. BEREC shall update the guidelines by 31 December 2025, and regularly thereafter.

CHAPTER V

Regulatory control of retail services

Article 83

Regulatory control of retail services

1 Member States may ensure that national regulatory authorities impose appropriate regulatory obligations on undertakings identified as having significant market power on a given retail market in accordance with Article 63, where:

a as a result of a market analysis carried out in accordance with Article 67, a national regulatory authority determines that a given retail market identified in accordance with Article 64 is not effectively competitive; and

b the national regulatory authority concludes that obligations imposed under Articles 69 to 74 would not result in the achievement of the objectives set out in Article 3.

2 Obligations imposed under paragraph 1 of this Article shall be based on the nature of the problem identified and be proportionate and justified in light of the objectives laid down in Article 3. The obligations imposed may include requirements that the identified undertakings do not charge excessive prices, inhibit market entry or restrict competition by setting predatory prices, show undue preference to specific end-users or unreasonably bundle services. National regulatory authorities may apply to such undertakings appropriate retail price cap measures, measures to control individual tariffs, or measures to orient tariffs towards costs or prices on comparable markets, in order to protect end-user interests whilst promoting effective competition.

3 National regulatory authorities shall ensure that, where an undertaking is subject to retail tariff regulation or other relevant retail controls, the necessary and appropriate cost-accounting systems are implemented. National regulatory authorities may specify the format and accounting methodology to be used. Compliance with the cost-accounting system shall be verified by a qualified independent body. National regulatory authorities shall ensure that a statement concerning compliance is published annually.

4 Without prejudice to Articles 85 and 88, national regulatory authorities shall not apply retail control mechanisms under paragraph 1 of this Article to geographical or retail markets where they are satisfied that there is effective competition.

(**1**) Regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU (OJ L 348 20.12.2013, p. 1).