

Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (Text with EEA relevance)

DIRECTIVE 2009/140/EC OF THE EUROPEAN
PARLIAMENT AND OF THE COUNCIL

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Economic and Social Committee⁽¹⁾,

Having regard to the Opinion of the Committee of the Regions⁽²⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty, in the light of the joint text approved by the Conciliation Committee on 13 November 2009⁽³⁾,

Whereas:

- (1) The functioning of the five directives comprising the existing EU regulatory framework for electronic communications networks and services (Directive 2002/21/EC (Framework Directive)⁽⁴⁾, Directive 2002/19/EC (Access Directive)⁽⁵⁾, Directive 2002/20/EC (Authorisation Directive)⁽⁶⁾, Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive)⁽⁷⁾, and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)⁽⁸⁾ (together referred to as 'the Framework Directive and the Specific Directives') is subject to periodic review by the Commission, with a view in particular to determining the need for modification in the light of technological and market developments.

- (2) In that regard, the Commission presented its initial findings in its Communication of 29 June 2006 on the review of the EU regulatory framework for electronic communications networks and services. On the basis of these initial findings, a public consultation was held, which identified the continued lack of an internal market for electronic communications as the most important aspect needing to be addressed. In particular, regulatory fragmentation and inconsistencies between the activities of the national regulatory authorities were found to jeopardise not only the competitiveness of the sector, but also the substantial consumer benefits from cross-border competition.
- (3) The EU regulatory framework for electronic communications networks and services should therefore be reformed in order to complete the internal market for electronic communications by strengthening the Community mechanism for regulating operators with significant market power in the key markets. This is complemented by Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office⁽⁹⁾. The reform also includes the definition of an efficient and coordinated spectrum management strategy in order to achieve a single European information space and the reinforcement of provisions for users with disabilities in order to obtain an inclusive information society.
- (4) Recognising that the Internet is essential for education and for the practical exercise of freedom of expression and access to information, any restriction imposed on the exercise of these fundamental rights should be in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms. Concerning these issues, the Commission should undertake a wide public consultation.
- (5) The aim is progressively to reduce *ex-ante* sector specific rules as competition in the markets develops and, ultimately, for electronic communications to be governed by competition law only. Considering that the markets for electronic communications have shown strong competitive dynamics in recent years, it is essential that *ex-ante* regulatory obligations only be imposed where there is no effective and sustainable competition.
- (6) In carrying out its reviews of the functioning of the Framework Directive and the Specific Directives, the Commission should assess whether, in the light of developments in the market and with regard to both competition and consumer protection, there is a continued need for the provisions on sector specific *ex-ante* regulation laid down in Articles 8 to 13a of Directive 2002/19/EC (Access Directive) and Article 17 of Directive 2002/22/EC (Universal Service Directive) or whether those provisions should be amended or repealed.
- (7) In order to ensure a proportionate and adaptable approach to varying competitive conditions, national regulatory authorities should be able to define markets on a sub-national basis and to lift regulatory obligations in markets and/or geographic areas where there is effective infrastructure competition.
- (8) In order to achieve the goals of the Lisbon Agenda, it is necessary to give appropriate incentives for investment in new high-speed networks that will support innovation in content-rich Internet services and strengthen the international competitiveness of

the European Union. Such networks have enormous potential to deliver benefits to consumers and businesses across the European Union. It is therefore vital to promote sustainable investment in the development of these new networks, while safeguarding competition and boosting consumer choice through regulatory predictability and consistency.

- (9) In its Communication of 20 March 2006 entitled ‘Bridging the Broadband Gap’, the Commission acknowledged that there is a territorial divide in the European Union regarding access to high-speed broadband services. Easier access to radio spectrum facilitates the development of high-speed broadband services in remote regions. Despite the general increase in broadband connectivity, access in various regions is limited on account of high costs resulting from low population densities and remoteness. In order to ensure investment in new technologies in underdeveloped regions, electronic communications regulation should be consistent with other policies, such as State aid policy, cohesion policy or the aims of wider industrial policy.
- (10) Public investment in networks should be made in accordance with the principle of non-discrimination. To this end, public support should be given by means of open, transparent and competitive procedures.
- (11) In order to allow national regulatory authorities to meet the objectives set out in the Framework Directive and the Specific Directives, in particular concerning end-to-end interoperability, the scope of the Framework Directive should be extended to cover certain aspects of radio equipment and telecommunications terminal equipment as defined in Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity⁽¹⁰⁾ and consumer equipment used for digital television, in order to facilitate access for disabled users.
- (12) Certain definitions should be clarified or changed to take account of market and technological developments and to eliminate ambiguities identified in implementing the regulatory framework.
- (13) The independence of the national regulatory authorities should be strengthened in order to ensure a more effective application of the regulatory framework and to increase their authority and the predictability of their decisions. To this end, express provision should be made in national law to ensure that, in the exercise of its tasks, a national regulatory authority responsible for *ex-ante* market regulation or for resolution of disputes between undertakings is protected against external intervention or political pressure liable to jeopardise its independent assessment of matters coming before it. Such outside influence makes a national legislative body unsuited to act as a national regulatory authority under the regulatory framework. For that purpose, rules should be laid down at the outset regarding the grounds for the dismissal of the head of the national regulatory authority in order to remove any reasonable doubt as to the neutrality of that body and its imperviousness to external factors. It is important that national regulatory authorities responsible for *ex-ante* market regulation should have their own budget allowing them, in particular, to recruit a sufficient number of qualified staff. In order to ensure transparency, this budget should be published annually.

- (14) In order to ensure legal certainty for market players, appeal bodies should carry out their functions effectively; in particular, appeals proceedings should not be unduly lengthy. Interim measures suspending the effect of the decision of a national regulatory authority should be granted only in urgent cases in order to prevent serious and irreparable damage to the party applying for those measures and if the balance of interests so requires.
- (15) There has been a wide divergence in the manner in which appeal bodies have applied interim measures to suspend the decisions of the national regulatory authorities. In order to achieve greater consistency of approach common standards should be applied in line with Community case-law. Appeal bodies should also be entitled to request available information published by BEREC. Given the importance of appeals for the overall operation of the regulatory framework, a mechanism should be set up for collecting information on appeals and decisions to suspend decisions taken by the regulatory authorities in all the Member States and for the reporting of that information to the Commission.
- (16) In order to ensure that national regulatory authorities carry out their regulatory tasks in an effective manner, the data which they gather should include accounting data on the retail markets that are associated with wholesale markets where an operator has significant market power and as such are regulated by the national regulatory authority. The data should also include data which enables the national regulatory authority to assess the possible impact of planned upgrades or changes to network topology on the development of competition or on wholesale products made available to other parties.
- (17) The national consultation provided for under Article 6 of Directive 2002/21/EC (Framework Directive) should be conducted prior to the Community consultation provided for under Articles 7 and 7a of that Directive, in order to allow the views of interested parties to be reflected in the Community consultation. This would also avoid the need for a second Community consultation in the event of changes to a planned measure as a result of the national consultation.
- (18) The discretion of national regulatory authorities needs to be reconciled with the development of consistent regulatory practices and the consistent application of the regulatory framework in order to contribute effectively to the development and completion of the internal market. National regulatory authorities should therefore support the internal market activities of the Commission and those of BEREC.
- (19) The Community mechanism allowing the Commission to require national regulatory authorities to withdraw planned measures concerning market definition and the designation of operators having significant market power has contributed significantly to a consistent approach in identifying the circumstances in which *ex-ante* regulation may be applied and those in which the operators are subject to such regulation. Monitoring of the market by the Commission and, in particular, the experience of the procedure under Article 7 of Directive 2002/21/EC (Framework Directive), has shown that inconsistencies in the national regulatory authorities' application of remedies, even under similar market conditions, could undermine the internal market in electronic communications. Therefore the Commission may participate in ensuring a higher level

of consistency in the application of remedies by adopting opinions on draft measures proposed by national regulatory authorities. In order to benefit from the expertise of national regulatory authorities on the market analysis, the Commission should consult BEREC prior to adoption of its decisions and/or opinion.

- (20) It is important that the regulatory framework is implemented in a timely manner. When the Commission has taken a decision requiring a national regulatory authority to withdraw a planned measure, national regulatory authorities should submit a revised measure to the Commission. A deadline should be laid down for the notification of the revised measure to the Commission under Article 7 of Directive 2002/21/EC (Framework Directive) in order to allow market players to know the duration of the market review and in order to increase legal certainty.
- (21) Having regard to the short time limits in the Community consultation mechanism, powers should be conferred on the Commission to adopt recommendations and/or guidelines to simplify the procedures for exchanging information between the Commission and national regulatory authorities, for example in cases concerning stable markets, or involving only minor changes to previously notified measures. Powers should also be conferred on the Commission in order to allow for the introduction of a notification exemption so as to streamline procedures in certain cases.
- (22) In line with the objectives of the Charter of Fundamental Rights of the European Union and the United Nations Convention on the Rights of Persons with Disabilities, the regulatory framework should ensure that all users, including disabled end-users, the elderly, and users with special social needs, have easy access to affordable high quality services. Declaration 22 annexed to the final Act of Amsterdam provides that the institutions of the Community shall take account of the needs of persons with a disability in drawing up measures under Article 95 of the Treaty.
- (23) A competitive market provides users with a wide choice of content, applications and services. National regulatory authorities should promote users' ability to access and distribute information and to run applications and services.
- (24) Radio frequencies should be considered a scarce public resource that has an important public and market value. It is in the public interest that spectrum is managed as efficiently and effectively as possible from an economic, social and environmental perspective, taking account of the important role of radio spectrum for electronic communications, of the objectives of cultural diversity and media pluralism, and of social and territorial cohesion. Obstacles to its efficient use should therefore be gradually withdrawn.
- (25) Radio spectrum policy activities in the Community should be without prejudice to measures taken at Community or national level, in accordance with Community law, to pursue general interest objectives, in particular with regard to content regulation and audiovisual and media policies, and the right of Member States to organise and use their radio spectrum for the purposes of public order, public security and defence.
- (26) Taking into account the different situation in Member States, the switchover from analogue to digital terrestrial television would, as a result of the superior transmission

efficiency of digital technology, increase the availability of valuable spectrum in the Community (known as the 'digital dividend').

- (27) Before a specific harmonisation measure under Decision No 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision)⁽¹¹⁾ is proposed, the Commission should carry out an impact assessment on the costs and benefits of the proposed measure, such as the realisation of economies of scale and the interoperability of services for the benefit of consumers, the impact on efficiency of spectrum use, or the demand for harmonised use in the different parts of the European Union.
- (28) Although spectrum management remains within the competence of the Member States, strategic planning, coordination and, where appropriate, harmonisation at Community level can help ensure that spectrum users derive the full benefits of the internal market and that EU interests can be effectively defended globally. For these purposes, where appropriate, legislative multiannual radio spectrum policy programmes should be established to set out the policy orientations and objectives for the strategic planning and harmonisation of the use of radio spectrum in the Community. These policy orientations and objectives may refer to the availability and efficient use of radio spectrum necessary for the establishment and functioning of the internal market and may also refer, in appropriate cases, to the harmonisation of procedures for the granting of general authorisations or individual rights of use for radio frequencies where necessary to overcome barriers to the internal market. These policy orientations and objectives should be in accordance with this Directive and the Specific Directives.
- (29) The Commission has indicated its intention to amend, before the entry into force of this Directive, Commission Decision 2002/622/EC of 26 July 2002 establishing a Radio Spectrum Policy Group⁽¹²⁾ in order to provide a mechanism for the European Parliament and the Council to request opinions or reports, either orally or in writing, from the Radio Spectrum Policy Group (RSPG) on spectrum policy relating to electronic communications, and in order for RSPG to advise the Commission on the proposed content of the radio spectrum policy programmes.
- (30) The spectrum management provisions of this Directive should be consistent with the work of international and regional organisations dealing with radio spectrum management, such as the International Telecommunications Union (ITU) and the European Conference of Postal and Telecommunications Administrations (CEPT), so as to ensure the efficient management of and harmonisation of the use of spectrum across the Community and between the Member States and other members of the ITU.
- (31) Radio frequencies should be managed so as to ensure that harmful interference is avoided. This basic concept of harmful interference should therefore be properly defined to ensure that regulatory intervention is limited to the extent necessary to prevent such interference.
- (32) The current spectrum management and distribution system is generally based on administrative decisions that are insufficiently flexible to cope with technological and economic evolution, in particular with the rapid development of wireless technology

and the increasing demand for bandwidth. The undue fragmentation amongst national policies results in increased costs and lost market opportunities for spectrum users, and slows down innovation, to the detriment of the internal market, consumers and the economy as a whole. Moreover, the conditions for access to, and use of, radio frequencies may vary according to the type of operator, while electronic services provided by these operators increasingly overlap, thereby creating tensions between rights holders, discrepancies in the cost of access to spectrum, and potential distortions in the functioning of the internal market.

- (33) National borders are increasingly irrelevant in determining optimal radio spectrum use. Fragmentation of the management of access to spectrum rights limits investment and innovation and does not allow operators and equipment manufacturers to realise economies of scale, thereby hindering the development of an internal market for electronic communications networks and services using radio spectrum.
- (34) Flexibility in spectrum management and access to spectrum should be increased through technology and service-neutral authorisations to allow spectrum users to choose the best technologies and services to apply in frequency bands declared available for electronic communications services in the relevant national frequency allocation plans in accordance with Community law (the ‘principles of technology and service neutrality’). The administrative determination of technologies and services should apply when general interest objectives are at stake and should be clearly justified and subject to regular periodic review.
- (35) Restrictions on the principle of technology neutrality should be appropriate and justified by the need to avoid harmful interference, for example by imposing emission masks and power levels, to ensure the protection of public health by limiting public exposure to electromagnetic fields, to ensure the proper functioning of services through an adequate level of technical quality of service, while not necessarily precluding the possibility of using more than one service in the same frequency band, to ensure proper sharing of spectrum, in particular where its use is only subject to general authorisations, to safeguard efficient use of spectrum, or to fulfil a general interest objective in conformity with Community law.
- (36) Spectrum users should also be able to freely choose the services they wish to offer over the spectrum subject to transitional measures to deal with previously acquired rights. On the other hand, measures should be allowed which require the provision of a specific service to meet clearly defined general interest objectives such as safety of life, the need to promote social, regional and territorial cohesion, or the avoidance of the inefficient use of spectrum to be permitted where necessary and proportionate. Those objectives should include the promotion of cultural and linguistic diversity and media pluralism as defined by Member States in conformity with Community law. Except where necessary to protect safety of life or, exceptionally, to fulfil other general interest objectives as defined by Member States in accordance with Community law, exceptions should not result in certain services having exclusive use, but should rather grant them priority so that, in so far as possible, other services or technologies may coexist in the same band.

- (37) It lies within the competence of the Member States to define the scope and nature of any exception regarding the promotion of cultural and linguistic diversity and media pluralism.
- (38) As the allocation of spectrum to specific technologies or services is an exception to the principles of technology and service neutrality and reduces the freedom to choose the service provided or technology used, any proposal for such allocation should be transparent and subject to public consultation.
- (39) In the interests of flexibility and efficiency, national regulatory authorities may allow spectrum users freely to transfer or lease their usage rights to third parties. This would allow spectrum valuation by the market. In view of their power to ensure effective use of spectrum, national regulatory authorities should take action so as to ensure that trading does not lead to a distortion of competition where spectrum is left unused.
- (40) The introduction of technology and service neutrality and trading for existing spectrum usage rights may require transitional rules, including measures to ensure fair competition, as the new system may entitle certain spectrum users to start competing with spectrum users having acquired their spectrum rights under more burdensome terms and conditions. Conversely, where rights have been granted as a derogation from the general rules or according to criteria other than those which are objective, transparent, proportionate and non-discriminatory with a view to achieving a general interest objective, the situation of the holders of such rights should not in an unjustified manner be to the detriment of their new competitors beyond what is necessary to achieve that general interest objective or another related general interest objective.
- (41) In order to promote the functioning of the internal market and to support the development of cross-border services, the Commission should be given the power to adopt technical implementing measures in the field of numbering.
- (42) Permits issued to undertakings providing electronic communications networks and services allowing them to gain access to public or private property are essential factors for the establishment of electronic communications networks or new network elements. Unnecessary complexity and delay in the procedures for granting rights of way may therefore represent important obstacles to the development of competition. Consequently, the acquisition of rights of way by authorised undertakings should be simplified. National regulatory authorities should be able to coordinate the acquisition of rights of way, making relevant information accessible on their websites.
- (43) It is necessary to strengthen the powers of the Member States as regards holders of rights of way to ensure the entry or roll-out of a new network in a fair, efficient and environmentally responsible way and independently of any obligation on an operator with significant market power to grant access to its electronic communications network. Improving facility sharing can significantly improve competition and lower the overall financial and environmental cost of deploying electronic communications infrastructure for undertakings, particularly of new access networks. National regulatory authorities should be empowered to require that the holders of the rights to install facilities on, over or under public or private property share such facilities or property (including

physical co-location) in order to encourage efficient investment in infrastructure and the promotion of innovation, after an appropriate period of public consultation, during which all interested parties should be given the opportunity to state their views. Such sharing or coordination arrangements may include rules for apportioning the costs of the facility or property sharing and should ensure that there is an appropriate reward of risk for the undertakings concerned. National regulatory authorities should in particular be able to impose the sharing of network elements and associated facilities, such as ducts, conduits, masts, manholes, cabinets, antennae, towers and other supporting constructions, buildings or entries into buildings, and a better coordination of civil works. The competent authorities, particularly local authorities, should also establish appropriate coordination procedures, in cooperation with national regulatory authorities, with respect to public works and other appropriate public facilities or property which may include procedures that ensure that interested parties have information concerning appropriate public facilities or property and on-going and planned public works, that they are notified in a timely manner of such works, and that sharing is facilitated to the maximum extent possible.

- (44) Reliable and secure communication of information over electronic communications networks is increasingly central to the whole economy and society in general. System complexity, technical failure or human mistake, accidents or attacks may all have consequences for the functioning and availability of the physical infrastructures that deliver important services to EU citizens, including e-Government services. National regulatory authorities should therefore ensure that the integrity and security of public communications networks are maintained. The European Network and Information Security Agency (ENISA)⁽¹³⁾ should contribute to the enhanced level of security of electronic communications by, among other things, providing expertise and advice, and promoting the exchange of best practices. Both ENISA and the national regulatory authorities should have the necessary means to perform their duties, including powers to obtain sufficient information in order to assess the level of security of networks or services as well as comprehensive and reliable data about actual security incidents that have had a significant impact on the operation of networks or services. Bearing in mind that the successful application of adequate security is not a one-off exercise but a continuous process of implementation, review and updating, the providers of electronic communications networks and services should be required to take measures to safeguard their integrity and security in accordance with the assessed risks, taking into account the state of the art of such measures.
- (45) Member States should allow an appropriate period of public consultation before the adoption of specific measures to ensure that undertakings providing public communications networks or publicly available electronic communications services take the necessary technical and organisational measures to appropriately manage risk to security of networks and services or to ensure the integrity of their networks.
- (46) Where there is a need to agree on a common set of security requirements, power should be conferred on the Commission to adopt technical implementing measures to achieve an adequate level of security of electronic communications networks and services in the internal market. ENISA should contribute to the harmonisation of

appropriate technical and organisational security measures by providing expert advice. National regulatory authorities should have the power to issue binding instructions relating to technical implementing measures adopted pursuant to Directive 2002/21/EC (Framework Directive). In order to perform their duties, they should have the power to investigate cases of non-compliance and to impose penalties.

- (47) For the purposes of ensuring that there is no distortion or restriction of competition in the electronic communications markets, national regulatory authorities should be able to impose remedies aimed at preventing leverage of significant market power from one market to another closely related market. It should be clear that the undertaking which has significant market power on the first market may be designated as having significant market power on the second market only if the links between the two markets are such as to allow the market power held in the first market to be leveraged into the second market and if the second market is susceptible to *ex-ante* regulation in accordance with the criteria defined in the Recommendation on relevant product and service markets⁽¹⁴⁾.
- (48) In order to provide market players with certainty as to regulatory conditions, a time limit for market reviews is necessary. It is important to conduct a market analysis on a regular basis and within a reasonable and appropriate time-frame. The time-frame should take account of whether the particular market has previously been subject to market analysis and duly notified. Failure by a national regulatory authority to analyse a market within the time limit may jeopardise the internal market, and normal infringement proceedings may not produce their desired effect on time. Alternatively, the national regulatory authority concerned should be able to request the assistance of BEREC to complete the market analysis. For instance, this assistance could take the form of a specific task force composed of representatives of other national regulatory authorities.
- (49) Due to the high level of technological innovation and highly dynamic markets in the electronic communications sector, there is a need to adapt regulation rapidly in a coordinated and harmonised way at Community level, as experience has shown that divergence among the national regulatory authorities in the implementation of the EU regulatory framework may create a barrier to the development of the internal market.
- (50) One important task assigned to BEREC is to adopt opinions in relation to cross-border disputes where appropriate. National regulatory authorities should therefore take account of any opinions of BEREC in such cases.
- (51) Experience in the implementation of the EU regulatory framework indicates that existing provisions empowering national regulatory authorities to impose fines have failed to provide an adequate incentive to comply with regulatory requirements. Adequate enforcement powers can contribute to the timely implementation of the EU regulatory framework and therefore foster regulatory certainty, which is an important driver for investment. The lack of effective powers in the event of non-compliance applies across the regulatory framework. The introduction of a new provision in Directive 2002/21/EC (Framework Directive) to deal with breaches of obligations under the Framework Directive and Specific Directives should therefore ensure the application of consistent and coherent principles to enforcement and penalties for the whole EU regulatory framework.

- (52) The existing EU regulatory framework includes certain provisions to facilitate the transition from the old regulatory framework of 1998 to the new 2002 framework. This transition has been completed in all Member States and these measures should be repealed as they are now redundant.
- (53) Both efficient investment and competition should be encouraged in tandem, in order to increase economic growth, innovation and consumer choice.
- (54) Competition can best be fostered through an economically efficient level of investment in new and existing infrastructure, complemented by regulation, wherever necessary, to achieve effective competition in retail services. An efficient level of infrastructure-based competition is the extent of infrastructure duplication at which investors can reasonably be expected to make a fair return based on reasonable expectations about the evolution of market shares.
- (55) National regulatory authorities should, when imposing obligations for access to new and enhanced infrastructures, ensure that access conditions reflect the circumstances underlying the investment decision, taking into account, inter alia, the roll-out costs, the expected rate of take up of the new products and services and the expected retail price levels. Moreover, in order to provide planning certainty to investors, national regulatory authorities should be able to set, if applicable, terms and conditions for access which are consistent over appropriate review periods. Such terms and conditions may include pricing arrangements which depend on volumes or length of contract in accordance with Community law and provided they have no discriminatory effect. Any access conditions imposed should respect the need to preserve effective competition in services to consumers and businesses.
- (56) When assessing the proportionality of the obligations and conditions to be imposed, national regulatory authorities should take into account the different competitive conditions existing in the different areas within their Member States.
- (57) When imposing remedies to control prices, national regulatory authorities should seek to allow a fair return for the investor on a particular new investment project. In particular, there may be risks associated with investment projects specific to new access networks which support products for which demand is uncertain at the time the investment is made.
- (58) Any Commission decision under Article 19(1) of Directive 2002/21/EC (Framework Directive) should be limited to regulatory principles, approaches and methodologies. For the avoidance of doubt, it should not prescribe detail which will normally need to reflect national circumstances, and it should not prohibit alternative approaches which can reasonably be expected to have equivalent effect. Such a decision should be proportionate and should not have an effect on decisions taken by national regulatory authorities that do not create a barrier to the internal market.
- (59) Annex I to Directive 2002/21/EC (Framework Directive) identified the list of markets to be included in the Recommendation on relevant product and service markets which may warrant *ex-ante* regulation. This Annex should be repealed since its purpose of

serving as a basis for drawing up the initial version of the Recommendation on Relevant Product and Service Markets has been fulfilled.

- (60) It may not be economically viable for new entrants to duplicate the incumbent's local access network in part or in its entirety within a reasonable period of time. In this context, mandating unbundled access to the local loop or sub-loop of operators enjoying significant market power may facilitate market entry and increase competition in retail broadband access markets. In circumstances where unbundled access to local loop or sub-loop is not technically or economically feasible, relevant obligations for the provision of non-physical or virtual network access offering equivalent functionality may apply.
- (61) The purpose of functional separation, whereby the vertically integrated operator is required to establish operationally separate business entities, is to ensure the provision of fully equivalent access products to all downstream operators, including the operator's own vertically integrated downstream divisions. Functional separation has the capacity to improve competition in several relevant markets by significantly reducing the incentive for discrimination and by making it easier to verify and enforce compliance with non-discrimination obligations. In exceptional cases, functional separation may be justified as a remedy where there has been persistent failure to achieve effective non-discrimination in several of the markets concerned, and where there is little or no prospect of infrastructure competition within a reasonable time-frame after recourse to one or more remedies previously considered to be appropriate. However, it is very important to ensure that its imposition preserves the incentives of the concerned undertaking to invest in its network and that it does not entail any potential negative effects on consumer welfare. Its imposition requires a coordinated analysis of different relevant markets related to the access network, in accordance with the market analysis procedure set out in Article 16 of Directive 2002/21/EC (Framework Directive). When undertaking the market analysis and designing the details of this remedy, national regulatory authorities should pay particular attention to the products to be managed by the separate business entities, taking into account the extent of network roll-out and the degree of technological progress, which may affect the substitutability of fixed and wireless services. In order to avoid distortions of competition in the internal market, proposals for functional separation should be approved in advance by the Commission.
- (62) The implementation of functional separation should not prevent appropriate coordination mechanisms between the different separate business entities in order to ensure that the economic and management supervision rights of the parent company are protected.
- (63) Continued integration of the internal market for electronic communications networks and services requires better coordination in the application of the *ex-ante* regulation provided for under the EU regulatory framework for electronic communications.
- (64) Where a vertically integrated undertaking chooses to transfer a substantial part or all of its local access network assets to a separate legal entity under different ownership or by establishing a separate business entity for dealing with access products, the national regulatory authority should assess the effect of the intended transaction on

all existing regulatory obligations imposed on the vertically integrated operator in order to ensure the compatibility of any new arrangements with Directive 2002/19/EC (Access Directive) and Directive 2002/22/EC (Universal Service Directive). The national regulatory authority concerned should undertake a new analysis of the markets in which the segregated entity operates, and impose, maintain, amend or withdraw obligations accordingly. To this end, the national regulatory authority should be able to request information from the undertaking.

- (65) While it is appropriate in some circumstances for a national regulatory authority to impose obligations on operators that do not have significant market power in order to achieve goals such as end-to-end connectivity or interoperability of services, it is however necessary to ensure that such obligations are imposed in conformity with the EU regulatory framework and, in particular, its notification procedures.
- (66) The Commission should be empowered to adopt implementing measures with a view to adapting the conditions for access to digital television and radio services set out in Annex I to market and technological developments. This is also the case for the minimum list of items in Annex II that must be made public to meet the obligation of transparency.
- (67) Facilitating access to radio frequency resources for market players will contribute to removing the barriers to market entry. Moreover, technological progress is reducing the risk of harmful interference in certain frequency bands and therefore reducing the need for individual rights of use. Conditions for the use of spectrum to provide electronic communication services should therefore normally be laid down in general authorisations unless individual rights are necessary, considering the use of the spectrum, to protect against harmful interference, to ensure technical quality of service, to safeguard efficient use of the spectrum or to meet a specific general interest objective. Decisions on the need for individual rights should be made in a transparent and proportionate manner.
- (68) The introduction of the requirements of service and technology neutrality in granting rights of use, together with the increased possibility to transfer rights between undertakings, should increase the freedom and means to deliver electronic communications services to the public, thereby also facilitating the achievement of general interest objectives. However, certain general interest obligations imposed on broadcasters for the delivery of audiovisual media services may require the use of specific criteria for the granting of rights of use when it appears to be essential to meet a specific general interest objective set out by Member States in conformity with Community law. Procedures associated with the pursuit of general interest objectives should in all circumstances be transparent, objective, proportionate and non-discriminatory.
- (69) Considering its restrictive impact on free access to radio frequencies, the validity of an individual right of use that is not tradable should be limited in time. Where rights of use contain provision for renewing their validity, competent national authorities should first carry out a review, including a public consultation, taking into account market, coverage and technological developments. In view of spectrum scarcity, individual rights granted

to undertakings should be regularly reviewed. In carrying out this review, competent national authorities should balance the interests of the rights holders with the need to foster the introduction of spectrum trading as well as the more flexible use of spectrum through general authorisations where possible.

- (70) Minor amendments to rights and obligations are those amendments which are mainly administrative, do not change the substantial nature of the general authorisations and the individual rights of use and thus cannot cause any comparative advantage to the other undertakings.
- (71) Competent national authorities should have the power to ensure effective use of spectrum and, where spectrum resources are left unused, to take action to prevent anti-competitive hoarding, which can hinder new market entry.
- (72) National regulatory authorities should be able to take effective action to monitor and secure compliance with the terms and conditions of the general authorisation or of rights of use, including the power to impose effective financial or administrative penalties in the event of breaches of those terms and conditions.
- (73) The conditions that may be attached to authorisations should cover specific conditions governing accessibility for users with disabilities and the need of public authorities and emergency services to communicate between themselves and with the general public before, during and after major disasters. Also, considering the importance of technical innovation, Member States should be able to issue authorisations to use spectrum for experimental purposes, subject to specific restrictions and conditions strictly justified by the experimental nature of such rights.
- (74) Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop⁽¹⁵⁾ has proved to be effective in the initial stage of market opening. Directive 2002/21/EC (Framework Directive) calls upon the Commission to monitor the transition from the regulatory framework of 1998 to the 2002 framework and to bring forward proposals to repeal that Regulation at an appropriate time. Under the 2002 framework, national regulatory authorities have a duty to analyse the market for wholesale unbundled access to metallic loops and sub-loops for the purpose of providing broadband and voice services as defined in the Recommendation on Relevant Product and Service Markets. Since all Member States have analysed this market at least once and the appropriate obligations based on the 2002 framework are in place, Regulation (EC) No 2887/2000 has become unnecessary and should therefore be repealed.
- (75) Measures necessary for the implementation of Directive 2002/21/EC (Framework Directive), Directive 2002/19/EC (Access Directive) and Directive 2002/20/EC (Authorisation Directive) should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission⁽¹⁶⁾.
- (76) In particular, the Commission should be empowered to adopt Recommendations and/or implementing measures in relation to the notifications under Article 7 of Directive 2002/21/EC (Framework Directive); harmonisation in the fields of spectrum and

numbering as well as in matters related to security of networks and services; the identification of the relevant product and service markets; the identification of transnational markets; the implementation of standards and the harmonised application of the provisions of the regulatory framework. Power should also be conferred on the Commission to adopt implementing measures to update Annexes I and II to the Access Directive to market and technological developments. Since those measures are of general scope and are designed to amend non-essential elements of these Directives, inter alia, by supplementing them with new non-essential elements, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC,

HAVE ADOPTED THIS DIRECTIVE:

- (1) [OJ C 224, 30.8.2008, p. 50.](#)
- (2) [OJ C 257, 9.10.2008, p. 51.](#)
- (3) Opinion of the European Parliament of 24 September 2008 (not yet published in the Official Journal), Council Common Position of 16 February 2009 ([OJ C 103 E, 5.5.2009, p. 1](#)), Position of the European Parliament of 6 May 2009, Council Decision of 20 November 2009 and Legislative Resolution of the European Parliament of 24 November 2009.
- (4) [OJ L 108, 24.4.2002, p. 33.](#)
- (5) [OJ L 108, 24.4.2002, p. 7.](#)
- (6) [OJ L 108, 24.4.2002, p. 21.](#)
- (7) [OJ L 108, 24.4.2002, p. 51.](#)
- (8) [OJ L 201, 31.7.2002, p. 37.](#)
- (9) See page 1 of this Official Journal.
- (10) [OJ L 91, 7.4.1999, p. 10.](#)
- (11) [OJ L 108, 24.4.2002, p. 1.](#)
- (12) [OJ L 198, 27.7.2002, p. 49.](#)
- (13) Regulation (EC) No 460/2004 of the European Parliament and of the Council ([OJ L 77, 13.3.2004, p. 1](#)).
- (14) Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex-ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services ([OJ L 114, 8.5.2003, p. 45](#)).
- (15) [OJ L 336, 30.12.2000, p. 4.](#)
- (16) [OJ L 184, 17.7.1999, p. 23.](#)