FINAL
CA1
Access

The CA covers Art 2(2)-(3), (8)-(13) and (28)-(31), 43-44, 57-73 excluding 59(3), 75-78, 114(1), Annex II-III and related recitals, excluding recital 142. All relevant AMs, including AMs 326, 335, 590-591, 716-1055 excluding 784-788, 1105-1109 as well as IMCO 119-125 (excluding deletion of emergency services in 59(1)), 16-18, CULT 11, 22, 42-43, 45-48, 61, LIBE 44, fall.

Recitals

(19) The network termination point represents a boundary for regulatory purposes between the regulatory framework for electronic communications networks and services and the regulation of telecommunication terminal equipment. Defining the location of the network termination point is the responsibility of the national regulatory authority. In the light of the practice of national regulatory authorities, and given the variety of fixed and wireless topologies, the Body of European Regulators for Electronic Communications ('BEREC') should, in close cooperation with the Commission, adopt guidelines on how to identify the network termination point, in accordance with this Directive, in various concrete circumstances.

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

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

(99) It is necessary to strengthen the powers of the Member States as regards holders of rights of way to ensure the entry or roll-out of a new network in a fair, efficient and environmentally responsible way and independently of any obligation on an operator with significant market power to grant access to its electronic communications network. Improving facility sharing can lower the environmental cost of deploying electronic communications infrastructure and serve public health, public security and meet town

and country planning objectives. Competent authorities should be empowered to require that the undertakings which have benefitted from rights to install facilities on, over or under public or private property share such facilities or property (including physical co-location) after an appropriate period of public consultation, during which all interested parties should be given the opportunity to state their views, in the specific areas where such general interest reasons impose such sharing. That can be the case for instance where the subsoil is highly congested or where a natural barrier needs to be crossed. Competent authorities should in particular be able to impose the sharing of network elements and associated facilities, such as ducts, conduits, masts, manholes, cabinets, antennae, towers and other supporting constructions, buildings or entries into buildings, and a better coordination of civil works on environmental or other public-policy grounds. On the contrary, it should be for national regulatory authorities to define rules for apportioning the costs of the facility or property sharing, to ensure that there is an appropriate reward of risk for the undertakings concerned. In the light of the obligations imposed by Directive 2014/61/EU, the competent authorities, particularly local authorities, should also establish appropriate coordination procedures, in cooperation with national regulatory authorities, with respect to public works and other appropriate public facilities or property which may include procedures that ensure that interested parties have information concerning appropriate public facilities or property and ongoing and planned public works, that they are notified in a timely manner of such works, and that sharing is facilitated to the maximum extent possible.

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

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

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

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

(132) In markets where there continue to be large differences in negotiating power between undertakings, and where some undertakings rely on infrastructure provided by others for delivery of their services, it is appropriate to establish a framework to ensure that the

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

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

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

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

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

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

(138) In case such interoperability issues arise, the Commission may request a BEREC report which should provide a factual assessment of the market situation at the Union and Member States level. On the basis of the BEREC report and other available evidence and taking into account the effects on the internal market, the Commission should decide whether there is a need for regulatory intervention by national regulatory authorities. If the Commission considers that such regulatory intervention should be considered by National Regulatory Authorities, it may adopt implementing measures specifying the nature and scope of possible regulatory interventions by NRAs, including in particular measures to impose the mandatory use of standards or specifications on all or specific providers. The terms 'European standards' and 'international standards' are defined in

Article 2 of Regulation (EU) No 1025/2012.[1] National regulatory authorities should assess, in the light of the specific national circumstances, whether any intervention is necessary and justified to ensure end-to-end-connectivity or access to emergency services, and if so, impose proportionate obligations in accordance with the Commission implementing measures. ***To avoid creating barriers in the internal market, Member States should not impose obligations in addition to any such implementing measures.***[2]

(139) In situations where undertakings are deprived of access to viable alternatives to non-replicable assets up to the first distribution point ***and in order to promote competitive outcomes in the interest of end-user***,[3] national regulatory authorities should be empowered to impose access obligations to all operators, without prejudice to their respective market power. In this regard, national regulatory authorities should take into consideration all technical and economic barriers to future replication of networks. ***However as such obligations can be intrusive, undermine incentives for investments, and have the counterproductive effect of strengthening the position of dominant players, they should be taken only where justified and proportionate to achieving sustainable competition in the relevant markets.***[4] The mere fact that more than one such infrastructure already exists should not necessarily be interpreted as showing that its assets are replicable. The first distribution point should be identified by reference to objective criteria.

(139a) It should be possible to impose obligations to provide access to related complementary services, i.e. accessibility services to enable appropriate access for disabled end-users and data supporting connected television services and electronic programming guides, to the extent necessary to ensure accessibility for end-users of certain broadcasting services.[5]

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

(141) In such cases, in order to comply with the principle of proportionality, it can be appropriate for national regulatory authorities to exclude obligations going beyond the first distribution point, on the grounds that an access obligation not based on significant market power would risk compromising ***the*** business case for recently deployed network elements ***or due to the presence of viable alternative means of access suitable for the provision of very high capacity networks***.[6]

(143) While it is appropriate in some circumstances for a national regulatory authority to impose obligations on operators that do not have significant market power in order to achieve goals such as end-to-end connectivity or interoperability of services, it is

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

[2] AM 230 Kallas (amended). DLA input.

[3] AM 233/234 Kumpula-Natri/Reimon (part, as amended). DLA input.

[4] AM 235 Kallas (amended). DLA input.

[5] As discussed 7/7 techmeet. Relates to 59(1)(d)

[6] DR AM 18. As aligned to agreed text of 59(2).

however necessary to ensure that such obligations are imposed in conformity with the regulatory framework and, in particular, its notification procedures.

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

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

(146) There is a need for ex ante obligations in certain circumstances in order to ensure the development of a competitive market, the conditions of which favour the deployment and take-up of very high capacity ***networks*** and the maximisation of end-user benefits. The definition of significant market power used in this Directive is equivalent to the concept of dominance as defined in the case law of the Court of Justice.[7]

(147) Two or more undertakings can be found to enjoy a joint dominant position not only where there exist structural or other links between them but also where the structure of the relevant market is conducive to coordinated effects, ***and enables them to behave to an appreciable extent independently of competitors, customers and ultimately consumers,*** that is, it encourages parallel or aligned anti-competitive behaviour on the market. ***Such a structure might be demonstrated by characteristics such as a high degree of concentration, a sufficient degree of market transparency which makes coordination or a common policy sustainable over time, and the existence of high barriers preventing entry from potential competitors and absence of choice preventing reaction from consumers. In the specific circumstances of ex ante regulation of electronic communications markets, where barriers to entry for new entrants are typically high, the refusal by network owners to provide wholesale access on reasonable terms which benefit competitive dynamics sustainably, observed or foreseen in the absence of ex ante regulation, in conjunction with a shared interest in sustaining significant rents on downstream or contiguous retail markets out of proportion to investments made and risks incurred, may be in itself an indicator of a common policy adopted by members of an uncompetitive oligopoly.***[8]

(148) It is essential that *ex ante* regulatory obligations should only be imposed on a wholesale market where there are one or more undertakings with significant market power, with a view to ensure sustainable competition ~~on a related retail market~~,[9] and where national and Union competition law remedies are not sufficient to address the problem. The Commission has drawn up guidelines at Union level in accordance with the principles of competition law for national regulatory authorities to follow in assessing whether

[7] DR AM 20. Justif: *In this case, "connectivity" clearly means "networks". Clarification is necessary as the text addresses obligations.*
[8] Shadows 11/7
[9] Art 3 CA alignment

competition is effective in a given market and in assessing significant market power. National regulatory authorities should analyse whether a given product or service market is effectively competitive in a given geographical area, which could be the whole or a part of the territory of the Member State concerned or neighbouring parts of territories of Member States considered together. An analysis of effective competition should include an analysis as to whether the market is prospectively competitive, and thus whether any lack of effective competition is durable. Those guidelines should also address the issue of newly emerging markets, where de facto the market leader is likely to have a substantial market share but should not be subjected to inappropriate obligations. The Commission should review the guidelines regularly, in particular on the occasion of a review of the existing legislation, taking into account evolving case law, economic thinking and actual market experience and with a view to ensuring that they remain appropriate in a rapidly developing market. National regulatory authorities will need to cooperate with each other where the relevant market is found to be transnational.

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

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

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

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

regulatory approaches to ensure that transnational demand can be met in a satisfactory way, ***providing a basis for wholesale access products across the Union*** and permitting efficiencies and economies of scale despite the fragmented supply side. BEREC's guidelines should shape the choices of national regulatory authorities in pursuing the internal market objective when imposing regulatory obligations on SMP operators at the national level.~~***deleted***~~[10]

(153) ***deleted***[11]

~~(154) The objective of any *ex ante* regulatory intervention is ultimately to produce benefits for end-users in terms of price, quality and choice by making retail markets effectively competitive on a sustainable basis. It is likely that national regulatory authorities will gradually be able to find many retail markets to be competitive even in the absence of wholesale regulation, especially taking into account expected improvements in innovation and competition.~~[12]

~~(155) For national regulatory authorities the starting point for the identification of wholesale markets susceptible to *ex ante* regulation is the analysis of corresponding retail markets. The analysis of effective competition at the retail and at the wholesale level is conducted from a forward-looking perspective over a given time horizon, and is guided by competition law, including the relevant case-law of the Court of Justice, as appropriate.~~[13] ~~If it is concluded that a retail markets would be effectively competitive in the absence of *ex ante* wholesale regulation on the corresponding relevant market(s), this should lead the national regulatory authority to conclude that regulation is no longer needed at the relevant wholesale level.~~[14]

(156) During the gradual transition to deregulated markets, commercial agreements**, *including for co-investment and access,***[15] between operators will gradually become more common, and if they are sustainable and improve competitive dynamics, they can contribute to the conclusion that a particular wholesale market does not warrant *ex ante* regulation. A similar logic would apply in reverse, to unforeseeable termination of commercial agreements on a deregulated market. The analysis of such agreements should take into account that the prospect of regulation can be a motive for network owners to enter into commercial negotiations. With a view to ensure adequate consideration of the impact of regulation imposed on related markets when determining whether a given market warrants *ex ante* regulation, national regulatory authorities should ensure markets are analysed in a coherent manner and where possible, at the same time or as close as possible to each other in time.

(157) When assessing wholesale regulation to solve problems at the retail level, national regulatory authorities should take into account that several wholesale markets can provide wholesale upstream inputs for a particular retail market, and conversely, one wholesale market can provide wholesale upstream inputs for a variety of retail markets. Furthermore, competitive dynamics in a particular market can be influenced by markets that are contiguous but not in a vertical relationship, such as can be the case between certain fixed and mobile markets. National regulatory authorities should conduct that

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[10] ~~DR AM 21. Justif: *In accordance with amendment deleting Article 64.*~~ Art 64 alignment

[11] DR AM 22. (Same justif as to AM 21.)

[12] Alignment to Art 3 CA

[13] First two sentences retained as per DLA suggestion. Cf recital 28 in CA7 General objectives for further DLA input.

[14] Alignment to Art 3 CA. Entirely moved to Art 3 CA (recital 28) following Shadows 11/7. 14/7 techmeet: Agreed to delegate to DLA to recommend distribution of text between this recital and recital 28 of the Art 3 CA (parts addressing wholesale v retail markets on the one hand, parts addressing market analysis procedure on the other)

[15] Cf fn 51

assessment for each individual wholesale market considered for regulation, starting with remedies for access to civil infrastructure, as such remedies are usually conducive to more sustainable competition including infrastructure competition, and thereafter analysing any wholesale markets considered susceptible to ex ante regulation in order of their likely suitability to address identified competition problems at retail level. When deciding on the specific remedy to be imposed, national regulatory authorities should assess its technical feasibility and carry out a cost-benefit analysis, having regard to its degree of suitability to address the identified competition problems at retail level***, and enabling competition based on differentiation and technological neutrality***.[16] National regulatory authorities should consider the consequences of imposing any specific remedy which, if feasible only on certain network topologies, could constitute a disincentive for the deployment of very high capacity networks in the interest of end-users. ***In addition, the national regulatory authorities should provide incentives through the remedies imposed, and, where possible, before the roll-out of infrastructure, for the development of flexible and open network architecture, which would reduce eventually the burden and complexity of remedies imposed at a later stage.***[17] At each stage of the assessment, before the national regulatory authority determines whether any additional***, more burdensome,*** remedy should be imposed on the significant market power operator, it should seek to determine whether the ***remedies already considered*** would ***suffice to make the ~~retail~~***[18]***market concerned*** effectively competitive***, also taking into account*** any relevant commercial arrangements or other wholesale market circumstances, including other types of regulation already in force, such as for example general access obligations to non-replicable assets or obligations imposed pursuant to Directive 2014/61/EU, and of any regulation already deemed appropriate by the national regulatory authority for an operator with significant market power. ***Such a staged assessment, aiminged ~~at~~ to ensure that only the ~~minimum, least burdensome,~~ most appropriate remedies necessary to effectively address any problems identified in the market analysis are imposed, does not preclude a national regulatory authority from finding that a mix of such remedies together, even if of differing intensity, offers the least intrusive way of addressing the problem.***[19] Even if such differences do not result in the definition of distinct geographic markets, they may justify differentiation in the appropriate remedies imposed in light of the differing intensity of competitive constraints. ***~~The obligations set out in Articles 67 to 75 of this Directive represent a scale of obligations ranking from the least burdensome, obligations of transparency, to the most burdensome, functional separation.~~***[20]21

(158) *Ex ante* regulation imposed at the wholesale level, which is in principle less intrusive than retail regulation, is considered sufficient to tackle potential competition problems on the related downstream retail market or markets. The advances in the functioning of competition since the regulatory framework for electronic communications has been in place are demonstrated by the progressive deregulation of retail markets across the Union. Further, the rules relating to the imposition of *ex ante* remedies on undertakings with significant market power should be simplified and be made more predictable, where possible. Therefore, the power of imposition of *ex ante* regulatory controls based on significant market power in retail markets should be repealed.[22]

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[16] 252 Kallas (part)
[17] id. DLA input
[18] Art 3 CA alignment
[19] As discussed 7/7. Shadows 11/7. DLA input
[20] ~~DR AM 23~~
[21] Shadows 11/7. DLA input
[22] Linked to COM proposed deletion of USD Art 17. Exclusive IMCO competence.

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

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

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

(162) However, in the interest of greater stability and predictability of regulatory measures, the maximum period allowed between market analyses should be extended from three to five years ***in the case of stable or predictable markets***, provided market changes in the intervening period do not require a new analysis. In determining whether a national regulatory authority has complied with its obligation to analyse markets and notified the corresponding draft measure at a minimum every five years, only a notification including a new assessment of the market definition and of significant market power will be considered as starting a new five-year market cycle. A mere notification of new or amended regulatory remedies, imposed on the basis of a previous and unrevised market analysis will not be considered to have satisfied that obligation. ***In the case of dynamic markets, the maximum period allowed between ~~for~~ market analyses should, however, remain three years. A market should be considered to be dynamic where the parameters used to determine whether to impose or remove obligations, including technological evolution and end-user demand patterns, are not unlikely to evolve in such a way that the conclusions of the analysis could change in periods of less than one year for a significant number of geographic areas representing at least 10% of the market.***[23]

(163) The imposition of a specific obligation on an undertaking with significant market power does not require an additional market analysis but a justification that the obligation in question is appropriate and proportionate in relation to the nature of the problem identified on the market in question~~, and on the related retail market~~.[24]

[23] DR AM 24. DLA input
[24] Art 3 CA alignment

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

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

(166) Reviews of obligations imposed on operators designated as having significant market power during the timeframe of a market analysis should allow national regulatory authorities to take into account the impact on competitive conditions of new developments, for instance of newly concluded voluntary agreements between operators, such as access and co-investment agreements, thus providing the flexibility which is particularly necessary in the context of longer regulatory cycles. A similar logic should apply in case of unforeseeable termination of commercial agreements. If such termination occurs in a deregulated market, a new market analysis may be necessary. ~~***Equally, national regulatory authorities should be obliged to consider the effects of new developments on the request of an operator, including with respect to evaluating the impact of planned developments. Furthermore, in order to accelerate effectiveness of this Directive and align market reviews and their periodicity across the Union, national regulatory authorities should be obliged to reassess existing obligations on the basis of this Directive within a period of six months after the date for transposition set out herein. In addition, to avoid negative effects of market review cycles being delayed beyond the extension permissible under this Directive, any obligations imposed pursuant to a prior market review should lapse where the subsequent market review is not conducted in time.***~~[25]

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

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

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

(170) In order to address and prevent non-price related discriminatory behaviour, equivalence of inputs (EoI) is in principle the surest way to achieve effective protection from

[25] DR AM 25. Alignment to substantive agreement

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

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

(172) Civil engineering assets that can host an electronic communications network are crucial for the successful roll-out of new ~~very high capacity~~ networks because of the high cost of duplicating them, and the significant savings that can be made when they can be reused. Therefore, in addition to the rules on physical infrastructure laid down in Directive 2014/61/EU, a specific remedy is necessary in those circumstances where civil engineering assets are owned by an operator designated with significant market power. Where civil engineering assets exist and are reusable, the positive effect of achieving effective access to them on the roll-out of competing infrastructure is very high, and it is therefore necessary to ensure that access to such assets can be used as a self-standing remedy for the improvement of competitive and deployment dynamics in any downstream market, to be considered before assessing the need to impose any other potential remedies, and not just as an ancillary remedy to other wholesale products or services or as a remedy limited to undertakings availing of such other wholesale products or services. ***An existing asset should not be considered to be available for reuse where technical or physical constraints prevent functional access to it.***[26] National regulatory authorities should value reusable legacy civil engineering assets on the basis of the regulatory accounting value net of the accumulated depreciation at the time of calculation, indexed by an appropriate price index, such as the retail price index, and excluding those assets which are fully depreciated, over a period of not less than 40 years, but still in use.[27]

(173) National regulatory authorities should, when imposing obligations for access to new and enhanced infrastructures, ensure that access conditions reflect the circumstances underlying the investment decision, taking into account, *inter alia*, the roll-out costs, the expected rate of take up of the new products and services and the expected retail price levels. Moreover, in order to provide planning certainty to investors, national regulatory authorities should be able to set, if applicable, terms and conditions for access which are consistent over appropriate review periods. In the event that price controls are deemed appropriate, such terms and conditions can include pricing arrangements which depend

[26] AM 892 Kallas, partly (amended, moved). Amended as per 7/7 discussion. DLA input

[27] DR AM 26. Justif: *Access to civil engineering assets can be valuable with respect to deployment of all types of networks, and the corresponding Article 70 is not limited to very high capacity networks.*

on volumes or length of contract in accordance with Union law and provided they have no discriminatory effect. Any access conditions imposed should respect the need to preserve effective competition in services to consumers and businesses.

(174) Mandating access to network infrastructure***, such as dark fibre,***[28] can be justified as a means of increasing competition, but national regulatory authorities need to balance the rights of an infrastructure owner to exploit its infrastructure for its own benefit, and the rights of other service providers to access facilities that are essential for the provision of competing services.

~~(175) In geographic areas where two access networks can be expected on a forward-looking basis, end-users are more likely to benefit from improvements in network quality, by virtue of infrastructure-based competition, than in areas where only one network persists. The adequacy of competition on other parameters, such as price and choice, is likely to depend on the national and local competitive circumstances. Where at least one of the network operators offers wholesale access to any interested undertaking on reasonable commercial terms permitting sustainable competition on the retail market, national regulatory authorities are unlikely to need to impose or maintain SMP-based wholesale access obligations, beyond access to civil infrastructure, therefore reliance can be placed on the application of general competition rules. This applies *a fortiori* if both network operators offer reasonable commercial wholesale access. In both such cases, it may be more appropriate for national regulatory authorities to rely on specific monitoring on an *ex post* basis. Where on a forward-looking basis, three access network operators are present or are expected to be present and to sustainably compete in the same retail and wholesale markets (e.g. as can be the case for mobile, and as can occur in some geographic areas for fixed-line networks, especially where there is effective access to civil infrastructure and/or co-investment, such that three or more operators have effective control over the necessary access network assets to meet retail demand), national regulatory authorities will be less likely to identify an operator as having SMP, unless they make a finding of collective dominance, or if each of the undertakings in question has significant market power in distinct wholesale markets, such as in the case of voice call termination markets. The application of general competition rules in such markets characterised by sustainable and effective infrastructure-based competition should be sufficient.~~[29]

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

(177) Price control may be necessary when market analysis in a particular market reveals inefficient competition. In particular, operators with significant market power should

[28] DLA input (otherwise tautological)
[29] Shadows 11/7

avoid a price squeeze whereby the difference between their retail prices and the interconnection and/or access prices charged to competitors who provide similar retail services is not adequate to ensure sustainable competition. When a national regulatory authority calculates costs incurred in establishing a service mandated under this Directive, it is appropriate to allow a reasonable return on the capital employed including appropriate labour and building costs, with the value of capital adjusted where necessary to reflect the current valuation of assets and efficiency of operations. The method of cost recovery should be appropriate to the circumstances taking account of the need to promote efficiency, sustainable competition and deployment of very high capacity networks and thereby maximise end-user benefits, and should take in account the need to have predictable and stable wholesale prices for the benefit of all operators seeking to deploy new and enhanced networks, in accordance with Commission guidance[30].

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

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

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

(181) In order to reduce the regulatory burden in addressing the competition problems relating to wholesale voice call termination coherently across the Union, this Directive should lay down a common approach as a basis for setting price control obligations, to be

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

completed by a binding common methodology to be determined by the Commission and by technical guidance which should be developed by BEREC.

(182) In order to simplify their setting and facilitate their imposition where appropriate, wholesale voice call termination rates in fixed and mobile markets in the Union shall be set by means of a delegated act. This Directive should lay down the detailed criteria and parameters on the basis of which the values of voice call termination rates are set. In applying that set of criteria and parameters, the Commission should take into account, *inter alia*, that only those costs which are incremental to the provision of wholesale call termination service should be covered; that spectrum fees are subscriber- and not traffic-driven and should therefore be excluded and that additional spectrum is mainly allocated for data and therefore not relevant for the call termination increment; that it is recognised that while in mobile networks a minimum efficient scale is estimated at the level of at least 20% market share, in the fixed networks smaller operators can achieve the same efficiencies and produce at the same unit costs as the efficient operator, independently of their size. When setting the exact maximum rate, the Commission should include appropriate weighting to take into account the total number of end-users in each Member State, where this is required on account of remaining cost divergences. When the Commission determines that rate, the experience of BEREC and the national regulatory authorities in building suitable cost models will be invaluable and should be taken into account. ***Termination rates across the Union have decreased consistently and are expected to continue to do so. When the Commission determines the maximum termination rates in the first delegated act that it adopts pursuant to this Directive, it should disregard any unjustified exceptional national deviation from that trend.***[31]

(183) ***deleted***[32]

(184) Due to current uncertainty regarding the rate of materialisation of demand for very high capacity broadband services as well as general economies of scale and density, co-investment agreements ***can*** offer significant benefits in terms of pooling of costs and risks, enabling smaller-scale operators to invest on economically rational terms and thus promoting sustainable, long-term competition, including in areas where infrastructure-based competition might not be efficient.~~Where an operator with significant market power makes an open call for co-investment on fair, reasonable and non-discriminatory terms in new network elements which significantly contribute to the deployment of very high capacity networks, the national regulatory authority should typically refrain from imposing obligations pursuant to this Directive on the new network elements, subject to further review in subsequent market analyses. Provided due account is taken of the prospective pro-competitive effects of the co-investment at wholesale and retail level, national regulatory authorities can still consider it appropriate, in light of the existing market structure and dynamics developed under regulated wholesale access conditions, and in the absence of a commercial offer to that effect, to safeguard the rights of access seekers who do not participate in a given co-investment through the maintenance of existing access products or – where legacy network elements are dismantled in due course – through imposition of access products with comparable functionality to those previously available on the legacy infrastructure.~~[33]

(185) The purpose of functional separation, whereby the vertically integrated operator is required to establish operationally separate business entities, is to ensure the provision of fully equivalent access products to all downstream operators, including the operator's own vertically integrated downstream divisions. Functional separation has the capacity

[31] As discussed 7/7. DLA input
[32] DR AM 27
[33] 274 Kumpula-Natri

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

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

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

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

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

(190) Network owners that do not have retail market activities~~***, and undertakings who do have retail market activities but where the wholesale activities are separate from the retail activities and effectively independent with respect to their legal form, operations***~~

~~and management,~~[34] and whose business model is therefore limited to the provision of wholesale services to others, can be beneficial to the creation of a thriving wholesale market, with positive effects on retail competition downstream. Furthermore, their business model can be attractive to potential financial investors in less volatile infrastructure assets and with longer term perspectives on deployment of very high capacity networks. Nevertheless, the presence of a wholesale-only operator does not necessarily lead to effectively competitive retail markets, and wholesale-only operators can be designated with significant market power in particular product and geographic markets. The competition risks arising from the behaviour of operators following wholesale-only business models might be lower than for vertically integrated operators, provided the wholesale-only model is genuine and no incentives to discriminate between downstream providers exist. The regulatory response should therefore be commensurately less intrusive. On the other hand, national regulatory authorities must be able to intervene if competition problems have arisen to the detriment of end-users.[35]

(191) To facilitate the migration from legacy copper networks to next-generation networks, which is in the interests of end-users, national regulatory authorities should be able to monitor network operators' own initiatives in this respect and to establish, where necessary, an appropriate migration process, for example by means of prior notice, transparency and acceptable ~~comparable~~[36] access products, once the intent and readiness by the network owner to switch off the copper network is clearly demonstrated. In order to avoid unjustified delays to the migration, national regulatory authorities should be empowered to withdraw access obligations relating to the copper network once an adequate migration process has been established. ***Access seekers migrating from an access product based on legacy infrastructure to an access product based on a more advanced technology or medium should be able to upgrade their access to any regulated product with higher capacity, should they wish but should not be required to do so. In the case of an upgrade, access seekers should adhere to the regulatory conditions for access to the higher capacity access product, as determined by the national regulatory authority in its market analysis.***[37]

(278) The provisions of this Directive should be reviewed periodically, in particular with a view to determining the need for modification in the light of changing technological or market conditions. ***In view of the risk of emergence of uncompetitive oligopolistic market structures in the place of monopolistic market structures, the provisions relating to the powers of national regulatory authorities to impose access obligations on operators with significant market power, individual or joint, applied in conjunction with other obligations that can be imposed on them, should be given particular attention in the reviews, so as to ensure that the powers are sufficient for the effective achievement of the objectives of this Directive.***

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[34] Technical 12/7

[35] DR AM 28. Justif: *To clarify that Article 77 can apply also with respect to cases of functionally separated undertakings, where the wholesale operator is effectively independent from the retail operations in all relevant respects.*

[36] Alignment to agreed text, cf 284 Kallas

[37] DLA input

Articles

Article 2

Definitions

(2) 'very high capacity network' means an electronic communications network which either consists wholly of optical fibre elements at least up to the distribution point at the serving location or ***any other type of network*** which is capable of delivering under usual peak-time conditions ***similar*** network performance in terms of available down- and uplink bandwidth, resilience, error-related parameters, and latency and its variation. Network performance ***shall be assessed on the basis of technical parameters*** regardless of whether the end-user experience varies due to the inherently different characteristics of the medium by which the network ultimately connects with the network termination point.[38]

(3) 'transnational markets' means markets identified in accordance with Article 63 covering the Union or a substantial part thereof located in more than one Member State;

(8) 'public communications network' means an electronic communications network used wholly or mainly for the provision of electronic communications services available to the public which support the transfer of information between network termination points;

(9) 'network termination point' or 'NTP' means the physical point at which an end-user is provided with access to a public communications network; in the case of networks involving switching or routing, the NTP is identified by means of a specific network address, which may be linked to an end-user's number or name.

(10) 'associated facilities' means those associated services, physical infrastructures and other facilities or elements associated with an electronic communications network and/or an electronic communications service which enable and/or support the provision of services via that network and/or service or have the potential to do so, and include, inter alia, buildings or entries to buildings, building wiring, antennae, towers and other supporting constructions, ducts, conduits, masts, manholes, and cabinets;

(11) 'associated services' means those services associated with an electronic communications network and/or an electronic communications service which enable and/or support the provision of services~~, self-provision or automated-provision~~[39] via that network and/or service or have the potential to do so and include, inter alia, number translation or systems offering equivalent functionality, conditional access systems and electronic programme guides, voice command, multi-language or language translation as well as other services such as identity, location and presence service;

(12) 'conditional access system' means any technical measure, authentication system and/or arrangement whereby access to a protected radio or television broadcasting service in intelligible form is made conditional upon subscription or other form of prior individual authorisation;

(28) 'access' means the making available of facilities and/or services to another undertaking, under defined conditions, on either an exclusive or non-exclusive basis, for the purpose of

[38] Reinstated (from VHCN Title) after techmeet 14/7 and in the form agreed by Shadows
[39] AM 326 Tosenovsky

providing electronic communications services, including when they are used for the delivery of information society services or broadcast content services. It covers inter alia: access to network elements and associated facilities, which may involve the connection of equipment, by fixed or non-fixed means (in particular this includes access to the local loop and to facilities and services necessary to provide services over the local loop); access to physical infrastructure including buildings, ducts and masts; access to relevant software systems including operational support systems; access to information systems or databases for pre-ordering, provisioning, ordering, maintaining and repair requests, and billing; access to number translation or systems offering equivalent functionality; access to fixed and mobile networks, ~~including software emulated networks,~~[40] in particular for roaming; access to conditional access systems for digital television services and access to virtual network services;

(29) 'interconnection' means the physical and logical linking of public communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking, or to access services provided by another undertaking. Services may be provided by the parties involved or other parties who have access to the network. Interconnection is a specific type of access implemented between public network operators;

(30) 'operator' means an undertaking providing or authorised to provide a public communications network or an associated facility;

(31) 'local loop' means the physical path used by electronic communications signals connecting the network termination point to a distribution frame or equivalent facility in the fixed public electronic communications network.

Article 43

Rights of way

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

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

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

the competent authority:

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

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

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

2. Member States shall ensure that where public or local authorities retain ownership or control of undertakings operating public electronic communications networks and/or publicly available electronic communications services, there is an effective structural separation of the function

[40] AM 335 Tosenovsky

responsible for granting the rights referred to in paragraph 1 from the activities associated with ownership or control.

2 a. Member States shall designate or establish that an effective mechanism to allow undertakings to appeal against decisions on the granting of rights to install facilities to a body that is independent of the parties involved. That body shall take its decision within a reasonable time.[41]

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

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

Article 57

General framework for access and interconnection

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

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

[41] AM 591/590 Kumpula-Natri/Blanco Lopez and as discussed 16/6 techmeet. DLA input

Article 58

Rights and obligations for undertakings

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

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

2a. Member States may provide for negotiations to be conducted through neutral intermediaries when conditions of competition so require.[42]

CHAPTER II

ACCESS AND INTERCONNECTION

Article 59

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

1. National regulatory authorities shall, acting in pursuit of the objectives set out in Article 3, ***including media pluralism and cultural diversity,***[43] encourage and where appropriate ensure, in accordance with the provisions of this Directive, adequate access and interconnection, and the interoperability of services, exercising their responsibility in a way that promotes efficiency, sustainable competition, the deployment of very high capacity networks, efficient investment and innovation, and gives the maximum benefit to end-users. They shall provide guidance and make publicly available the procedures applicable to gain access and interconnection to ensure that small and medium-sized enterprises and operators with a limited geographical reach can benefit from the obligations imposed.

In particular, without prejudice to measures that may be taken regarding undertakings with significant market power in accordance with Article 66, national regulatory authorities shall be able to impose***, while not undermining security standards***:[44]

(a) to the extent that is necessary to ensure end-to-end connectivity, obligations on those undertakings that are subject to general authorisation***, except number-***

[42] Along the lines discussed at 16/6 techmeet.

[43] AM 717 Martin (as moved)

[44] S&D, ALDE, rephrased and moved (so as to not only cover number-independent ECS). Replaces former reference to Art 40 in point (c). As discussed 7/7.

independent interpersonal communications services, and that control access to end-users, including in justified cases the obligation to interconnect their networks where this is not already the case;

(b) in justified cases and to the extent that is necessary, obligations on those undertakings that are subject to general authorisation***, except number-independent interpersonal communications services,*** and that control access to end-users to make their services interoperable;[45]

(c) in justified cases, ***where the reach, coverage, quality of service***[46] ***and user uptake corresponds to that of number-based*** ~~obligations on providers of number-independent interpersonal communications services to make their~~ services***, ~~where there are no other alternatives,~~***[47] ***and*** ~~interoperable, namely~~ where ***~~strictly necessary in order to ensure~~*** access to emergency services ***is endangered*** or ***as strictly necessary in order to ensure*** end-to-end connectivity between end-users***,*** ~~is endangered due to a lack of interoperability between interpersonal communications~~ ***~~services~~ obligations on relevant categories of***[48] ***providers of number-independent interpersonal communications services to make their services interoperable;***[49]

(d) to the extent that is necessary to ensure accessibility for end-users to digital radio and television broadcasting services ***and related complementary services***[50] specified by the Member State, obligations on operators to provide access to the other facilities referred to in Annex II, Part II on fair, reasonable and non-discriminatory terms.

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

(i) to the extent necessary to ensure interoperability of interpersonal communications services and may include ***proportionate*** obligations ***on the provider of the interpersonal communications service to publish and allow*** ~~relating to~~ the use***, modification and redistribution of any relevant information or an obligation to use or*** ~~and~~ implement~~ation of~~ standards or specifications listed in Article 39(1)[51] or of any other relevant European or international standards; and

(ii) where the Commission, ~~on the basis of a report that it had requested~~ ***~~from~~ after consulting*** BEREC ***and taking the utmost account of its opinion***,[52] has found an appreciable threat to effective access to emergency services or to end-to-end connectivity between end-users ~~within one or several Member States or~~ throughout[53] the European Union and has adopted implementing measures specifying the nature and scope of any obligations that may be imposed, in accordance with the examination procedure referred to in Article 110(4). ***Member States shall not impose obligations with respect to the nature and scope of any obligations beyond those implementing measures.***[54]

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[45] Changes to (a)-(b) as per techmeet 14/7

[46] ALDE input (the only concrete QoS requirements in the framework are in Annex IX of the IMCO part, covering aspects such as fault repair times for number-based ECS and, for IAS, latency/jitter/packet loss. There are none for number-independent.)

[47] ECR input

[48] ECR input

[49] AM 725 Hokmark. As amended after techmeet 26/6, including IMCO aspect re emergency services.

[50] AM 727 Kumpula-Natri? The accessibility-related obligations which may be imposed are, as listed in Annex II part II, access (i) to APIs, and (ii) to EPGs/electronic programming guides. Awaiting "input". Shadows 11/7, see Annex II and recital 139a.

[51] AM 731 Reimon (as amended). Further amendment after 26/6 techmeet

[52] As discussed at 16/6 techmeet

[53] Error correction (thanks ALDE)

[54] AM 733 Kallas (as amended). Further amended after 16/6 and 26/6 techmeets. DLA input

2. ***Without prejudice to Article 59(1),***[55] ~~N~~***n***ational regulatory authorities shall impose obligations ~~upon~~ ***to meet*** reasonable request***s for*** ~~to grant~~ access to wiring and cables inside buildings or up to the first concentration or distribution point where that point is located outside ***~~but close to~~***[56] the building, on the owners of such wiring and cable or on undertakings that have the right to use such wiring and cables, where this is justified on the grounds that replication of such network elements would be economically inefficient or physically impracticable ***and access to such elements is necessary to foster sustainable competition***.[57] The access conditions imposed ***shall be objective, transparent, non-discriminatory, proportionate, consistent with Directive 2014/61 and*** may include specific rules on access, transparency and non-discrimination and for apportioning the costs of access, ~~which, where appropriate, are adjusted to~~ tak***ing***~~e~~ into account risk factors.[58]

National regulatory authorities may extend to those owners or undertakings the imposition of such access obligations, on fair and reasonable terms and conditions, beyond the first concentration or distribution point to a concentration point as close as possible to end-users, to the extent strictly necessary to address insurmountable economic or physical barriers to replication in areas with lower population density.[59]

National regulatory authorities shall not impose obligations in accordance with the second subparagraph where ***either***:[60]

> (a) ~~deleted~~ a viable alternative means of access to end users***, suitable for the provision of*** very high capacity ***networks,*** is provided ***by the network operator, provided that such access is offered on fair and reasonable terms and conditions; or*** [61]
>
> (b) in the case of recently deployed network elements, in particular by smaller local projects[62] ***where*** the granting of that access would compromise the economic or financial viability of their deployment.[63]

4. Obligations and conditions imposed in accordance with paragraph 1, 2 and 3 shall be objective, transparent, proportionate and non-discriminatory, they shall be implemented in accordance with the procedures referred to in Articles 23, 32 and 33. National regulatory authorities shall assess the results of such obligations and conditions within five years from the adoption of the previous measure adopted in relation to the same operators and whether it would be appropriate to withdraw or amend them in [64]light of evolving conditions. National regulatory authorities shall notify the outcome of their assessment in accordance with the same procedures.

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

6. By [entry into force plus 18 months] in order to contribute to a consistent definition of the location of network termination points by national regulatory authorities, BEREC shall, after

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[55] AM 736 Kumpula-Natri

[56] Proposed deletion as the text merely refers to whether the 1st point is inside or outside the building

[57] ALDE

[58] AM 736 Kumpula-Natri, 738 Reimon (as amended)

[59] AM 753 Kumpula-Natri. S&D alternative of keeping COM proposal

[60] DR AM 110. Justif: *Symmetric obligations relate to networks elements as such, independently of their owners. The exception from the possibility to impose symmetric obligations should neutral as to the character of the network but not to situations where the economics of the network deployment would be compromised by the obligation.* The deletion of "where" reversed. DLA input

[61] DR AM 111. (Same justif as to AM 110.) Also AM 767 Reimon, 769 Tosenovsky. AM 773 Kumpula-Natri (as amended). DLA input

[62] Reinstated after 16/6 techmeet

[63] DR AM 112. (Same justif as to AM 110.)

[64] DLA input

consulting stakeholders and in close cooperation with the Commission, adopt guidelines on common approaches to the identification of the network termination point in different network topologies. National regulatory authorities shall take utmost account of those guidelines when defining the location of network termination points.

Article 60

Conditional access systems and other facilities

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

2. In [65]light of market and technological developments, the Commission shall be empowered to adopt delegated acts in accordance with Article 109 to amend Annex II.

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

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

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

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

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

(ii) conditional access systems and other associated facilities,

would not be adversely affected by such amendment or withdrawal.

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

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

[65] DLA input

CHAPTER III

MARKET ANALYSIS AND SIGNIFICANT MARKET POWER

Article 61

Undertakings with significant market power

1. Where this Directive requires national regulatory authorities to determine whether operators have significant market power in accordance with the procedure referred to in Article 65, paragraph 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, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.

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

Two or more undertakings may be found in a joint dominant position, even in the absence of structural or other links between them, when the market structure enables them to behave to an appreciable extent independently of competitors, customers and ultimately consumers. This is likely to be the case where the market exhibits a number of characteristics such as:

(a) a high degree of concentration,

(b) a high degree of market transparency providing incentives for parallel or aligned anti-competitive behaviour,

(c) the existence of high barriers to entry,

(d) the foreseeable reaction of competitors and consumers would not jeopardise parallel or aligned anti-competitive behaviour.[66]

National regulatory authorities shall evaluate such market characteristics in light of relevant principles of competition law while taking into account the specific context of ex ante regulation and the objectives set out in Article 3.[67]

3. Where an undertaking has significant market power on a specific market (the first market), it may also be designated as having significant market power on a closely related market (the second market), where the links between the two markets are such as to allow the market power held in the first market to be leveraged into the second market, thereby strengthening the market power of the undertaking. Consequently, remedies aiming to prevent such leverage may be applied in the second market pursuant to this Directive.[68]

Article 62

Procedure for the identification and definition of markets

1. After public consultation including with national regulatory authorities and taking the utmost account of the opinion of BEREC, the Commission shall adopt a Recommendation on Relevant

[66] DLA input reversed
[67] Shadows 11/7. DLA input
[68] AM 797 Kumpula-Natri, 797 Kallas, 795 Reimon. The corresponding recital from Directive 2009/140 is #47. DLA input

Product and Service Markets (the Recommendation). The Recommendation shall identify those product and service markets within the electronic communications sector the characteristics of which may be such as to justify the imposition of regulatory obligations set out in this Directive, without prejudice to markets that may be defined in specific cases under competition law. The Commission shall define markets in accordance with the principles of competition law.

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

The Recommendation shall be reviewed at the latest by [transposition date]. The Commission shall ***thereafter*** regularly review the Recommendation.[69]

2. ***After consulting with BEREC, T****~~t~~*he Commission shall publish, at the latest on the date of entry into force of this Directive, guidelines for market analysis and the assessment of significant market power (hereinafter 'the SMP guidelines') which shall be in accordance with the ***relevant*** principles of competition law.[70]

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 ***including by taking into account the degree of infrastructure competition in those areas***,[71] in accordance with the principles of competition law. ~~National regulatory authorities shall take into account the results of the geographical survey conducted in accordance with Article 22(1) *and in particular the degree of infrastructure competition in those areas*.~~[72] They shall follow the procedures referred to in Articles 23 and 32 before defining the markets that differ from those identified in the Recommendation.[73]

Article 63

Procedure for the identification of transnational markets

1. After consulting stakeholders and in close cooperation with the Commission, BEREC may adopt***, acting by a two-thirds majority of members of the Board of Regulators,***[74] a Decision identifying transnational markets in accordance with the principles of competition law and taking utmost account of the Recommendation and SMP Guidelines adopted in accordance with Article 62. BEREC shall conduct an analysis of a potential transnational market if the Commission or at least two national regulatory authorities concerned submit a reasoned request providing supporting evidence.

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

Two or more national regulatory authorities may also jointly notify their draft measures regarding the market analysis and any regulatory obligations in the absence of transnational

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[69] DR AM 114. Justif: *The review of the Recommendation is inextricably linked to other admissible AMs and is necessary in order to address conflicting rules.*
[70] AM 802 Kumpula-Natri (as amended). Shadows 11/7
[71] Suggestion due to the AM 804/805/806 delete
[72] AM 804/805/806 Kumpula-Natri, Kallas, Reimon
[73] DR AM 115
[74] ECR input

markets, where they consider that market conditions in their respective jurisdictions are sufficiently homogeneous.

Article 64

Procedure for the identification of transnational demand

~~***deleted***~~[75]

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***, or upon a reasoned request from market participants, indicating that existing wholesale or retail products and services do not allow to meet a transnational demand,*** ~~concerned indicating that there is a serious demand problem to be addressed. BEREC may also conduct such analysis if it receives a reasoned request from market participants providing sufficient supporting evidence~~ and considers there is a serious demand problem to be addressed. ~~BEREC's analysis is without prejudice to any findings of transnational markets in accordance with Article 63(1) and to any findings of national or sub-national geographical markets by national regulatory authorities in accordance with Article 62(3).~~

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

~~If BEREC concludes that a transnational end-user demand exists, is significant and is not sufficiently met by supply provided on a commercial or regulated~~ ***On the*** basis ***of that analysis***, ~~it shall, after consulting stakeholders and in close cooperation with the Commission, issue guidelines on common approaches for~~ ***the*** national regulatory authorities ***shall consider in subsequent market analyses conducted*** ~~to meet the identified transnational demand, including, where appropriate, when they impose remedies~~ in accordance with Article ~~66~~ ***63(2) or Article 65, whether to amend regulated wholesale access products in order to enable the transnational demand to be met***. ~~National regulatory authorities shall take into utmost account these guidelines when performing their regulatory tasks within their jurisdiction.~~[76]

2. ~~On the basis of BEREC guidelines referred to in paragraph 1,~~ ***BEREC may, after consulting stakeholders and in close cooperation with*** the Commission ***issue guidelines for the national regulatory authorities on common approaches to meeting the transnational demand identified, providing the basis for convergence of wholesale access products across the Union.*** ~~may adopt a Decision pursuant to Article 38 to harmonise the technical specifications of wholesale access products capable of meeting such identified transnational demand, when they are imposed by n~~ ***N***ational regulatory authorities ***shall take those guidelines into utmost account when performing their regulatory tasks within their jurisdiction, without prejudice to their*** ~~on operators designated with significant market power in markets where such access products are supplied, as defined according to national~~ ***decision on the appropriateness of wholesale access products that should be imposed in specific local*** circumstances. ~~Article 38(3)(a) second subparagraph first indent shall not apply in such a case.~~[77]

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[75] DR AM 116. Justif: *The identification of transnational demand and transnational markets should take place within the normal framework for market analysis. The proposed process could ultimately prove to be extremely complex and lead to additional layers of regulation to what already provided at national/local level.*

[76] DLA input

[77] Kallas 811-813, 815 amended wording. DLA input

Article 65

Market analysis procedure

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

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

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

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

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

Where a national regulatory authority conducts an analysis of a market that is included in the Recommendation, it shall consider that points (a), (b) and (c) of the second subparagraph have been met, unless the national regulatory authority determines that one or more of such criteria is not met in the specific national circumstances. ~~***deleted***~~[78]

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

(a) the existence of market developments which may increase the likelihood of the relevant market tending towards effective competition~~, such as those commercial co-investment or access agreements between operators which benefit competitive dynamics sustainably~~;[79]

(b) all relevant competitive constraints, ***on wholesale and*** ~~including at~~ retail level,[80] irrespective of whether the sources of such constraints are deemed to be electronic communications networks, electronic communications services, or other types of services or applications which are comparable from the perspective of the end-user, and irrespective of whether such constraints are part of the relevant market;

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

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

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

[78] DR AM 117. Text reinstated as per S&D and ALDE comments

[79] AM 818/819/820 Reimon, Kumpula-Natri, Tosenovsky delete (a) altogether. AM 824 Kallas deletes the ref to agreements/co-investment. Reference to commercial agreements etc to be adequately reflected in a recital.

[80] AM 832 Kumpula-Natri

cases where there already are sector specific regulatory obligations imposed in accordance with Article 66, it shall withdraw such obligations placed on undertakings in that relevant market.

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

4. Where a national regulatory authority determines that, in a relevant market the imposition of regulatory obligations in accordance with paragraphs 1 and 2 of this Article is justified, it shall identify any undertakings which individually or jointly have a significant market power on that relevant market in accordance with Article 61. The national regulatory authority shall impose on such undertakings appropriate specific regulatory obligations in accordance with Article 66 or maintain or amend such obligations where they already exist if it considers that one or more ~~retail~~ markets[81] would not be effectively competitive in the absence of those obligations.

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

(a) within five years from the adoption of a previous measure where the national regulatory authority has defined the relevant market and determined which undertakings have significant market power. Exceptionally, that five-year period may be extended for up to one additional year, where the national regulatory authority has notified a reasoned proposed extension to the Commission no later than four months before the expiry of the five years period, and the Commission has not objected within one month of the notified extension***. In the case of markets characterised by rapid change in technology and demand patterns, however ~~at the retail level~~,***[82] ***the market analysis shall be carried out every three years, subject to the same possibility of a one-year extension;***[83]

(b) within two 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.

~~5a. With effect from the expiry of the relevant time period, any obligations previously imposed shall automatically lapse where the national regulatory authority has not completed the subsequent analysis of the relevant market within the time period set out in paragraph 4 point (a), including any extension as provided for therein.~~[84]

~~All national regulatory authorities shall assess the impact of this Directive within [six months from the transposition date]. That assessment shall determine whether it is necessary to review any designations of operators with significant market power or obligations previously imposed on them in order to ensure that such designations and obligations comply with this~~

[81] Implementation of Art 3 CA
[82] Id
[83] DR AM 118. Justif: *The five-year market review cycle would be too long in the case of highly dynamic markets, and an obligation for NRAs to conduct a full market review within a shorter timeframe, rather than just reacting in a more limited fashion to a request by an operator (as introduced in Art 66(6), is warranted where the environment is changing rapidly. Inextricably linked to other admissible AMs.* DLA input
[84] S&D, ECR, ALDE comment

~~***Directive. Any amendment to a designation or an obligation shall only be made following consultation in accordance with Articles 23 and 32 or, where necessary, a new market analysis.***~~[85]

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

CHAPTER IV

ACCESS REMEDIES AND SIGNIFICANT MARKET POWER

Article 66

Imposition, amendment or withdrawal of obligations

1. Member States shall ensure that national regulatory authorities are empowered to impose the obligations identified in Articles 67 to 78.

2. Where an operator is designated as having significant market power on a specific market as a result of a market analysis carried out in accordance with Article 65 of this Directive, national regulatory authorities shall ~~be able to~~[86] impose any of the obligations set out in Articles 67 to 75 and 77 of this Directive as appropriate. ***In accordance with the principle of proportionality, a national regulatory authority*** ~~***shall only impose the minimum obligation or set of obligations considered necessary to make the relevant retail markets effectively competitive, and***~~ ***shall not impose obligations involving a higher degree of intervention if less burdensome obligations are sufficient to address problems identified in the market analysis.***[87]

3. Without prejudice to:

– the provisions of Articles 59 and 60,

– the provisions of Articles 44 and 17 of this Directive, Condition 7 in Part D of Annex I as applied by virtue of Article 13(1) of this Directive, Articles 91 and 99 of this Directive and the relevant provisions of Directive 2002/58/EC[88] containing obligations on undertakings other than those designated as having significant market power, or

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[85] DR AM 119. Justif: *In order to avoid uncertainty and lingering obligations that remain only because of delay in completing a market review, any previous obligations should lapse where the market review is not completed in the time required, including any extension. Furthermore, to give effect to this Directive sooner and in a uniform fashion across the Union, all NRAs should review existing obligations against the new legal framework set out herein promptly after the transposition date. Inextricably linked to other admissible AMs.* S&D, ECR, ALDE comment to delete

[86] AM 850/851 Reimon, Kumpula-Natri. The AMs would also delete "as appropriate" at the end, but that's part of the existing text. Cf also 65(4) for "shall" and "as appropriate".

[87] DR AM 120. Justif: *In accordance with the principle of proportionality, as well as the protection of property and the right to conduct a business, obligations should be limited to the minimum necessary for the problem to be addressed. Inextricably linked to other admissible AMs.* Redraft in view of S&D and ALDE input and as discussed techmeet 26/6. Redraft 28/6 based on ALDE suggestion. Recital to be addressed.

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

– the need to comply with international commitments,

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

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

4. Obligations imposed in accordance with this Article shall be based on the nature of the problem identified~~, in particular at retail level~~ ***in the relevant markets to safeguard long term sustainable competition***[89] and where appropriate taking into account the identification of transnational demand pursuant to Article 64. They shall be proportionate, have regard to the costs and benefits, and be justified in the light of the objectives laid down in Article 3 of this Directive. Such obligations shall only be imposed following consultation in accordance with Articles 23 and 32.

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

6. National regulatory authorities shall consider the impact of new ~~***or planned***~~ market developments ***which are reasonably likely to affect competitive dynamics***~~, such as in relation to commercial agreements, including ***without limitation*** co-investment agreements ***and/or undertakings absent from any retail market for electronic communications services.***~~[90]

~~***National regulatory authorities shall do so:***~~

~~***(a) on their own initiative, taking account of the need for predictable market conditions, or***~~

~~***(b) on a reasoned request***~~.

If the developments are not sufficiently important in order to ***require*** a new market analysis in accordance with Article 65, the national regulatory authority shall assess ***without delay*** whether it is necessary to review the obligations ***and amend any previous decision, including by withdrawing obligations or imposing new obligations*** on operators designated with significant market power in order to ensure that such obligations continue to meet the ***requirements of this Directive, and, following a consultation in accordance with Articles 23 and 32, whether to impose no, fewer or less onerous obligations*** ~~***with respect to a planned development.***~~[91]

~~***As a condition for considering a request by an operator designated as having significant market power for withdrawal of obligations imposed on it, national regulatory authorities***~~

[89] AM 852 Kallas (part). Also addresses AM 854/855 Kumpula-Natri, Reimon

[90] AM 860 Kumpula-Natri; 864 Reimon. S&D, ECR, ALDE. As discussed techmeet 26/6

[91] DR AM 121. Justif: *The principle that NRAs shall consider relevant market developments should be extended to cover also planned such developments. The initiation of such a consideration and possible re-assessment of obligations imposed should not depend solely on the NRA but should also be triggered on a reasoned request. In order to discourage frivolous requests, the NRA is not bound to either accept or reject any specific relief sought, but can take a broader view. It should also be able to impose an administrative charge for the costs caused by a request.* S&D, ECR, ALDE. As discussed techmeet 26/6. DLA input

~~***may impose an administrative charge pursuant to Article 16 in order to meet the cost of considering the request.***~~[92]

Article 67

Obligation of transparency

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

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

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

3a. Where an operator has obligations of access to civil engineering and/or obligations of access to, and use of, specific network facilities, national regulatory authorities shall specify key performance indicators as well as corresponding service level agreements and associated financial penalties, to be made available on the access provided, to the operator's own downstream activities and to beneficiaries of the access obligations.[93]

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

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

Article 68

Obligation of non-discrimination

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

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[92] DR AM 122. Justif: *Inextricably linked to other admissible AMs.* S&D, ECR, ALDE. As discussed techmeet 26/6

[93] AM 869 Reimon (partly, as amended)

2. Obligations of non-discrimination shall ensure, in particular, that the operator applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners. ~~In particular, in cases where the operator is deploying new systems, n~~ ***N***ational regulatory authorities may impose on that operator 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.[94]

Article 69

Obligation of accounting separation

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

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

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

Article 70

Access to civil engineering

1. A national regulatory authority may, in accordance with Article 66, impose obligations on operators to meet reasonable requests for access to, and use of, civil engineering including, without limitation, buildings or entries to buildings, building cables including wiring, antennae, towers and other supporting constructions, poles, masts, ducts, conduits, inspection chambers, manholes, and cabinets, in situations where the market analysis indicates that denial of access or access given under unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market ~~at the retail level~~[95] and would not be in the end-user's interest.

~~1a. A national regulatory authority shall ensure that where access to civil engineering is not available, alternatives means of access are imposed in accordance with Article 71.~~[96]

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

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[94] As discussed techmeet 26/6

[95] Implementation of Art 3 CA

[96] AM 892 Kallas (as amended). Ref to dark fibre proposed moved to recital 174. See also recital 172 re access limitations. Deleted techmeet 14/7 to follow-up on 11/7 Shadows alignment point.

Article 71

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

1. ~~Only where~~ ***A*** national regulatory authority ~~concludes that the obligations imposed in accordance with Article 70 would not on their own lead to the achievement of the objectives set out in Article 3, it~~ may, in accordance with the provisions of Article 66, impose obligations on operators to meet reasonable requests for access to, and use of, specific network elements and associated facilities, in situations where the national regulatory authority considers that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market ~~at the retail level~~,[97] and would not be in the end-user's interest.[98] ***Before imposing such obligations, the national regulatory authorities shall assess whether the sole imposition of obligations in accordance with Article 70 would be sufficient to address problems identified in the market analysis.***[99]

Operators may be required *inter alia*:

(a) to give third parties ***appropriate, including physical (other than pursuant to Article 70), active or virtual,*** access to***, and use of, entire specific physical*** ~~specified~~ network elements and/or ***associated*** facilities, as appropriate including ~~access to network elements which are either not active or physical and/or active or virtual~~ unbundled access to the ***metallic*** local loop ***and sub-loop as well as unbundled access to fibre loops and terminating segments***;[100]

(ab) to share with third parties specified network elements, including as appropriate shared access to the metallic local loop and sub-loop as well as shared access to fibre loops and terminating segments including wavelength division multiplexing and similar sharing obligations;[101]

(ac) to give third parties access to specified active or virtual network elements and services;[102]

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

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

(ca) to provide specified services on a wholesale basis for resale by third parties;[103]

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

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

(f) to provide specified services needed to ensure interoperability of end-to-end services to users, ~~including facilities for software emulated networks~~ or roaming on mobile networks;[104]

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

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[97] Implementation of Art 3 CA

[98] DR AM 123. Justif: *The deleted text is replaced by the generalised application of the principle that only the least onerous obligation necessary to address the problem at hand should be imposed.*

[99] Poss additional text, related to 66(2), with post 28/6 alignment to 66(2). See also additional text in recital 157. Retained following majority of Shadows 11/7. DLA input

[100] AM 876 Kumpula-Natri (part). As discussed 7/7. DLA input

[101] id

[102] S&D comments re (a), (ab), (ac). Cf also EFDD input. As discussed 7/7

[103] ECR input

[104] ECR input, consequence of change to definition

(h) to interconnect networks or network facilities;

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

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

2. When national regulatory authorities are considering the appropriateness of imposing any of the possible specific obligations referred in paragraph 1, and in particular when assessing, in conformity with the principle of proportionality, whether and how such obligations should be imposed, they shall analyse whether other forms of access to wholesale inputs either on the same or a related wholesale market, would already be sufficient to address the identified problem ~~at the retail level~~.[105] The assessment shall include ~~existing or prospective~~[106]commercial access offers, regulated access pursuant to Article 59, or existing or contemplated regulated access to other wholesale inputs pursuant to this Article. They shall take account in particular of the following factors:

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

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

(ba) the need to ensure technology neutrality enabling the parties to design and manage their own networks;[107]

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

(d) the initial investment by the facility owner, taking account of any public investment made and the risks involved in making the investment with particular regard to investments in and risk levels associated with very high capacity networks;[108]

(e) the need to safeguard competition in the long term, with particular attention to economically efficient infrastructure-based competition and ***innovative commercial business models which support*** sustainable competition ***such as those*** based on co-investment in networks;[109]

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

(g) the provision of pan-European services.

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

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[105] Implementation of Art 3 CA

[106] S&D comment

[107] AM 952 Kallas

[108] DR AM 124. Justif: *The reference to very high capacity networks is moved to the new Title III of Part II.* Reinstated after techmeet 26/6

[109] DR AM 125. Justif: *In accordance with the need to provide regulatory flexibility to take into account e.g. voluntary agreements between operators, as stated in recital 166.*

Article 72

Price control and cost accounting obligations

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

In determining whether or not price control obligations would be appropriate, national regulatory authorities shall take into account long-term end-user interests related to the deployment and take-up of next-generation networks, and in particular of very high capacity networks. In particular, ~~***To***~~ to encourage investments by the operator, including in next-generation networks, national regulatory authorities shall take into account the investment made by the operator. Where the national regulatory authorities deem price controls appropriate, they shall allow the operator a reasonable rate of return on adequate capital employed, taking into account any risks specific to a particular new investment network project.[110]

National regulatory authorities shall not impose or maintain 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 67 to 71, including in particular any economic replicability test imposed in accordance with Article 68 ensures effective and non discriminatory access.

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

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

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

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

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[110] DR AM 126. Justif: *The reference to very high capacity networks is moved to the new Title III of Part II.* Original text reinstated following techmeet 14/7 as a consequence of not introducing a new Title III.

Article 73

Termination rates

1. ***By [transposition date] the Commission shall, after consulting BEREC, adopt delegated acts in accordance with Article 109 concerning single*** maximum termination rates ***to be imposed by national regulatory authorities on undertakings designated as having significant market power in fixed and mobile voice termination markets respectively in the Union***.[111]

2. ***The termination rates referred to in paragraph 1 shall be set as maximum symmetric termination rates based on the costs incurred by an efficient operator and*** shall ***comply with the criteria and parameters set out ~~provided~~ in Annex III. The evaluation of efficient costs shall be based on current cost values. The cost methodology to calculate efficient costs shall be based on a bottom-up modelling approach using long-run incremental traffic-related costs of providing the wholesale voice call*** termination ***service to third parties. When adopting such delegated acts the Commission shall take into account national circumstances which result in significant differences between Member States. The maximum*** termination ***rates in the first delegated acts shall not be higher than the highest rates in force in any Member State, after any necessary adjustment for exceptional national circumstances, [six] months before the adoption of delegated acts***.[112]

3. ***deleted***[113]

4. ***deleted***[114]

5. ***deleted***[115]

6. ***deleted***[116]

7. The Commission shall review the delegated acts adopted pursuant this Article every five years.

~~*[*Article 74~~

~~**Regulatory treatment of new network elements**~~

~~***deleted***[117]~~]

Article 75

Functional separation

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

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[111] DR AM 127. Justif: *In order to avoid unjustified levels of charges and fragmented national approaches resulting in a call between the same points in different MS being charged differently merely depending on where it terminates, the Commission should set maximum fixed and mobile termination rates by the transposition date under a simplified mechanism relying on the costs of an efficient operator. Those maximum termination rates should not exceed the highest rates in force in any MS.* DLA input

[112] DR AM 128. (Same justif as for AM 127.) S&D comment on increased TRs addressed in recital 182. DLA input

[113] DR AM 129

[114] DR AM 130

[115] DR AM 131

[116] DR AM 132

[117] ~~DR AM 133. Justif: *The Article is moved to the new Title III of Part II.*~~ Art 74 not covered by this CA.

obligation on vertically integrated undertakings to place activities related to the wholesale provision of relevant access products in an independently operating business entity.

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

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

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

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

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

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

3. The draft measure shall include the following elements:

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

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

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

(d) rules for ensuring compliance with the obligations;

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

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

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

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

Article 76

Voluntary separation by a vertically integrated undertaking

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

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

Undertakings may also offer commitments regarding access conditions that will apply to their network during an implementation period and after the proposed form of separation is implemented, with a view to ensuring effective and non-discriminatory access by third parties. The offer of commitments shall include sufficient details, including in terms of timing of implementation and duration, so as to allow the national regulatory authority to conduct its tasks in accordance with paragraph 2 of this Article. Such commitments may extend beyond the maximum period for market reviews established in Article 65(5).

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

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

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

On the basis of its assessment, the national regulatory authority shall impose, maintain, amend or withdraw obligations, in accordance with Articles 23 and 32, applying, if appropriate, the provisions of Article 77. In its decision, the national regulatory authority may make the commitments binding, wholly or in part. By way of exception to Article 65(5), the national regulatory authority may make some or all commitments binding for the entire period for which they are offered.

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

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

Article 77

~~Vertically separate~~ *Wholesale-only* undertakings[118]

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

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

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

2. If the national regulatory authority concludes that the conditions laid down in points (a) and (b) of paragraph 1 of this Article are fulfilled, it may only impose on that undertaking obligations pursuant to Articles 70 or 71.

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

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

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

Article 78

Migration from legacy infrastructure

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

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

[118] ECR input

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

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

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

Such withdrawal shall be implemented in accordance with the procedures referred to in Articles 23, 32 and 33. ***Those provisions shall be ~~are~~ without prejudice to the availability of regulated products imposed by the national regulatory authority on the upgraded network infrastructure in accordance with the procedures in Articles 65 and 66.~~deleted~~***[119]

Article 78a[120]

Demand aggregation

Member States shall not impose more onerous provisions, whether with respect to duration, interest rates or otherwise, on operator financing of the deployment of a very high capacity physical connection to the premises of an end-user than they do on financial institutions, including where such operator financing is by way of an instalment contract.[121]

Article 78b

BEREC guidelines on very high capacity networks

By [transposition date], BEREC shall, after consulting stakeholders and in close cooperation with the Commission, issue guidelines on the criteria a network has to fulfil in order to be considered a very high capacity network. The national regulatory authorities shall take those guidelines into utmost account. BEREC shall update the guidelines by 31 December 2025, and thereafter every [three years].[122]

Article 114

Review procedures

1. The Commission shall periodically review the functioning of this Directive and report to the European Parliament and to the Council, on the first occasion not later than five years after the date of application referred to in Article 115 (1), second subparagraph ***and thereafter every fifth year***.

Those reviews shall evaluate in particular whether the ex ante intervention powers pursuant this Directive are sufficient to enable national regulatory authorities to ensure that, in the presence of uncompetitive oligopolistic market structures, and together with the proportionate application of other obligations in accordance with this Directive, competition in electronic communications ~~retail~~ markets continues to thrive to the benefit of end-users in

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[119] DR AM 134. Justif: *The Article is moved to the new Title III of Part II.* Amended text provisionally included as per S&D input. DLA input

[120] Art 78a-c (previously in the poss new Title III) inserted as a consequence of not introducing that new Title

[121] DR AM 141. Justif: *This is a version of the proposed Art 98(1) second subparagraph of the Directive, focussed on deployment of very high capacity network connection and ensuring equivalence between financing of the connection by the operator and financial institutions.* DLA input

[122] DR AM 143, as adjusted at technical level.

terms of quality, choice and price and that wholesale markets providing access to electronic communications infrastructures develop and thrive, as necessary to ensure competitive outcomes for end-users and very high capacity connectivity.

For this purpose, the Commission may request information from the Member States, which shall be supplied without undue delay.

ANNEX II

CONDITIONS FOR ACCESS TO DIGITAL TELEVISION AND RADIO SERVICES BROADCAST TO VIEWERS AND LISTENERS IN THE UNION

PART I: CONDITIONS FOR CONDITIONAL ACCESS SYSTEMS TO BE APPLIED IN ACCORDANCE WITH ARTICLE 60(1)

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, Member States must ensure in accordance with Article 60 that the following conditions apply:

(a) all operators of conditional access services, irrespective of the means of transmission, who provide access services to digital television and radio services and whose access services broadcasters depend on to reach any group of potential viewers or listeners are to:

- offer to all broadcasters, on a fair, reasonable and non-discriminatory basis compatible with Union competition law, technical services enabling the broadcasters' digitally-transmitted services to be received by viewers or listeners authorised by means of decoders administered by the service operators, and comply with Union competition law,
- keep separate financial accounts regarding their activity as conditional access providers.

(b) when granting licences to manufacturers of consumer equipment, holders of industrial property rights to conditional access products and systems are to ensure that this is done on fair, reasonable and non-discriminatory terms. Taking into account technical and commercial factors, holders of rights are not to subject the granting of licences to conditions prohibiting, deterring or discouraging the inclusion in the same product of:

- a common interface allowing connection with several other access systems, or
- means specific to another access system, provided that the licensee complies with the relevant and reasonable conditions ensuring, as far as he is concerned, the security of transactions of conditional access system operators.

PART II: OTHER FACILITIES TO WHICH CONDITIONS MAY BE APPLIED UNDER ARTICLE 59(1)(ʙD)[123]

(a) Access to application program interfaces (APIs);

(b) Access to electronic programme guides (EPGs);

(c) Access related complementary services, i.e. accessibility services enabling appropriate access for disabled end-users and data supporting connected television services and electronic programming guides.[124]

[123] Error correction
[124] Shadows 11/7

ANNEX III

CRITERIA FOR THE DETERMINATION OF WHOLESALE CALL TERMINATION RATES

Criteria and parameters for the determination of rates for wholesale call termination on fixed and mobile markets, referred to in Article 73 (4):

(a) the relevant incremental costs of the wholesale voice call termination service shall be determined by the difference between the total long-run costs of an operator providing its full range of services and the total long-run costs of that operator not providing a wholesale voice call termination service to third parties;

(b) only those traffic related costs which would be avoided in the absence of a wholesale voice call termination service being provided shall be allocated to the relevant termination increment;

(c) costs related to additional network capacity shall be included only to the extent that they are driven by the need to increase capacity for the purpose of carrying additional wholesale voice call termination traffic;

(d) radio spectrum fees shall be excluded from the mobile termination increment;

(e) only those wholesale commercial costs shall be included which are directly related to the provision of the wholesale voice call termination service to third parties;

(f) all fixed network operators shall be deemed to provide voice call termination services at the same unit costs as the efficient operator, regardless of their size;

(g) for mobile network operators, the minimum efficient scale shall be set at a market share not below 20%;

(h) the relevant approach for asset depreciation shall be economic depreciation; and

the technology choice of the modelled networks shall be forward looking, based on an IP core network, taking into account the various technologies likely to be used over the period of validity of the maximum rate. In the case of fixed networks, calls shall be considered to be exclusively packet switched

FINAL
CA2

Information request to undertakings

The CA covers Art 2(10), 2(11), 20 and related recitals. All relevant AMs, including AMs 326, 429-441, as well as IMCO 88, fall.

Recitals

(55) National regulatory and other competent authorities need to gather information from market players in order to carry out their tasks effectively. It might also be necessary to gather such information on behalf of the Commission or BEREC, to allow them to fulfil their respective obligations under Union law. Requests for information should be proportionate and not impose an undue burden on undertakings. Information gathered by national regulatory and other competent authorities should be publicly available, except in so far as it is confidential in accordance with national rules on public access to information and subject to Union and national law on business confidentiality.

(56) 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 compliance with conditions attached to rights of use, 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. Information regarding compliance with coverage obligations attached to rights of use for radio spectrum is key to ensure completeness of the geographic surveys of network deployments undertaken by national regulatory authorities. In that respect, they should be able to require that information is provided at disaggregated local level with a granularity adequate to conduct a geographical survey of networks.

(58) Member States' obligations to provide information for the defence of Union interests under international agreements as well as reporting obligations under legislation which is not specific to the electronic communications sector such as competition law should not be affected.

(59) Information that is considered confidential by a competent authority, in accordance with Union and national rules on business confidentiality and protection of personal data, may be exchanged with the Commission and other national regulatory authorities and BEREC where such exchange is necessary for the application of the provisions of this Directive. The information exchanged should be limited to that which is relevant and proportionate to the purpose of such an exchange.

Articles

Art 2(10)-(11) (Definitions)

(10) ‘associated facilities’ means those associated services, physical infrastructures and other facilities or elements associated with an electronic communications network and/or an electronic communications service which enable and/or support the provision of services via that network and/or service or have the potential to do so, and include, inter alia, buildings or entries to buildings, building wiring, antennae, towers and other supporting constructions, ducts, conduits, masts, manholes, and cabinets;

(11) ‘associated services’ means those services associated with an electronic communications network and/or an electronic communications service which enable and/or support the provision of services~~, self-provision or automated provision~~ via that network and/or service or have the potential to do so and include, inter alia, number translation or systems offering equivalent functionality, conditional access systems and electronic programme guides~~, voice command, multi-language or language translation~~ as well as other services such as identity, location and presence service;[1]

Article 20

Information request to undertakings

1. Member States shall ensure that undertakings providing electronic communications networks and services, associated facilities, or associated services provide all the information, including financial information, necessary for national regulatory authorities, other competent authorities and BEREC to ensure conformity with the provisions of, or decisions made in accordance with, this Directive. In particular, national regulatory authorities shall have the power to require those undertakings to submit information concerning future network or service developments that could have an impact on the wholesale services that they make available to competitors. They may also require information on electronic communications networks and associated facilities which is disaggregated at local level and sufficiently detailed for the national regulatory authority to be able to conduct the geographical survey and to designate digital exclusion areas in accordance with Article 22. ~~In accordance with Article 29, national regulatory authorities may sanction undertakings deliberately providing misleading, erroneous or incomplete information.~~[2]

Undertakings with significant market power on wholesale markets may also be required to submit accounting data on the retail markets that are associated with those wholesale markets.

National regulatory authorities and other competent authorities may request information from the single information points established pursuant to Directive 2014/61/EU on measures to reduce the cost of high-speed electronic communications networks.

Undertakings shall provide such information promptly upon request and in conformity with the timescales and level of detail required. The information requested shall be proportionate to the performance of that task. The competent authority shall give the reasons justifying its request for information and shall treat the information in accordance with paragraph 3.

2. Member States shall ensure that national regulatory authorities and other competent authorities provide the Commission, after a reasoned request, with the information necessary

[1] 326 Tosenovsky.
[2] 443 Kumpula-Natri; covers 434 Kallas

for it to carry out its tasks under the Treaty. The information requested by the Commission shall be proportionate to the performance of those tasks. Where the information provided refers to information previously provided by undertakings at the request of the authority, such undertakings shall be informed thereof. To the extent necessary, and unless the authority that provides the information has made an explicit and reasoned request to the contrary, the Commission shall make the information provided available to another such authority in another Member State.

Subject to the requirements of paragraph 3, Member States shall ensure that the information submitted to one authority can be made available to another such authority in the same or different Member State and to BEREC, after a substantiated request, where necessary to allow either authority, or BEREC, to fulfil its responsibilities under Union law.

3. Where information is considered confidential by a national regulatory or other competent authority in accordance with Union and national rules on business confidentiality***, national security,***[3] or the protection of personal data, the Commission, BEREC and the authorities concerned shall ensure such confidentiality. In accordance with the principle of sincere cooperation, national regulatory authorities and other competent authorities shall not deny the provision of the requested information to the Commission, to BEREC or to another authority on the grounds of confidentiality or the need to consult with the parties which provided the information. When the Commission, BEREC or a competent authority undertake to respect the confidentiality of information identified as such by the authority holding it, the latter shall share the information on request for the identified purpose without having to further consult the parties who provided the information.

4. Member States shall ensure that, acting in accordance with national rules on public access to information and subject to Union and national rules on business confidentiality and protection of personal data, national regulatory and other competent authorities publish such information as would contribute to an open and competitive market.

5. National regulatory and other competent authorities shall publish the terms of public access to information as referred to in paragraph 4, including procedures for obtaining such access.

[3] 440 Kumpula-Natri.

FINAL
CA3
General Authorisation
~~(subject to finalisation)~~

The CA covers Art 2(16), 2(23), 12-16, 21, Annex I and related recitals. All relevant AMs, including AMs 4-5, 188-191, 194, 41-44, 47, 333, 417-421, 442-443, 1098-1104 as well as IMCO 87, 89, 240, 9-10, LIBE 23, fall.

(39) The least onerous authorisation system possible should be used to allow the provision of electronic communications networks and services in order to stimulate the development of new communications services and pan-European communications networks and services and to allow service providers and consumers to benefit from the economies of scale of the single market.

(40) The benefits of the single market to service providers and end-users can be best achieved by general authorisation of electronic communications networks and of electronic communications services ~~other than number-independent interpersonal communications services~~, without requiring any explicit decision or administrative act by the national regulatory authority

(40a) ~~and by limiting a~~***A***ny procedural requirements ***should be limited*** to a ***single*** declaratory notification.[1] Where Member States require notification by providers of electronic communications networks or services when they start their activities, ***that*** ~~this~~ ~~***single***~~[2] notification should be submitted to BEREC which acts as a single contact point. Such notification should not entail administrative cost for the providers and could be made available via an entry point at the website of ~~the national regulatory authorities~~ ***BEREC***.[3] BEREC should forward in good time the notifications to the national regulatory authority in all Member States ***requiring notification*** in which the providers of electronic communications networks or services intend to provide electronic communications networks or services. Member States can also require proof that notification was made by means of any legally recognised postal or electronic acknowledgement of receipt of the notification to BEREC. Such acknowledgement should in any case not consist of or require an administrative act by the national regulatory authority, or any other authority.[4]

(41) The notification to BEREC should entail a mere declaration of the provider's intention to commence the provision of electronic communications networks and services. A provider may only be required to accompany such declaration by the information set out in Article 12 of this Directive***, being the minimum information needed to facilitate a consistent implementation of this Directive as well as to provide the most relevant***

[1] DLA input
[2] DLA input
[3] AM 188 Kallas
[4] DR AM 4 as proposed amended. Proposed to split recital 40 into two to make a clearer distinction between authorisation and notification

market knowledge to BEREC and national regulatory authorities.[5] Member States should not impose additional or separate notification requirements.

(42) ~~Contrary to the other categories of~~ ***A provider of any*** electronic communications ~~networks and~~ services ~~as defined in this Directive, number-independent interpersonal communications services do not~~ ***should be able to*** benefit from ~~the use of public numbering resources and do not participate in a publicly assured interoperable ecosystem. It is therefore not appropriate to subject these types of services to~~ the general authorisation regime.[6]

(43) When granting rights of use for radio spectrum, numbers or rights to install facilities, the competent authorities should inform the undertakings to whom they grant such rights of the relevant conditions.

(44) General authorisations should only contain conditions which are specific to the electronic communications sector. ***They*** ~~It~~ should not be made subject to conditions which are already applicable by virtue of other existing national law***, in particular regarding consumer protection,*** which is not specific to the communications sector ***and should be without prejudice to provisions of consumer contracts established in accordance with Regulation (EC) No 593/2008 of the European Parliament and of the Council***.[7] For instance, the national regulatory authorities may inform operators about applicable environmental and, town and country planning requirements.

(45) The conditions that may be attached to ***general*** 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.[8]

(46) It is necessary to include the rights and obligations of undertakings under general authorisations explicitly in such authorisations in order to ensure a level playing field throughout the Union and to facilitate cross-border negotiation of interconnection between public communications networks.

(47) The general authorisation entitles undertakings providing electronic communications networks and services to the public to negotiate interconnection under the conditions of this Directive. Undertakings providing electronic communications networks and services other than to the public can negotiate interconnection on commercial terms.

(47a) Providers of electronic communication services that operate in more than one Member State remain subject to different rules, requirements and reporting obligations despite having the freedom to provide electronic communications networks and services anywhere in the Union, which hinders the development and growth of the internal market for electronic communications. It should therefore be possible for such a provider, where it has a main establishment in the Union, to fall under a single general authorisation by the Member State of its main establishment in the Union.[9] ***BEREC should facilitate the coordination and exchange of information. Providers of electronic communication services may still need to obtain***

[5] AM 189 Kumpula-Natri (as amended)
[6] DR AM 5
[7] DLA input
[8] Possible clarification
[9] DLA input

specific authorisations for the rights of use for numbers, radio spectrum and for rights to install facilities.[10]

(47b) It is necessary for the proper functioning of the internal market to avoid incentives for providers to seek to obtain a more favourable legal position to the detriment of end-users (fraudulent or abusive forum shopping). Therefore, the place of main establishment in the Union should reflect the central location where the provider has an effective establishment, adopts its strategic business decisions and performs substantial activities ~~necessary to be able to provide~~ directly related to the provision of electronic communication services in the Union .[11]

(48) In the case of electronic communications networks and services not provided to the public it is appropriate to impose fewer and lighter conditions than are justified for electronic communications networks and services provided to the public.

(49) Specific obligations which may be imposed on providers of electronic communications networks and electronic communications services ~~other than number-independent interpersonal communications services~~[12] in accordance with Union law by virtue of their significant market power as defined in this Directive should be imposed separately from the general rights and obligations under the general authorisation.

(50) Providers of electronic communications networks and services may need a confirmation of their rights under the general authorisation with respect to interconnection and rights of way, in particular to facilitate negotiations with other, regional or local, levels of government or with service providers in other Member States. For this purpose BEREC, which receives the notification to provide public or private communications networks or services, should provide declarations to undertakings ~~either upon request or alternatively~~[13] as an automatic response to a notification under the general authorisation. Such declarations should not by themselves constitute entitlements to rights nor should any rights under the general authorisation or rights of use or the exercise of such rights depend upon a declaration.

(51) Administrative charges may be imposed on providers of electronic communications services in order to finance the activities of the national regulatory authority or other competent authority in managing the authorisation system and for the granting of rights of use. Such charges should be limited to cover the actual administrative costs for those activities. For this purpose transparency should be created in the income and expenditure of national regulatory authorities and of other competent authorities by means of annual reporting about the total sum of charges collected and the administrative costs incurred. This will allow undertakings to verify that administrative costs and charges are in balance.

(52) Systems for administrative charges should not distort competition or create barriers for entry into the market. With a general authorisation system it will no longer be possible to attribute administrative costs and hence charges to individual undertakings except for the granting of rights of use for numbers, radio spectrum and for rights to install facilities. Any applicable administrative charges should be in line with the principles of a general authorisation system. An example of a fair, simple and transparent alternative

[10] AM 191 Kallas (as amended to refer to the case where a provider has a main establishment and to remove the reference to notification)

[11] To address concerns raised 7/7. Linked to definition of main establishment. DLA input.

[12] Consequence of AM 4

[13] Suggestion to further simplify. Flows from the fact that the GA does not consist of or require any explicit decision or administrative act (rec 40 and Art 12(3)).

for these charge attribution criteria could be a turnover related distribution key. Where administrative charges are very low, flat rate charges, or charges combining a flat rate basis with a turnover related element could also be appropriate. To the extent that the general authorisation system extends to undertakings with very small market shares, such as community-based network providers, or to service providers whose business model generates very limited revenues even in case of significant market penetration in terms of volumes, Member States should assess the possibility to establish an appropriate de minimis threshold for the imposition of administrative charges.

(57) To alleviate reporting and information obligations for network and service providers and the competent authority concerned, such obligations should be proportionate, objectively justified and limited to what is strictly necessary. In particular, duplication of requests for information by the competent authority, and by BEREC and the systematic and regular proof of compliance with all conditions under a general authorisation or a right of use should be avoided. ***Reporting and information obligations for electronic communication services providers operating in several Member States should, where the provider has a main establishment in the Union and falls under the general authorisation of the Member State of its main establishment, be coordinated through that Member State, without prejudice to information request related to the granting of rights of use for numbers, radio spectrum and for rights to install facilities. BEREC should facilitate the free flow of information between the Member States concerned.***[14] ***Such information should be requested in a common and standardised format provided by BEREC.***[15] Undertakings should know the intended use of the information sought. Provision of information should not be a condition for market access. For statistical purposes a notification may be required from providers of electronic communications networks or services when they cease activities.

Article 2

Definitions

For the purposes of this Directive:

(16)‘provision of an electronic communications network’ means the establishment, operation, control or making available of such a network;

(23) ‘general authorisation’ means a legal framework established by the Member State ensuring rights for the provision of electronic communications networks or services and laying down sector-specific obligations that may apply to all or to specific types of electronic communications networks and services, in accordance with this Directive.

[14] DLA input.
[15] AM 194 Kallas (as amended)

CHAPTER II

GENERAL AUTHORISATION *AND RIGHTS OF USE*[16]

SECTION 1 GENERAL PART

Article 12

General authorisation of electronic communications networks and services

1. Member States shall ensure the freedom to provide electronic communications networks and services, subject to the conditions set out in this Directive. To this end, Member States shall not prevent an undertaking from providing electronic communications networks or services, except where this is necessary for the reasons set out in Article 52 (1) of the Treaty.[17] Any such limitation to the freedom to provide electronic communications networks and services shall be duly reasoned***, shall be in compliance with the Charter of Fundamental Rights of the European Union*** ~~***provided for by law, respect the essence of the rights and freedoms recognised by the Charter and be subject to the principle of proportionality, in accordance with Article 52 (1) of the Charter***~~[18] and shall be notified to the Commission. ~~***Member States shall provide the Commission and the other Member States with a reasoned notification within 12 months following the [transposition date] if they deem that a notification requirement is justified. The Commission shall examine the notification and, where appropriate, adopt a decision within a period of three months from the date of notification requesting the Member State in question to abolish the notification requirement.***~~[19]

2. The provision of electronic communications networks or the provision of electronic communications services ~~other than number-independent interpersonal communications services~~[20] may, without prejudice to the specific obligations referred to in Article 13(2) or rights of use referred to in Articles 46 and 88, only be subject to a general authorisation. ***The undertaking shall not be subject to prior authorisation or any other administrative act.***[21]

2a.[22] ***Where an undertaking providing electronic communication services in more than one Member State has a main establishment in the Union, it shall be subject to the general authorisation of that Member State and has the right to provide electronic communications services in all Member States.***

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[16] DR AM 40. Justif: *The provisions of this chapter refer to both general authorisation and rights of use - internal logic of the text.*

[17] TFEU 52(1): "The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health."

[18] AM 417 Helveg Petersen. 52(1) of the Charter: "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others." Clarificatory suggestion from LS. DLA input.

[19] DR AM 41. Justif: *Reinstating an AM aimed at regulatory simplification adopted by the Parliament in its first reading of the TSM Regulation. Subject to final placing. Proposed moved to 12(3)*

[20] DR AM 42. Justif: *All ECS should benefit from the general authorisation.*

[21] AM 418 Kallas (as amended). As discussed 7/7, aligned to recital 40. DLA input.

[22] Highlighted aspects in par 2a reflect ALDE input

For the purposes of this Directive, the main establishment corresponds to the place where the undertaking meets all of the following criteria:

a) it performs its substantial activities other than purely administrative such as business development, accounting and personnel departments;

b) it takes its strategic business decisions as to provide electronic communications services in the Union]; and[23]

c) it produces a significant part of its turnover.

~~***d) employs most of its staff [or] is the country where it has most of its costumers***~~

2c~~b~~b The competent authority of the Member State of main the establishment, also acting on the request of the competent authorities of another Member State, shall undertake measures necessary to monitor and supervise compliance with the conditions of the general authorisation and provide information under Article 21. Where necessary, BEREC shall facilitate and coordinate that exchange of information.

In the case of a demonstrated breach of the relevant rules in a Member State other than the one of the main establishment, the competent authorities of the Member State of the main establishment shall decide on[24] ***the appropriate measures in accordance with Article 30.***

In the case of disagreement with the measures taken by the authorities of the Member State of main establishment or related to conflicting views as it regards the main place of establishment, BEREC may act as mediator and, if necessary in the case of an unresolved dispute, issue a decision, acting by a two-thirds majority of members of the Board of Regulators.[25]

~~***[additional paragraph needed to address cases where a NRA disputes the main establishment of an operator]***~~

3. Where a Member State deems that a notification requirement is justified, that Member State may only require undertakings to submit a notification to BEREC but it may not require them to obtain an explicit decision or any other administrative act by the national regulatory authority or by any other authority before exercising the rights stemming from the authorisation. ***Member States shall provide the Commission and the other Member States with a reasoned notification within 12 months after ...~~following the~~ [transposition date] if they consider a notification requirement to be justified. The Commission shall examine the notification and, where appropriate, adopt a decision within three months of the date of notification requesting the Member State in question to revoke the notification requirement.***[26]

Member States requiring notification shall allow but shall not require a provider of electronic communications services offered in fewer than [three] Member States and with an aggregate group Union turnover of less than EUR [100] million to submit a notification. Upon

[23] ALDE input. Cf recital 47b

[24] Suggested technical correction 30/8.

[25] AM 419 Kallas (as amended). As discussed 7/7 and as a consequence of new 13(-1). Note ECR suggested alternative drafting (made w/o prejudice to their disagreement with a new decision-making power for BEREC): "In case of disagreement with the measures taken by the authority~~ies~~ of the Member State of main establishment, BEREC ~~may~~ ***shall make its utmost effort to resolve the dispute*** as mediator ~~and issue decisions in case of unresolved disputes~~***; only where the mediation was not successful, BEREC may adopt, acting by a two-thirds majority of members of the Board of Regulators, a Decision on the disputed matter***." DLA input.

[26] DR AM 41. Proposed moved. DLA input.

notification to BEREC, when required, an undertaking may begin activity, where necessary subject to the provisions on rights of use pursuant to this Directive. ***If a notification does not identify one or more Member States concerned, it shall be deemed to cover all the Member States.*** BEREC shall forward by electronic means and without delay each notification to the national regulatory authority in all Member States concerned by the provision of electronic communications networks or the provision of electronic communications services.[27]

Information in accordance with this paragraph on existing notifications already made to the national regulatory authority on the date of transposition of this Directive shall be provided to BEREC at the latest on [date of transposition].

4. The notification referred to in paragraph 3 shall not entail more than a declaration by a legal or natural person to BEREC of the intention to commence the provision of electronic communications networks or services and the submission of the minimal information which is required to allow BEREC and the national regulatory authority to keep a register or list of providers of electronic communications networks and services. This information must be limited to:

(1) the name of the provider;

(2) the provider's legal status, form and registration number, where the provider is registered in a trade or other similar public register in the EU;

(3) the geographical address of the provider's main establishment ~~in the EU~~ and, where ~~existing~~ ***applicable***, any secondary branch in a Member State;[28]

(3a) the provider's website, where existing, associated with the provision of electronic communications networks and/or services;[29]

(4) a contact person and contact details;

(5) a short description of the networks or services intended to be provided;

(6) the Member States concerned, and

(7) an estimated date for starting the activity.

Member States may not impose any additional or separate notification requirements.

Article 13

Conditions attached to the general authorisation and to the rights of use for radio spectrum and for numbers, and specific obligations

-1 Unless otherwise provided in this Directive, providers of electronic communications services having a main establishment in a Member State and active in more than one Member

[27] DR AM 43. Justif: *This allows providers of ECS to obtain the benefit of the general authorisation if they so desire in Member States that require notification, while excluding an obligation on those providers to file a notification unless they have a community dimension in the form of meeting a test relating to presence in several member States and minimum turnover (from all sources), as inspired by Union competition law (Regulation 139/2004). This is in line with the approach to newly emerging services, as set out in recital 148 and the Recommendation on relevant product and service markets. Also slight simplification allowing in particular providers of ECS to receive the benefit of the general authorisation across the entire Union without having to list all Member States (some of which also do not require notification). Inextricably linked to other admissible AMs*. DLA input.

[28] BEREC (as amended)

[29] BEREC. DLA input.

State shall be subject only to the conditions attached to the general authorisation applicable in the Member State of their main establishment. The national regulatory authority of that Member State shall be responsible for exercising the enforcement powers related to the general authorisation conditions without prejudice to other obligations not covered by this Directive.[30] ***and ~~is without prejudice~~ to the provider's obligation to comply with the laws of the Member State where it ~~the~~provides~~r offers~~ electronic communication services.***[31]

~~Providers of electronic communication services active in more than one Member State shall also be subject to the national authorities of all the Member States where they operate for the provisions of this directive other than provisions related to general authorisation and any other obligation under national law.~~

1. The general authorisation for the provision of electronic communications networks or services and the rights of use for radio spectrum and rights of use for numbers may be subject only to the conditions listed in Annex I. Such conditions shall be non-discriminatory, ***adapted to the specifics of the network or service,*** proportionate and transparent and, in the case of rights of use for radio spectrum, shall be in accordance with Articles 45 and 51 in the case of rights of use for numbers, shall be in accordance with Article 88.

2. Specific obligations which may be imposed on providers of electronic communications networks and services under Articles ~~13,~~[32] 36, 46(1), 48(2)***, 59(1)***[33] or on those designated to provide universal service under this Directive shall be legally separate from the rights and obligations under the general authorisation. In order to achieve transparency for undertakings, the criteria and procedures for imposing such specific obligations on individual undertakings shall be referred to in the general authorisation.

3. The general authorisation shall only contain conditions which are specific for that sector and are set out in Parts A, B and C of Annex I and shall not duplicate conditions which are applicable to undertakings by virtue of other national legislation.

4. Member States shall not duplicate the conditions of the general authorisation where they grant the right of use for radio frequencies or numbers.

Article 14

Declarations to facilitate the exercise of rights to install facilities and rights of interconnection

~~At the request of an undertaking,~~ BEREC shall~~, within one week,~~ issue standardised declarations, confirming, where applicable, that the undertaking has submitted a notification under Article 12(***3~~2~~***) and detailing under what circumstances any undertaking providing electronic communications networks or services under the general authorisation has the right to apply for rights to install facilities, negotiate interconnection, and/or obtain access or interconnection in order to facilitate the exercise of those rights for instance at other levels of government or in relation to other undertakings. ~~Where appropriate such~~ ***Those*** declarations ~~may also~~ ***shall*** be issued as an automatic reply following the notification referred to in Article 12(***3~~2~~***).[34]

[30] ALDE input (as amended)
[31] DLA input
[32] Appears to be an error
[33] BEREC comment
[34] See fn to recital 50. LS correction of crossreference

SECTION 2 GENERAL AUTHORISATION RIGHTS AND OBLIGATIONS

Article 15

Minimum list of rights derived from the general authorisation

1. Undertakings authorised pursuant to Article 12, shall have the right to:

(a) provide electronic communications networks and services;

(b) have their application for the necessary rights to install facilities considered in accordance with Article 43 of this Directive

(c) use radio spectrum in relation to electronic communications services and networks subject to Articles 13, 46 and 54.

(d) have their application for the necessary rights of use for numbers considered in accordance with Article 88.

2. When such undertakings provide electronic communications networks or services to the public the general authorisation shall also give them the right to:

(a) negotiate interconnection with and where applicable obtain access to or interconnection from other providers of publicly available communications networks and services covered by a general authorisation anywhere in the Union under the conditions of and in accordance with this Directive ;

(b) be given an opportunity to be designated to provide different elements of a universal service and/or to cover different parts of the national territory in accordance with Article 81 or 82.

Article 16

Administrative charges

1. Any administrative charges imposed on undertakings providing a service or a network under the general authorisation or to whom a right of use has been granted shall:

(a) in total, cover only the administrative costs which will be incurred in the management, control and enforcement of the general authorisation scheme and of rights of use and of specific obligations as referred to in Article 13(2), which may include costs for international cooperation, harmonisation and standardisation, market analysis, monitoring compliance and other market control, as well as regulatory work involving preparation and enforcement of secondary legislation and administrative decisions, such as decisions on access and interconnection; and

(b) be imposed upon the individual undertakings in an objective, transparent and proportionate manner which minimises additional administrative costs and attendant charges. Member States may choose not to apply administrative charges to undertakings whose turnover is below a certain threshold or whose activities do not reach a minimum market share or have a very limited territorial scope. ***Member States may not apply any administrative charges on providers of electronic communications services present in fewer than [three] Member States and with an aggregate Union turnover of less than EUR [100] million over and above a***

maximum one-off charge not exceeding EUR [10]~~, to cover any administrative costs incurred in the mere registration of any voluntary notification under Article 12~~. [35]

2. Where national regulatory authorities or other competent authorities impose administrative charges, they shall publish a yearly overview of their administrative costs and of the total sum of the charges collected. In the light of the difference between the total sum of the charges and the administrative costs, appropriate adjustments shall be made.

Article 21

Information required under the general authorisation, for rights of use and for the specific obligations

1. Without prejudice to ***any information requested pursuant to*** [36]***Article 20 and*** information and reporting obligations under national legislation other than the general authorisation, national regulatory and other competent authorities may ~~only~~ require undertakings to provide information under the general authorisation, for rights of use or the specific obligations referred to in Article 13(2) that is proportionate and objectively justified for ***in particular***:

(a) systematic or case-by-case verification of compliance with condition 1 of Part A, conditions 2 and 6 of Part D and conditions 2 and 7 of Part E of Annex I and of compliance with obligations as referred to in Article 13 (2);

(b) case-by-case verification of compliance with conditions as set out in Annex I where a complaint has been received or where the competent authority has other reasons to believe that a condition is not complied with or in case of an investigation by the competent authority on its own initiative;

(c) procedures for and assessment of requests for granting rights of use;

(d) publication of comparative overviews of quality and price of services for the benefit of consumers;

(e) clearly defined statistical***, reports or studies*** purposes;

(f) market analysis for the purposes of this Directive ***including data on the downstream or retail markets associated with or related to the markets subject to market analysis***;

(g) safeguarding the efficient use and ensuring the effective management of radio spectrum and of numbering resources;

(h) evaluating future network or service developments that could have an impact on wholesale services made available to competitors, on ***territorial coverage*** or on the designation of digital exclusion areas***;*** [37]

(ha) conducting geographical studies;

[35] DR AM 44. Justif: *Providers of ECS wishing to avail themselves of the benefits of the general authorisation, with respect to Member States requiring notification, even though they have not achieved a community dimension should not be dissuaded by burdensome and unpredictable recurring administrative charges. As proposed amended.*

[36] DLA input

[37] DR AM 47. Justif: *This provision is part of the information national authorities may request from providers. The text therefore needs to be clear. "Connectivity" here clearly means coverage.*

(hb) responding to reasoned requests for information by BEREC.[38]

~~***(hc) responding to requests for information from national regulatory and other competent authorities that are not of the main place of establishment of the operator in compliance with obligation as referred to in article 12 (2).***~~

The information referred to in points (a), (b), (d), (e), (f), (g) and (h) of the first subparagraph may not be required prior to, or as a condition for, market access.

BEREC shall, by [date], develop standardised formats for information requests.[39]

2. As regards the rights of use for radio spectrum, such information shall refer in particular to the effective and efficient use of radio spectrum as well as to compliance with the coverage and quality of service obligations attached to the rights of use for radio spectrum and their verification.

3. Where national regulatory or other competent authorities require undertakings to provide information as referred to in paragraph 1, they shall inform them of the specific purpose for which this information is to be used.

4. National regulatory or other competent authorities may not duplicate requests of information already made by BEREC pursuant to Article 30 of Regulation [xxxx/xxxx/EC (BEREC Regulation)][40].

4a. Without prejudice to information and reporting obligations for rights of use and for specific obligations, where an undertaking provides electronic communication services in more than one Member State, and has a main establishment in the Union, only the national regulatory authority of the Member State of the main establishment may request the information referred to in paragraph 1. The national regulatory authorities of other Member States concerned may request information from the first national regulatory authority or from BEREC. BEREC shall facilitate the coordination and exchange of information between the national regulatory authorities concerned through the exchange of information established pursuant to Article 30 of Regulation [xxxx/xxxx/EC (BEREC Regulation).[41]

[38] BEREC (as amended)

[39] AM 442 Kallas (as amended)

[40] Regulation (EC) No xxxx/xxxx of the European Parliament and of the Council of [] establishing the Body of European Regulators for Electronic Communications (BEREC) (OJ L. []).

[41] AM 443 Kallas (as amended). DLA input.

ANNEX I

LIST OF CONDITIONS WHICH MAY BE ATTACHED TO GENERAL AUTORISATIONS, RIGHTS OF USE OF RADIO SPECTRUM AND RIGHTS TO USE NUMBERS

The conditions listed in this Annex provide the maximum list of conditions which may be attached to general authorisations for electronic communications networks and services~~, except number-independent interpersonal communications services~~ ,[42] (Part A), electronic communications networks (Part B), electronic communications services~~, except number-independent interpersonal communications services,~~[43] (Part C), rights to use radio frequencies (Part D) and rights to use numbers (Part E)

A. GENERAL CONDITIONS WHICH MAY BE ATTACHED TO A GENERAL AUTHORISATION

1. Administrative charges in accordance with Article 16 of this Directive.

2. Personal data and privacy protection specific to the electronic communications sector in conformity with Directive 2002/58/EC of the European Parliament and of the Council (Directive on privacy and electronic communications)[44]

3. Information to be provided under a notification procedure in accordance with Article 12 of this Directive and for other purposes as included in Article 21 of this Directive.

4. Enabling of legal interception by competent national authorities in conformity with Directive 2002/58/EC and Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[45].

5. Terms of use for communications from public authorities to the general public for warning the public of imminent threats and for mitigating the consequences of major catastrophes.

6. Terms of use during major disasters or national emergencies to ensure communications between emergency services and authorities.

7. Access obligations other than those provided for in Article 13***(2)*** of this Directive applying to undertakings providing electronic communications networks or services.[46]

8. Measures designed to ensure compliance with the standards and/or specifications referred to in Article 39.

9. Transparency obligations on public communications network providers providing electronic communications services available to the public to ensure end-to-end connectivity, in conformity with the objectives and principles set out in Article 3 and, where necessary and proportionate, access by national regulatory authorities to such information needed to verify the accuracy of such disclosure.

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[42] Consequence of AM 4

[43] id

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

[45] OJ L 281, 23.11.1995, p. 31.

[46] BEREC comment on 13(2) reference. Otherwise, according to input, "This refers to access obligations other than those included in 13. Article 13 includes symmetric access obligations, conditional access, and access obligations for the universal service provider. Other obligations could regard for instance to access to information or to facilities."

B. SPECIFIC CONDITIONS WHICH MAY BE ATTACHED TO A GENERAL AUTHORISATION FOR THE PROVISION OF ELECTRONIC COMMUNICATIONS NETWORKS

1. Interconnection of networks in conformity with this Directive.

2. 'Must carry' obligations in conformity with this Directive.

3. Measures for the protection of public health against electromagnetic fields caused by electronic communications networks in accordance with Union law, taking utmost account of Council Recommendation No 1999/519/EC.

4. Maintenance of the integrity of public communications networks in accordance with this Directive including by conditions to prevent electromagnetic interference between electronic communications networks and/or services in accordance with Council Directive 89/336/EEC of 3 May 1989 on the approximation of the laws of the Member States relating to electromagnetic compatibility[47].

5. Security of public networks against unauthorised access according to Directive 2002/58/EC (Directive on Privacy and electronic communications).

6. Conditions for the use of radio spectrum, in conformity with Article 7[48] of Directive 2014/53/EU, where such use is not made subject to the granting of individual rights of use in accordance with Articles 46(1) and 48 of this Directive.

C. SPECIFIC CONDITIONS WHICH MAY BE ATTACHED TO A GENERAL AUTHORISATION FOR THE PROVISION OF ELECTRONIC COMMUNICATIONS SERVICES~~, EXCEPT NUMBER-INDEPENDENT INTERPERSONAL COMMUNICATIONS SERVICES~~[49]

1. Interoperability of services in conformity with this Directive.

2. Accessibility by end users of numbers from the national numbering plan, numbers from the Universal International Freephone Numbers and, where technically and economically feasible, from numbering plans of other Member States, and conditions in conformity with this Directive.

3. Consumer protection rules specific to the electronic communications sector.

4. Restrictions in relation to the transmission of illegal content, in accordance with Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market[50] and restrictions in relation to the transmission of harmful content in accordance with Directive 2010/13/EU of the European Parliament and of the Council[51].

D. CONDITIONS WHICH MAY BE ATTACHED TO RIGHTS OF USE FOR RADIO SPECTRUM

1. Obligation to provide a service or to use a type of technology within the limits of Article 49 of this Directive including, where appropriate, coverage and quality of service requirements.

2. Effective and efficient use of spectrum in conformity with this Directive.

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47 OJ L 139, 23.5.1989, p. 19. Directive as last amended by Directive 93/68/EEC (OJ L 220, 30.8.1993, p. 1).

48 Correction confirmed by COM

49 Consequence of AM 4

50 OJ L 178, 17.7.2000, p. 1.

51 OJ L 95, 15.4.2010, p. 1.

3. Technical and operational conditions necessary for the avoidance of harmful interference and for the protection of public health against electromagnetic fields, taking utmost account of Council Recommendation No 1999/519/EC [52] where such conditions are different from those included in the general authorisation.

4. ~~Maximum d~~***D***uration ***and conditions*** in conformity with Article 49 of this Directive~~, subject to any changes in the national frequency plan~~.[53]

5. Transfer or leasing of rights at the initiative of the right holder and conditions for such transfer in conformity with this Directive.

6. Usage fees in accordance with Article 42 of this Directive.

7. Any commitments which the undertaking obtaining the usage right has made in the framework of an authorisation or authorisation renewal process prior to the authorisation being granted or, where applicable, to the invitation for application for rights of use.

8. Obligations to pool or share radio spectrum or allow access to radio spectrum for other users in specific regions or at national level.

9. Obligations under relevant international agreements relating to the use of frequencies.

10. Obligations specific to an experimental use of radio frequencies.

E. CONDITIONS WHICH MAY BE ATTACHED TO RIGHTS OF USE FOR NUMBERS

1. Designation of service for which the number shall be used, including any requirements linked to the provision of that service and, for the avoidance of doubt, tariff principles and maximum prices that can apply in the specific number range for the purposes of ensuring consumer protection in accordance with Article3(2)(d) of this Directive.

2. Effective and efficient use of numbers in conformity with this Directive.

3. Number portability requirements in conformity with this Directive.

4. Obligation to provide public directory end user information for the purposes of Article 104 of this Directive.

5. Maximum duration in conformity with Article 46 of this Directive, subject to any changes in the national numbering plan.

6. Transfer of rights at the initiative of the right holder and conditions for such transfer in conformity with this Directive.

7. Usage fees in accordance with Article 42 of this Directive.

8. Any commitments which the undertaking obtaining the usage right has made in the course of a competitive or comparative selection procedure.

9. Obligations under relevant international agreements relating to the use of numbers.

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[52] Recommendation 1999/519/EC of the Council of 12 July 1999 on the limitation of exposure of the general public to electromagnetic fields (0 Hz to 300 GHz) (OJ L 1999, 30.7.1999, p. 59).

[53] Proposed alignment to Spectrum CA. According to input, the highlighted part means: "A change in the national frequency plan (corresponding to changing technical conditions) can make any right unusable. It could be e.g. changing a band to military or from terrestrial to satellite. This is unusual but an established spectrum management principle. Note that this possibility has to be stated in the conditions attached to rights of use."

10. Obligations concerning the extraterritorial use of numbers within the Union to ensure compliance with consumer protection and other number-related rules in Member States other than that of the country code.

FINAL
CA4[1]

Spectrum

~~[Art 28 Radio spectrum coordination among MS addressed in separate CA but could be included here]~~

The CA covers Art 4, 18-19, 35-37, 42, 45-56, 59(3), AM 74 and related recitals. All relevant AMs, including AMs 36, 45-46, 60-67, 68-109, 113, 392-395, 420-428, 536-558, 582-589, 592-715, 784-790, as well as IMCO 114-118, 15, CULT 3, 9-10, 28, 37-41, LIBE 10, 19, fall.

Recitals

(9) In order to allow national regulatory authorities to meet the objectives set out in this Directive, in particular concerning end-to-end interoperability, the scope of the Directive should cover certain aspects of radio equipment as defined in Directive 2014/53/EU of the European Parliament and of the Council[2] and consumer equipment used for digital television, in order to facilitate access for disabled users. It is important for regulators to encourage network operators and equipment manufacturers to cooperate in order to facilitate access by disabled users to electronic communications services. The non-exclusive use of spectrum for the self-use of radio terminal equipment, although not related to an economic activity, should also be subject to this directive in order to guarantee a coordinated approach with regard to their authorisation regime.

(12) The regulatory framework should cover the use of radio spectrum by all electronic communications networks, including the emerging self-use of radio spectrum by new types of networks consisting exclusively of autonomous systems of mobile radio equipment that is connected via wireless links without a central management or centralised network operator, and not necessarily within the exercise of any specific economic activity. In the developing fifth generation mobile communications environment, such networks are likely to develop in particular outside buildings and on the roads, for transport, energy, R&D, eHealth, public protection and disaster relief, Internet of Things, machine-to-machine and connected cars. As a result, the application by Member States, based on Article 7 of Directive 2014/53/EU, of additional national requirements regarding the putting into service or use of such radio equipment, or both, in relation to the effective and efficient use of spectrum and avoidance of harmful interference should reflect the principles of the internal market.

[1] Art 35(1)(f) adjusted to take into account outcome on Access CA and Art 78i renumbered as 56a as there will be no new Title III

[2] Directive 2014/53/EU of the European Parliament and of the Council of 16 April 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment and repealing Directive 1999/5/EC (OJ L 153, 22.5.2014, p. 62).

(29) Electronic communications are becoming essential for an increasing number of sectors. The Internet of Things is an illustration of how the radio signal conveyance underpinning electronic communications continues to evolve and shape societal and business reality. To derive the greatest benefit from those developments, the introduction and accommodation of new wireless communications technologies and applications in spectrum management is essential. As other technologies and applications relying on spectrum are equally subject to growing demand, and can be enhanced by integration of or combination with electronic communications, spectrum management should adopt, where appropriate, a cross-sectorial approach to improve spectrum usage efficiency.

(30) Strategic planning, coordination and, where appropriate, harmonisation at Union level can help ensure that spectrum users derive the full benefits of the internal market and that Union interests can be effectively defended globally. For these purposes, where appropriate, legislative multiannual radio spectrum policy programmes may be adopted, with the first one defined by Decision No 243/2012/EU of the European Parliament and of the Council[3], setting out policy orientations and objectives for the strategic planning and harmonisation of the use of radio spectrum in the Union. 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, in accordance with this Directive.

(31) National borders are increasingly irrelevant in determining optimal radio spectrum use. Undue fragmentation amongst national policies regarding the management of radio spectrum, including unjustified different conditions for access to, and use of, radio spectrum according to the type of operator, may result in increased costs and lost market opportunities for spectrum users. It may slow down innovation, limit investment, reduce economies of scale for manufacturers and operators as well as create tensions between rights holders and discrepancies in the cost of access to spectrum. This fragmentation may overall result in a distortion of the functioning of the internal market and prejudice to consumers and the economy as a whole.

(32) 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 Union and between the Member States and other members of the ITU.

(53) Member States may need to amend rights, conditions, procedures, charges and fees relating to general authorisations and rights of use where this is objectively justified. Such changes should be duly notified to all interested parties in good time, giving them adequate opportunity to express their views on any such amendments. Taking into account the need to ensure legal certainty and to promote regulatory predictability, any restriction or withdrawal of existing rights of use for radio spectrum or to install facilities should be subject to predictable and transparent procedures; hence stricter requirements or a notification mechanism could be imposed where rights of use have been assigned pursuant to competitive or comparative procedures. ***Furthermore, in the***

[3] OJ L 81, 21.3.2012, p. 7.

case of individual rights of use for radio spectrum, the rights and conditions of such licenses should only be amended following prior consultation of the right holder. As restrictions or withdrawals of general authorisations or rights may have significant ~~and unpredictable~~[4] ***consequences for their holders, national competent authorities should take particular care and assess in advance the potential harm that such measures may cause before adopting such measures.*** Unnecessary procedures should be avoided in case of minor amendments to existing rights to install facilities or to use spectrum when such amendments do not impact on third parties' interests. The change in the use of spectrum as a result of the application of technology and service neutrality principles should not be considered a sufficient justification for a withdrawal of rights since it does not constitute the granting of a new right.[5]

(54) 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.

(70) Competent authorities should be able to monitor and secure compliance with the terms and conditions of the general authorisation and rights of use, and in particular to ensure effective and efficient use of spectrum and compliance with coverage and quality of service obligations, through financial or administrative penalties including injunctions and withdrawals of rights of use in the event of breaches of those terms and conditions. Undertakings should provide the most accurate and complete information possible to competent authorities to allow them to fulfil their surveillance tasks. In order to avoid the creation of barriers to entry in the market, namely through anti-competitive hoarding, enforcement of conditions attached to spectrum rights by Member States should be improved and all competent authorities beyond national regulatory authorities should participate. Enforcement conditions should include the application of a "use it or lose it" solution to counter-balance long duration of rights. For that purpose, trading and leasing of spectrum should be considered as modalities which ensure effective use by the original right holder. In order to ensure legal certainty in respect of possible exposure to any sanction for lack of use for spectrum, thresholds of use, among others in terms of time, quantity or identity of spectrum, should be defined in advance.

(70a) The granting of rights of use for radio spectrum for 25 years or more should be subject to conditions aimed at ensuring that general interest objectives, such as efficient and effective use and considerations relating to public order, security and defence, are safeguarded. Ssuch rights of use should therefore be subject to a mid-term assessment after no longer than ten years.[6]

(84) By virtue of their overall economic expertise and market knowledge, and of the objective and technical character of their assessments, and in order to ensure coherence with their other tasks of market regulation, national regulatory authorities should determine the elements of selection procedures and the conditions attached to the rights of use for spectrum which have the greatest impact on market conditions and the competitive situation, including conditions for entry and expansion. That includes for

[4] S&D comment
[5] DR AM 6
[6] DLA input

example the parameters for economic valuation of spectrum in compliance with this Directive, the specification of the regulatory and market-shaping measures such as the use of spectrum caps or reservation of spectrum or the imposition of wholesale access obligations, or the means to define the coverage conditions attached to rights of use. A more convergent use and definition of such elements would be favoured by a coordination mechanism whereby BEREC, the Commission and the national regulatory authorities of the other Member States would review draft measures in advance of the granting of rights of use by a given Member State in parallel to the national public consultation. The measure determined by the national regulatory authority can only be a subset of a wider national measure, which may more broadly consist of the granting, trade and lease, duration, renewal or the amendment of rights of use for radio spectrum as well as of the selection procedure or the conditions attached to the rights of use. Therefore, when notifying a draft measure, national regulatory authorities may provide information on other draft national measures related to the relevant selection procedure for limiting rights of use for radio spectrum which are not covered by the peer review mechanism.

(85) Where the harmonised assignment of radio frequencies to particular undertakings has been agreed at European level, Member States should strictly implement such agreements in the granting of rights of use for radio frequencies from the national frequency usage plan.

(86) Member States should be encouraged to consider joint authorisations as an option when issuing rights of use where the expected usage covers cross-border situations.

(93) Where the provision of electronic communications relies on public resources whose use is subject to specific authorisation, Member States may grant the authority competent for issuance thereof the right to impose fees to ensure optimal use of those resources, in accordance with the procedures envisaged in this Directive. In line with the case-law of the Court of Justice, Member States cannot levy any charges or fees in relation to the provision of networks and electronic communications services other than those provided for by this Directive. In that regard, Member States should have a coherent approach in establishing those charges or fees in order not to provide an undue financial burden linked to the general authorisation procedure or rights of use for undertakings providing electronic communications networks and services.

(94) To ensure optimal use of resources, fees should reflect the economic and technical situation of the market concerned as well as any other significant factor determining their value. At the same time, fees should be set in a manner that enables innovation in the provision of networks and services as well as competition in the market. Member States should therefore ensure that fees for rights of use are established on the basis of a mechanism which provides for appropriate safeguards against outcomes whereby the value of the fees is distorted as a result of revenue maximisation policies, anticompetitive bidding or equivalent behaviour. This Directive is without prejudice to the purpose for which fees for rights of use and rights to install facilities are employed. Such fees may for instance be used to finance activities of national regulatory authorities and competent authorities that cannot be covered by administrative charges. Where, in the case of competitive or comparative selection procedures, fees for rights of use for radio spectrum consist entirely or partly of a one-off amount, payment arrangements should ensure that such fees do not in practice lead to selection on the basis of criteria unrelated to the objective of ensuring optimal use of radio spectrum. The Commission may publish on a regular basis benchmark studies and other guidance as appropriate

with regard to best practices for the assignment of radio spectrum, the assignment of numbers or the granting of rights of way.

(95) ***Fees imposed on undertakings for*** rights of use for radio spectrum can influence decisions about whether to seek such rights and ***how to make the best*** use ***of*** radio spectrum resources. ***With a view to ensuring optimal, efficient***[7] ***use, when*** setting reserve prices Member States should therefore ensure that ***they reflect the alternative use of the resource and*** the additional costs associated with the fulfilment of authorisation conditions imposed to further policy objectives that would not reasonably be expected to be met pursuant to normal commercial standards, such as territorial coverage conditions.[8]

(96) Optimal use of radio spectrum resources depends on the availability of appropriate networks and associated facilities. In that regard, fees for rights of use for radio spectrum and for rights to install facilities should take into consideration the need to facilitate continuous infrastructure development with a view to achieving the most efficient use of the resources. Member States should therefore provide for modalities for payment of the fees for rights of use for radio spectrum linked with the actual availability of the resource in a manner that facilitates the investments necessary to promote such development. The modalities should be specified in an objective, transparent, proportionate and non-discriminatory manner before opening procedures for the granting of rights of use for spectrum ***and the fees clearly defined***.[9]

(101) Radio spectrum is a scarce public resource with an important public and market value. It is an essential input for radio-based electronic communications networks and services and, in so far as it relates to such networks and services, should therefore be efficiently allocated and assigned by national regulatory authorities according to harmonised objectives and principles governing their action as well as to objective, transparent and non-discriminatory criteria, taking into account the democratic, social, linguistic and cultural interests related to the use of frequencies.. 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)[10] establishes a framework for harmonisation of radio spectrum~~,~~.

(102) Radio spectrum policy activities in the Union should be without prejudice to measures taken, at Union or national level, in accordance with Union 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 public order, public security and defence. As use of spectrum for military and other national public security purposes impacts on the availability of spectrum for the internal market, radio spectrum policy should take into account all sectors and aspects of Union policies and balance their respective needs, while respecting Member States' rights.

(103) Ensuring ***maximum coverage of the highest capacity networks*** in each Member State is essential for economic and social development, participation in public life and social

[7] S&D comment
[8] DR AM 11
[9] DR AM 12. Justif: *The text seeks to further increase certainty with respect to investment needs*
[10] 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) (OJ L 108, 24.4.2002).

and territorial cohesion. As ***use of electronic communications*** becomes an integral element to European society and welfare, EU-wide coverage ***to cover close to 100 percent of citizens of the Union***[11] should be achieved by relying on imposition by Member States of appropriate coverage requirements, which should be adapted to each area served and limited to proportionate burdens in order not to hinder deployment by service providers. ***Seamless*** coverage of the territory should be maximised and reliable, with a view to promote services and applications such as connected cars and e-health. Therefore, application by competent authorities of coverage obligations should be coordinated at Union level. Considering national specificities, such coordination should be limited to general criteria to be used to define and measure coverage obligations, such as population density or topographical and topological features.[12]

(104) The need to ensure that citizens are not exposed to electromagnetic fields at a level harmful to public health should be approached in a consistent way across the Union, having particular regard to the precautionary approach taken in Council Recommendation No 1999/519/EC[34], in order to ensure consistent deployment conditions. ***With respect to very high capacity networks, Member States should apply the procedure set out in Directive 2015/1535/EU of the European Parliament and of the Council where relevant with a view also to providing transparency to stakeholders and to allow other Member States and the Commission to react.***[13]

(105) Spectrum harmonisation and coordination and equipment regulation supported by standardisation are complementary need to be coordinated closely to meet their joint objectives effectively, with the support of the RSPG. Coordination between the content and timing of mandates to CEPT under the Radio Spectrum Decision and standardisation requests to standardisation bodies, such as the European Telecommunications Standards Institute, including with regard to radio receivers parameters, should facilitate the introduction of future systems, support spectrum sharing opportunities and ensure efficient spectrum management.

(106) The demand for harmonised radio spectrum is not uniform in all parts of the Union. In cases where there is lack of demand for a harmonised band at regional or national level, Member States could exceptionally be able to allow an alternative use of the band as long as such lack of demand persists and provided that the alternative use does not prejudice the harmonised use of the said band by other Member States and that it ceases when demand for the harmonised use materialises.

(107) Flexibility in spectrum management and access to spectrum has been established 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 Union law (the 'principles of technology and service neutrality'). The administrative determination of technologies and services should apply only when general interest objectives are at stake and should be clearly justified and subject to regular periodic review.

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[11] AM 219 Kumpula-Natri. DLA input.

[12] DR AM 13. Justif: *Here, as elsewhere, there should be no confusion caused by the use of the vague "connectivity" in cases where a specific meaning is intended or where more precise usage is otherwise required. In this case, the text addresses territorial coverage, and is amended accordingly. Furthermore, "ubiquitous connectivity" implies complete coverage, which can be quite different from the appropriate coverage requirements, limitation to proportional burden etc outlined in the text.*

[13] DR AM 14. DLA input.

(108) 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 Union law.

(109) Spectrum users should also be able to freely choose the services they wish to offer over the spectrum. 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 Union 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 Union 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. 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.

(110) 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.

(111) In exceptional cases where Member States decide to limit the freedom to provide electronic communications networks and services based on grounds of public policy, public security or public health, Member States should explain the reasons for such limitation.

(112) Radio spectrum 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, having regard also to the need for network equipment and end-user devices to incorporate resilient receiver technology. Transport has a strong cross-border element and its digitalisation brings challenges. Vehicles (metro, bus, cars, trucks, trains, etc) are becoming more and more autonomous and connected. In an EU single market, vehicles travel beyond national borders more easily. Reliable communications, and avoiding harmful interferences, are critical for the safe and good operation of vehicles and their on-board communications systems.

(113) With growing spectrum demand and new varying applications and technologies which necessitate more flexible access and use of spectrum, Member States should promote the shared use of spectrum by determining the most appropriate authorisation regimes for each scenario and by defining appropriate and transparent rules and conditions therefor. Shared use of spectrum increasingly ensures its effective and efficient use by allowing several independent users or devices to access the same frequency band under various types of legal regimes so as to make additional spectrum resources available,

raise usage efficiency and facilitate spectrum access for new users. Shared use can be based on general authorisations or licence-exempt use allowing, under specific sharing conditions, several users to access and use the same spectrum in different geographic areas or at different moments in time. It can also be based on individual rights of use under arrangements such as licenced shared access where all users (with an existing user and new users) agree on the terms and conditions for shared access, under the supervision of the competent authorities, in such a way as to ensure a minimum guaranteed radio transmission quality. When allowing shared use under different authorisation regimes, Member States should not set widely diverging durations for such use under different authorisation regimes.

(113a) General authorisations for the use of spectrum may facilitate the most effective use of spectrum and foster innovation in some cases whereas individual rights of use for spectrum are likely to be the most appropriate authorisation regime in the presence of certain specific circumstances. For instance, individual rights of use should be considered when favourable propagation characteristics of the radio spectrum or the envisaged power level of the transmission makes this a more efficient use. This should also be the case where the geographical density of use is high or where radio spectrum is continuously in use. Another situation where individual rights of use should be considered is where the required quality of service prevents general authorisations from addressing the interference concerns. Where technical measures to improve receiver resilience can enable the use of general authorisations or enable spectrum sharing, these should be applied and the systematic recourse to non-protection, non-interference provisions should be avoided.[14]

(114) In order to ensure predictability and preserve legal certainty and investment stability, Member States should define in advance appropriate criteria to determine compliance with the objective of efficient use of spectrum by right holders when implementing the conditions attached to individual rights of use and general authorisations. Interested parties should be involved in the definition of such conditions and informed in a transparent manner about how the fulfilment of their obligations will be assessed.

(115) Considering the importance of technical innovation, Member States should be able to provide for rights to use spectrum for experimental purposes, subject to specific restrictions and conditions strictly justified by the experimental nature of such rights.

(116) Network infrastructure sharing, and in some instances spectrum sharing, can allow for a more efficient and effective use of radio spectrum and ensure the rapid deployment of networks, especially in less densely populated areas. When defining the conditions to be attached to rights of use for radio spectrum, competent authorities should also consider authorising forms of sharing or coordination between undertakings with a view to ensure effective and efficient use of spectrum or compliance with coverage obligations, in compliance with competition law principles.

(117) Market conditions as well as the relevance and number of players can differ amongst Member States. While the need and opportunity to attach conditions to rights of use for radio spectrum can be subject to national specificities which should be duly accommodated, the modalities of the application of such obligations should be

[14] DR AM 15. Justif: *The recital sets out explicitly under which circumstances individual rights of use for radio spectrum is the most appropriate authorisation regime (thus giving greater assurance that general or sharing provisions are more focused on new higher bands), while also pointing to efforts to promote technical measures to improve receiver resilience. Inextricably linked to other admissible AMs.*

coordinated at EU level through Commission implementing measures to ensure a consistent approach in addressing similar challenges across the EU.

(118) The requirements of service and technology neutrality in granting rights of use, together with the possibility to transfer rights between undertakings, underpin the freedom and means to deliver electronic communications services to the public, thereby also facilitating the achievement of general interest objectives. This Directive does not prejudice whether radio spectrum is assigned directly to providers of electronic communications networks or services or to entities that use these networks or services. Such entities may be radio or television broadcast content providers. The responsibility for compliance with the conditions attached to the right to use a radio frequency and the relevant conditions attached to the general authorisation should in any case lie with the undertaking to whom the right of use for the radio spectrum has been granted. Certain obligations imposed on broadcasters for the delivery of audiovisual media services may require the use of specific criteria and procedures for the granting of spectrum usage rights to meet a specific general interest objective set out by Member States in conformity with Union law. However, the procedure for the granting of such right should in any event be objective, transparent, non-discriminatory and proportionate. The case law of the Court of Justice requires that any national restrictions on the rights guaranteed by Article 56 of the Treaty on the Functioning of the European Union should be objectively justified, proportionate and not exceed what is necessary to achieve those objectives. Moreover, spectrum granted without following an open procedure should not be used for purposes other than the general interest objective for which they were granted. In such case, the interested parties should be given the opportunity to comment within a reasonable period. As part of the application procedure for granting rights, Member States should verify whether the applicant will be able to comply with the conditions to be attached to such rights. These conditions should be reflected in eligibility criteria set out in objective, transparent, proportionate and non-discriminatory terms prior to the launch of any competitive selection procedure. For the purpose of applying these criteria, the applicant may be requested to submit the necessary information to prove his ability to comply with these conditions. Where such information is not provided, the application for the right to use a radio frequency may be rejected.

(119) Member States should only impose, prior to the granting of right, the verification of elements that can reasonably be demonstrated by an applicant exercising ordinary care, taking due account of the important public and market value of radio spectrum as a scarce public resource. This is without prejudice to the possibility for subsequent verification of the fulfilment of eligibility criteria, for example through milestones, where criteria could not reasonably be met initially. To preserve effective and efficient use of radio spectrum, Member States should not grant rights where their review indicates applicants' inability to comply with the conditions, without prejudice to the possibility of facilitating time-limited experimental use. Sufficiently long duration of authorisations for the use of spectrum should increase investment predictability to contribute to faster network roll-out and better services, as well as stability to support spectrum trading and leasing. Unless use of spectrum is authorised for an unlimited period of time, such duration should both take account of the objectives pursued and be sufficient to facilitate recoupment of the investments made. While a longer duration can ensure investment predictability, measures to ensure effective and efficient use of radio spectrum, such as the power of the competent authority to amend or withdraw the right in case of non-compliance with the conditions attached to the rights of use, or the facilitation of radio spectrum tradability and leasing, will serve to prevent inappropriate

accumulation of radio spectrum and support greater flexibility in distributing spectrum resources. Greater recourse to annualised fees is also a means to ensure a continuous assessment of the use of the spectrum by the holder of the right.

(120) In deciding whether to renew already granted rights of use for radio spectrum, competent authorities should take into account the extent to which renewal would further the objectives of the regulatory framework and other objectives under national and Union law. Any such decision should be subject to an open, non-discriminatory and transparent procedure and based on a review of how the conditions attached to the rights concerned have been fulfilled. When assessing the need to renew rights of use, Member States should weigh the competitive impact of extending already assigned rights against the promotion of more efficient exploitation or of innovative new uses that might result if the band were opened to new users. Competent authorities may make their determination in this regard by allowing for only a limited extension in order to prevent severe disruption of established use. While decisions on whether to extend rights assigned prior to the applicability of this Directive should respect any rules already applicable, Member States should equally ensure that they do not prejudice the objectives of this Directive.

(121) When renewing existing rights of use, Member States should, together with the assessment of the need to renew the right, review the fees attached thereto with a view to ensuring that those fees continue to promote optimal use, taking account amongst other things, of the stage of market and technological evolution. For reasons of legal certainty, it is appropriate for any adjustments to the existing fees to be based on the same principles as those applicable to the award of new usage rights.

(122) Effective management of radio spectrum can be ensured by facilitating the continued efficient use of spectrum that has already been assigned. In order to ensure legal certainty to rights holders, the possibility of renewal of rights of use should be considered within an appropriate time-span prior to the expiry of the rights concerned. In the interest of continuous resource management, competent authorities should be able to undertake such consideration at their own initiative as well as in response to a request from the assignee. The renewal of the right to use may not be granted contrary to the will of the assignee.

(123) Transfer of spectrum usage rights can be an effective means of increasing the efficient use of spectrum. For the sake of flexibility and efficiency, and to allow valuation of spectrum by the market, Member States should by default allow spectrum users to transfer or lease their spectrum usage rights to third parties following a simple procedure and subject to the conditions attached to such rights and to competition rules, under the supervision of the national regulatory authorities responsible. In order to facilitate such transfers or leases, as long as harmonisation measures adopted under the Radio Spectrum Decision are respected, Member States should also consider requests to have spectrum rights partitioned or disaggregated and conditions for use reviewed.

(124) Measures taken specifically to promote competition when granting or renewing rights of use for radio spectrum should be decided by national regulatory authorities, which have the necessary economic, technical and market knowledge. Spectrum assignment conditions can influence the competitive situation in electronic communications markets and conditions for entry. Limited access to spectrum, in particular when spectrum is scarce, can create a barrier to entry or hamper investment, network roll-out, the provision of new services or applications, innovation and competition. New rights of use, including those acquired through transfer or leasing, and the introduction of new

flexible criteria for spectrum use can also influence existing competition. Where unduly applied, certain conditions used to promote competition, can have other effects; for example, spectrum caps and reservations can create artificial scarcity, wholesale access obligations can unduly constrain business models in the absence of market power, and limits on transfers can impede the development of secondary markets. Therefore, a consistent and objective competition test for the imposition of such conditions is necessary and should be applied consistently. The use of such measures should therefore be based on a thorough and objective assessment, by national regulatory authorities, of the market and the competitive conditions thereof. ***The national authorities should, however, always ensure the effective and efficient use of spectrum and avoid competitive harm through anti-competitive hoarding.***[15]

(125) Building on opinions from the RSPG, the adoption of a common deadline for allowing the use of a band which has been harmonised under the Radio Spectrum Decision can be necessary to avoid cross-border interferences and beneficial to ensure release of the full benefits of the related technical harmonisation measures for equipment markets and for the deployment of very high capacity electronic communications networks and services. In order to significantly contribute to the objectives of this framework and facilitate coordination, the establishment of such common deadlines should be subject to Commission implementing acts. ***In addition to the 700 MHz band, such common maximum deadlines could in particular cover spectrum in the 3.4-3.8 GHz and the 24.25-27.5 GHz bands which have been identified by the RSPG in its opinion on spectrum related aspects for next-generation wireless systems (5G) as 'pioneer' bands for use by 2020, as well as additional bands above 24 GHz which the RSPG considers potentially usable for 5G in the Union such as 31.8-33.4 GHz and 40.5-43.5 GHz. Assignment conditions in additional bands above 24 GHz should take into account potential spectrum sharing scenarios with incumbent users.***[16]

(126) Where the demand for a radio spectrum band exceeds the availability and, as a result, a Member State concludes that the rights of use for radio spectrum must be limited, appropriate and transparent procedures should apply for the granting of such rights to avoid any discrimination and optimise the use of the scarce resource. Such limitation should be justified, proportionate and based on a thorough assessment of market conditions, giving due weight to the overall benefits for users and to national and internal market objectives. The objectives governing any limitation procedure should be clearly defined in advance. When considering the most appropriate selection procedure, and in compliance with coordination measures taken at Union level, Member States should timely and transparently consult all interested parties on the justification, objectives and conditions of the procedure. Member States may use, *inter alia*, competitive or comparative selection procedures for the assignment of radio spectrum or for numbers with exceptional economic value. In administering such schemes, national regulatory authorities should take into account the objectives of this Directive. If a Member State finds that further rights can be made available in a band, it should start the process therefor.

(127) Massive growth in radio spectrum demand, and in end-user demand for wireless broadband capacity, calls for solutions allowing alternative, complementary, spectrally efficient access solutions, including low-power wireless access systems with a small-

[15] AM 227 Kumpula-Natri (as amended; "anti-competitive hoarding" also used in recital 70). DLA input ("harm" uncountable).

[16] DR AM 16. Justif: *To highlight the spectrum bands of most immediate importance to the roll-out of new advanced mobile networks.* DLA input.

area operating range such as radio local area networks (RLAN) and networks of low-power small-size cellular access points. Such complementary wireless access systems, in particular publicly accessible RLAN access points, increase access to the internet for end-users and mobile traffic off-loading for mobile operators. RLANs use harmonised radio spectrum without requiring an individual authorisation or spectrum usage right. Most RLAN access points are so far used by private users as local wireless extension of their fixed broadband connection. End-users, within the limits of their own internet subscription, should not be prevented from sharing access to their RLAN with others, so as to increase the number of available access points, particularly in densely populated areas, maximise wireless data capacity through radio spectrum re-use and create a cost-effective complementary wireless broadband infrastructure accessible to other end-users. Therefore, unnecessary restrictions to the deployment and interlinkage of RLAN access points should also be removed. Public authorities or public service providers, who use RLANs in their premises for their personnel, visitors or clients, for example to facilitate access to e-Government services or for information on public transport or road traffic management, could also provide access to such access points for general use by citizens as an ancillary service to services they offer to the public on such premises, to the extent allowed by competition and public procurement rules. Moreover, the provider of such local access to electronic communications networks within or around a private property or a limited public area on a non-commercial basis or as an ancillary service to another activity that is not dependant on such access (such as RLAN hotspots made available to customers of other commercial activities or to the general public in that area) can be subject to compliance with general authorisations for rights of use for radio spectrum but should not be subject to any conditions or requirements attached to general authorisations applicable to providers of public communications networks or services or to obligations regarding end-users or interconnection. However, such provider should remain subject to the liability rules of Article 12 of Directive 2000/31/EC on electronic commerce[17]. Further technologies such as LiFi are emerging that will complement current radio spectrum capabilities of RLANs and wireless access point to include optical visible light-based access points and lead to hybrid local area networks allowing optical wireless communication.

(128) Since low power small-area wireless access points are very small and make use of unobtrusive equipment similar to that of domestic RLAN routers and considering their positive impact on the use of spectrum and on the development of wireless communications, their technical characteristics - such as power output- should be specified at Union level in a proportionate way for local deployment and their use should be subject to general authorisations only – to the exception of RLAN which should not be subject to any authorisation requirement beyond what is necessary for the use of radio spectrum - and any additional restrictions under individual planning or other permits should be limited to the greatest extent possible.

(128a) Public buildings and other public infrastructure are visited and used daily by a significant number of end-users who need connectivity to consume eGovernance, eTransport and other services. Other public infrastructure (such as street lamps, traffic lights, etc.) offer very valuable sites for deploying small cells due to their density, etc. Operators should have access to those public sites for the purpose of adequately serving demand. Member States should therefore ensure that such public

[17] Directive2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), (OJ L 178, 17.7.2000, p.1).

buildings and other public infrastructure are made available on reasonable conditions for the deployment of small-cells with a view to complement Directive 2014/61/EU. The latter follows a functional approach and imposes obligations of access to physical infrastructure only when the latter is part of a network and only if it is owned or used by a network operator, thereby leaving many buildings owned or used by public authorities outside its scope. On the contrary, a specific obligation is not necessary for physical infrastructure, such as ducts or poles, used for intelligent transport systems (ITS), which are owned by network operators (providers of transport services and/or providers of public communications networks), and host parts of a network, thus falling within the scope of Directive 2014/61/EU.[18]

~~(142) *deleted*~~[19]

[18] DR AM 17. Justif: *Inextricably linked to other admissible amendments.* DLA input.

[19] ~~DR AM 19~~

Articles

Art 2(19)-(20), (24)-27 (Definitions)

(19) ‘spectrum allocation’ means the designation of a given frequency band for use by one or more types of radio communications services, where appropriate, under specified conditions;

[(20) ‘harmful interference’ [covered by the draft CA on Art 28 - spectrum coordination]]

(24) 'small-area wireless access point' means a low power wireless network access equipment of small size operating within a small range, using licenced radio spectrum or licence-exempt radio spectrum or a combination thereof, which may or may not be part of a public terrestrial mobile communications network, and be equipped with one or more low visual impact antennae, which allows wireless access by users to electronic communications networks regardless of the underlying network topology be it mobile or fixed;

(25) 'radio local area network' (RLAN) means a low power wireless access system, operating within a small range, with a low risk of interference to other such systems deployed in close proximity by other users, using on a non-exclusive basis, radio spectrum for which the conditions of availability and efficient use for this purpose are harmonised at Union level;

(26) 'shared use of radio spectrum' means access by two or more users to use the same frequencies under a defined sharing arrangement, authorised by a ~~national regulatory~~ ***competent***[20] authority on the basis of a general authorisation, individual rights of use or a combination thereof, including regulatory approaches such as licenced shared access aiming to facilitate the shared use of a frequency band, subject to a binding agreement of all parties involved, in accordance with sharing rules as included in their rights of use so as to guarantee to all users predictable and reliable sharing arrangements, and without prejudice to the application of competition law;

[(27) 'harmonised radio spectrum' [covered by the draft CA on Art 28 - spectrum coordination]]

[20] To correct what appears to be an error in the COM proposal. Cf 47(2).

Article 4

Strategic planning and coordination of radio spectrum policy

1. Member States shall cooperate with each other and with the Commission in the strategic planning, coordination and harmonisation of the use of radio spectrum in the Union. To this end, they shall take into consideration, inter alia, the economic, safety, health, public interest, public security and defence, freedom of expression, cultural, scientific, social and technical aspects of EU policies as well as the various interests of radio spectrum user communities with the aim of optimising the use of radio spectrum and avoiding harmful interference.

2. By cooperating with each other and with the Commission, Member States shall promote the coordination of radio spectrum policy approaches in the European Union and, where appropriate, harmonised conditions with regard to the availability and efficient use of radio spectrum necessary for the establishment and functioning of the internal market in electronic communications.

3. Member States shall cooperate through the Radio Spectrum Policy Group~~, established by Commission Decision 2002/622/EC,~~[21] with each other and with the Commission, and ***the Radio Spectrum Policy Group shall assist and advise*** the European Parliament and the Council ***on request***, in support of the strategic planning and coordination of radio spectrum policy approaches in the Union.[22] ***BEREC shall be associated on issues relating to regulation and competition.***[23]

4. The Commission, taking utmost account of the opinion of the Radio Spectrum Policy Group, may submit legislative proposals to the European Parliament and the Council for establishing multiannual radio spectrum policy programmes ***as well as for the release of spectrum for shared and unlicensed uses***. Such programmes shall set out the policy orientations and objectives for the strategic planning and harmonisation of the use of radio spectrum in accordance with the provisions of this Directive.[24]

Article 18

Amendment of rights and obligations

1. Member States shall ensure that the rights, conditions and procedures concerning general authorisations and rights of use for radio spectrum or for numbers or rights to install facilities may only be amended in objectively justified cases and in a proportionate manner, taking into consideration, where appropriate, the specific conditions applicable to transferable rights of use for radio spectrum and for numbers.

2. Except where proposed amendments are minor, and~~[25]~~ have been agreed with the holder of the rights or general authorisation, and without prejudice to Article 35 notice shall be given in an appropriate manner of the intention to make such amendments and interested parties, including users and consumers, shall be allowed a sufficient period of time to express their views on the proposed amendments, which shall be no less than four weeks except in exceptional circumstances.

[21] The CA on Art 28 would establish the RSPG.
[22] DR AM 36
[23] Martin 395 (adapted). DLA input.
[24] AM 603 Reimon (adapted).
~~[25] Cf AM 428 Martin on 19(4)~~

Any amendment shall be published stating the reasons thereof.

Article 19

Restriction or withdrawal of rights

1. Member States shall not restrict or withdraw rights to install facilities or rights of use for radio spectrum or numbers before expiry of the period for which they were granted except where justified pursuant to paragraph 2 and where applicable in conformity with the Annex I and relevant national provisions regarding compensation for withdrawal of rights.

2. In line with the need to ensure the effective and efficient use of radio spectrum or the implementation of harmonised conditions adopted under Decision No 676/2002/EC, Member States may allow ***the restriction or*** withdrawal of rights ***granted after ... [the date set out in Article 115]***, ~~including those with a ***30*** year minimum duration~~ ***by the competent national authority***,[26] based on ***detailed***[27] procedures laid down in advance, ***and with clearly defined usage conditions and thresholds at the time of award or renewal*** in compliance with the principles of proportionality and non-discrimination.[28]

3. A modification in the use of radio spectrum as a result of the application of paragraphs 4 or 5 of Article 45 shall not justify by itself the withdrawal of a right to use radio spectrum.

4. Any intention to restrict or withdraw authorisations or individual rights of use for radio spectrum or numbers ***without the consent of the right holder***[29] shall be subject to a public consultation in accordance with Article 23.[30]

Article 35

Peer review process

1. As regards the management of radio spectrum, national regulatory authorities shall be entrusted with the powers to at least adopt the following measures:

(a) in case of individual rights of use for radio spectrum, the selection process, in relation to Article 54;

(b) the criteria regarding the eligibility of the bidder, where appropriate, in relation to Article 48 (4);

(c) the parameters of spectrum economic valuation measures, such as the reserve price, in relation to Article 42;

(d) the duration of the rights of use and the conditions for renewal in line with Articles 49 and Article 50;

[26] AM 426 Kumpula-Natri
[27] id
[28] DR AM 46. Justif: *This is a horizontal amendment with respect to the 30 year minimum duration introduced in order to promote legal certainty.* DLA input.
[29] AM 428 Martin
[30] ECR suggestion to delete "authorisations or" and to limit consultation to where the rights of use have been limited. Cf also 428 Martin re consent of rightholder.

(e) any measures to promote competition pursuant to Article 52, when necessary;[31]

(f) the conditions related to the assignment, transfer, including trade and lease of rights of use for radio spectrum in relation to Article 51, sharing of spectrum or wireless infrastructure in relation to Article 59 paragraph 3[32] or the accumulation of rights of use in relation to Article 52 paragraph 2 (c) and (e); and[33]

(g) the parameters of coverage conditions pursuant to overall Member State policy objectives in this respect, in relation to Article 47.

When adopting these measures, the national regulatory authority shall take into account the ***need to cooperate with the national regulatory authorities of other Member States, the Commission and BEREC in order to ensure consistency across the Union,***[34] relevant national policy objectives set out by the Member State as well as other relevant national measures in regard to the management of radio spectrum in compliance with Union law and shall base its measure on a thorough and objective assessment of the competitive, technical and economic situation of the market.

2. ***In order to facilitate cross-border coordination, and efficient use of radio spectrum,***[35] ***w***here a national regulatory authority intends to take a measure which falls within the scope of paragraph 1 (a) to (g), it shall make the draft measure ***public***[36] ***and*** accessible, together with the reasoning on which the measure is based, ~~to~~ ***and inform*** BEREC, ***the Radio Spectrum Policy Group,***[37] the Commission and national regulatory authorities in other Member States ***thereof*** at the same time.[38] [39]

3. Within ***three months of the draft measure being made public***,[40] BEREC shall issue a reasoned opinion on the draft measure, which shall analyse whether that measure would be the most appropriate in order to:[41]

(a) promote the development of the internal market***, including the cross-border provision of services,***[42] as well as competition and maximise the benefits for the consumer, and overall achieve the objectives ~~and principles~~ set in Articles 3 and 45(2),[43] [44]

(b) ensure effective and efficient use of radio spectrum; and

[31] AM 541 Kumpula-Natri proposes an "including" addition, but that would depend on the outcome of Art 52 and need not be exemplified here.
[32] Linked to final outcome on 59(3), to be addressed in Access part. Maintained following outcome on Access CA
[33] DR AM 60. Justif: *This AM is introduced for consistency with the deletion of Article 59(3).*
[34] AM 542 Boni (adapted). DLA input.
[35] AM 544 Hokmark (part, adapted)
[36] DLA input.
[37] AM 544 (Hokmark) (part)
[38] DR AM 61
[39] AM 546 Kumpula-Natri
[40] DLA input.
[41] DR AM 62. Justif: *The peer review process should be efficient, and not extended for unlimited time.*
[42] AM 549 Kallas
[43] DR AM 63. Justif: *The objectives mentioned here are already established in Articles 3 and 45(2) but in slightly different wordings, and "principles" are different from "objectives". The deletion minimises possible confusion.*
[44] AM 549 Kallas proposes to add crossborder provision of services, but that's included in 3(2)(c) ("...provision of...[ECS] throughout the Union").

(c) ensure stable and predictable investment conditions for existing and prospective radio spectrum users when deploying networks for the provision of electronic communications services which rely on radio spectrum.

The reasoned opinion shall state if the draft measure should be amended or withdrawn. Where appropriate, BEREC shall provide specific recommendations to that end. National regulatory authorities and the Commission may also make comments on the draft decision to the national regulatory authority concerned.

BEREC shall adopt and make public the criteria it will apply in evaluating any draft measure.[45]

4. When carrying out their tasks pursuant to this Article, BEREC and national regulatory authorities shall have regard in particular to:

(a) the objectives and principles provided in this Directive; as well as to any relevant Commission implementing decision adopted in accordance with this Directive as well as Decisions 676/2002/EC and 243/2012/EC;

(b) any specific national objectives established by the Member State consistent with Union law;

(c) the need to avoid that competition is distorted when adopting such measures;

(ca) the principles of service and technological neutrality;[46]

(d) the results of the most recent geographical survey of networks pursuant to Article 22;

(e) the need to ensure coherence with recent and pending assignment procedures in other Member States, and possible effects on trade between Member States; and

(f) any relevant opinion of the Radio Spectrum Policy Group ***in particular regarding the effective and efficient use of radio spectrum***.[47]

5. The national regulatory authority concerned shall take utmost account of the opinion of BEREC and of comments made by the Commission and other national regulatory authorities before adopting its final decision. It shall communicate the final decision adopted to BEREC and the Commission.

Where the national regulatory authority decides not to amend or withdraw the draft measure on the basis of the reasoned opinion issued pursuant to paragraph 2 of this Article, it shall provide a reasoned justification.

The national regulatory authority concerned may withdraw its draft measure at any stage of the procedure.

6. When preparing their draft measure pursuant to this Article, national regulatory authorities may seek support from BEREC ***and the Radio Spectrum Policy Group***.[48]

7. BEREC, the ***Radio Spectrum Policy Group, the*** Commission and the national regulatory authority concerned shall cooperate closely to identify the most appropriate and effective solution in the light of the regulatory objectives and principles laid down in this Directive whilst

[45] AM 542 (Boni) (adapted)
[46] AM 552 (Buzek et al) (part)
[47] DR AM 64
[48] DR AM 65

taking due account of the views of market participants and the need to ensure the development of consistent regulatory practice.[49]

8. The final decision adopted by the national regulatory authority shall be published.

Article 36

Harmonised assignment of radio frequencies

Where the usage of radio frequencies has been harmonised, access conditions and procedures have been agreed, and undertakings to which the radio frequencies shall be assigned have been selected in accordance with international agreements and Union rules, Member States shall grant the right of use for such radio frequencies in accordance therewith. Provided that all national conditions attached to the right to use the radio frequencies concerned have been satisfied in the case of a common selection procedure, Member States shall not impose any further conditions, additional criteria or procedures which would restrict, alter or delay the correct implementation of the common assignment of such radio frequencies.

Article 37

Joint authorisation process to grant individual rights of use for radio spectrum

1. ***In the case of a risk of significant cross-border harmful interference,***[50] ***two*** or several Member States ~~may~~ ***shall, and in other cases they may,*** cooperate with each other and with the Commission***, the Radio Spectrum Policy Group*** and BEREC to meet their obligations under Articles 13, 46 and 54, by jointly establishing the common aspects of an authorisation process and also jointly conducting the selection process to grant individual rights of use for radio spectrum in line, where applicable**,** with any common timetable established in accordance with Article 53.

Any market participant may request the conduct of a joint selection process upon providing sufficient evidence that a lack of coordination creates a significant barrier to the internal market.[51]

The joint authorisation process shall meet the following criteria:[52]

(a) the individual national authorisation processes shall be initiated and implemented by the competent authorities according to a jointly agreed schedule;

(b) it shall provide where appropriate for common conditions and procedures for the selection and granting of individual rights among the Member States concerned;

(c) it shall provide where appropriate for common or comparable conditions to be attached to the individual rights of use among the Member States concerned inter alia allowing users to be assigned similar radio spectrum blocks;

(d) it shall be open at any time until the authorisation process has been conducted to other Member States.

[49] DR AM 66
[50] DLA input.
[51] AM 559 Kallas (as amended)
[52] DR AM 67

2. Where the measures taken for the purposes of paragraph (1) fall in the scope of Article 35(1), the procedure provided in that Article shall be followed by the national regulatory authorities concerned simultaneously.

Article 42

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

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 services or networks and associated facilities which ensure the optimal use of these resources. Member States shall ensure that such fees shall be objectively justified, transparent, non-discriminatory and proportionate in relation to their intended purpose and shall take into account the objectives in Articles 3, 4 and 45(2), as well as:[53]

(a) being service and technology neutral, subject only to limitations in line with Article 45(4) and (5), while promoting the effective and efficient use of spectrum and maximising social and economic utility of spectrum;[54]

(a) taking into account the need to foster the development of innovative services; and

(b) taking into account possible alternative uses of the resources.

2. Member States shall ensure that reserve prices established as minimum fees for rights of use for radio spectrum ***take into account the value of the rights in their possible alternative use and*** reflect the additional costs entailed by conditions attached to these rights in pursuit of the objectives under Articles 3, 4 and 45(2), such as coverage obligations that would fall outside normal commercial standards~~, in accordance with paragraph 1~~.[55]

3. Member States shall apply payment modalities linked to the actual availability of the radio spectrum in question, which do not unduly burden any additional investments in networks and associated facilities necessary for the efficient use of the radio spectrum and the provision of related services.

4. Member States shall ensure that where competent authorities impose fees, they take into account other fees or administrative charges linked to the general authorisation or rights of use established pursuant to this Directive, in order not to create undue financial burden to undertakings providing electronic communications networks and services and to incentivise optimal use of the allocated resources.

5. The imposition of fees pursuant to this Article shall comply with the requirements of Article 23 and, where applicable, Articles 35, 48(6) and 54.

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[53] DR AM 68. Justif: *"Optimal use" is the purpose of the fees, as stated a few lines above in the paragraph and in the recital, not also e.g. maintaining security (Art 3(2)(d)), strategic planning and coordination between MS (Art 4) or preventing interference (Art 45(2)(d)). Further specific purposes are set out in points (a)-(c) in any event. Inextricably linked to other admissible AMs.*

[54] DR AM 69

[55] DR AM 70. Justif: *Fees imposed on undertakings for the rights of use for radio spectrum can influence decisions about whether to seek such rights and how to make the best use of radio spectrum resources. With a view of ensuring optimal use, when setting reserve prices representing the minimum valuation, Member States should make sure that these are based on a thorough assessment of the market conditions at the moment of the assignment, taking into account the value of the rights in their second-best use.*

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 services and networks in their territory in accordance with Articles 3 and 4. They shall ensure that radio spectrum allocation used for electronic communications services and networks and issuing general authorisations or individual rights of use for such radio spectrum by competent authorities are based on objective, transparent, ***pro-competitive,***[56] 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, and may take public policy considerations into account.

2. Member States shall promote the harmonisation of use of radio spectrum across the Union, consistent with the need to ensure effective and efficient use thereof and in pursuit of ***competition and other***[57] benefits for the consumer such as economies of scale and interoperability of services and networks. In so doing, they shall act in accordance with Article 4 and with Decision 676/2002/EC by inter alia:

(a) ensuring coverage of their national territory and population at high quality and speed, both indoors and outdoors, ***as well as coverage of*** ~~including along~~ major ***national and Union*** transport paths, including the trans-European transport network ***as defined in Regulation (EU) No 1315/2013***;[58]

(b) ensuring that areas with similar characteristics, in particular in terms of network deployment or population density, are subject to consistent coverage conditions;

(c) facilitating the rapid development in the Union of new wireless communications technologies and applications, including, where appropriate, in a cross-sectorial approach;

(ca) ensuring predictability and consistency in the granting, renewal, amendment, restriction and withdrawal of rights in order to promote long-term investments;[59]

(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 and/or different uses of spectrum through appropriate established sharing rules and conditions, including the protection of existing rights of use, in accordance with Union law;[60]

[56] AM 593 Kumpula-Natri
[57] AM 601 Kumpula-Natri (as proposed moved and adjusted)
[58] AM 597 Kumpula-Natri, 596 Reimon - railroad issue; addressed as per input. DLA input.
[59] AM 599 Kumpula-Natri (suggested amended)
[60] AM 603 Reimon, cf Art 4(4).

(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) ensuring that rules for the granting, transfer, renewal, modification and withdrawal of rights to use radio spectrum are clearly and transparently defined and applied in order to guarantee regulatory certainty, consistency and predictability;

(h) ensuring consistency and predictability throughout the Union regarding the way the use of radio spectrum is authorised in protecting public health against harmful electromagnetic fields.

When adopting technical harmonisation measures under Decision No 676/2002/EC, the Commission may, taking utmost account of the opinion of Radio Spectrum Policy Group, adopt an implementing measure setting out whether, pursuant to Article 46 of this Directive, rights in the harmonised band shall be subject to a general authorisation or to individual rights of use. Those implementing measures shall be adopted in accordance with the examination procedure referred to in Article 110(4).

Where the Commission is considering acting to provide for measures in accordance with Article 39, it ~~may~~ ***shall***[61] seek the advice of the Radio Spectrum Policy Group 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 advice of the Radio Spectrum Policy Group in taking any subsequent steps.

3. In case of a national or regional lack of market demand for the use of a harmonised band ***when made available for use pursuant and subject to a harmonisation measure***,[62] ~~and subject to the harmonisation measure~~ adopted under Decision No 676/2002/EC, 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, provided that:

(a) the finding of a lack of market demand for the use of the harmonised band is based on a public consultation in line with Article 23***, including a forward-looking assessment of market demand***;[63]

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

(c) the Member State concerned takes due account of the long-term availability or use of the harmonised band in the Union and the economies of scale for equipment resulting from using the harmonised radio spectrum in the Union.[64]

The alternative use shall only be allowed on an exceptional basis ***in the absence of market demand for the band at the time it is first made available for use***. ~~It~~ ***Any decision to allow alternative use on an exceptional basis***[65] shall be subject to a review every three years, or ***promptly*** upon request to the competent authority for use of the band in accordance with the harmonisation measure by a prospective user. The Member State shall inform the Commission

[61] AM 605 Kumpula-Natri
[62] AM 607 Kumpula-Natri - as proposed amended.
[63] AM 610 Kallas (as amended)
[64] AM 607 Kumpula-Natri (as amended)
[65] ECR comment. DLA input.

and the other Member States of the decision taken as well as of the outcome of any review, together with its reasoning.[66]

4. Unless otherwise provided in the second subparagraph, Member States shall ensure that all types of technology used for electronic communications services or networks 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 ***only***[67] where this is necessary to:

(a) avoid harmful interference;

(b) protect public health against electromagnetic fields, taking utmost account of Council Recommendation No 1999/519/EC[68];

(c) ensure technical quality of service;

(d) ensure maximisation of shared use of radio spectrum ~~resources~~,[69] in accordance with Union law;

(e) safeguard efficient use of radio spectrum; or

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

5. Unless otherwise provided in 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 defined by Member States in conformity with Union law, such as, and 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 by the provision of radio and television broadcasting services~~.~~***;*** or

(da) the promotion of ~~coverage~~ very high quality connectivity along major transport paths.[70]

[66] Proposed as a consequence of 610 to avoid spectrum potentially left unused in case of possible demand on a forward-looking basis but not when made available.

[67] AM 611 Reimon and 612 Kumpula-Natri (amended) and as per input

[68] Recommendation 1999/519/EC of the Council of 12 July 1999 on the limitation of exposure of the general public to electromagnetic fields (0 Hz to 300 GHz) (OJ L 1999, 30.7.1999, p. 59).

[69] ECR comment

[70] AM 613 Kumpula-Natri and 616 Reimon as amended, partially as per input

A measure which prohibits the provision of any other electronic communications service in a specific band may only be provided for where justified by the need to protect safety of life services. Member States may, exceptionally, also extend such a measure in order to fulfil other general interest objectives as defined by ***the Union or by***[71] 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 these reviews public.

7. Restrictions established prior to 25 May 2011 shall comply with paragraphs 4 and 5 by the date of application of this Directive.

Article 46

Authorisation of the use of radio spectrum

1. Member States shall ***decide on the most appropriate regime for authorising the use of radio spectrum*** [72] ***in order to*** 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 necessary ***in order to:***[73]

~~To this end, Member States shall decide on the most appropriate regime for authorising the use of radio spectrum, taking account:~~[74]

(a) ~~the specific characteristics of the radio spectrum concerned;~~

(b) ***avoid or protect against*** harmful interference;[75]

~~(c) the requirements for a reliable sharing arrangement, where appropriate;~~

(d) ~~the appropriate level of receiver resilience to~~ ensure technical quality of communications or service;[76]

(e) ***fulfil other*** objectives of general interest as defined by Member States in conformity with Union law.[77]

(ea) ~~maximise~~ safeguard efficient use of spectrum.[78] [79]

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 on competition, innovation and market entry of different combinations and of gradual transfers from one category to the other***.[80] [81]

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[71] AM 617 Reimon and 618 Kumpula-Natri, proposed amended. Only aspect of 617/618 not covered is road/railways part, addressed as a package based on input (in this case rejected as covered in 45(2)(a) and 46(1)).
[72] AM 621 Kumpula-Natri
[73] DR AM 71. Justif: *The AMs to Art 46 form a block intended primarily to simplify the Article and bring it closer to its current wording.*
[74] DR AM 72. [AM72 deletes the entire subparagraph, in order for AMs 73-76 to rephrase it.]
[75] DR AM 73. Justif: *Inextricably linked to other admissible AMs.* Addition as per input, addressing 628 Reimon and 629 Kallas.
[76] DR AM 74. (Same justif as to AM 73.)
[77] DR AM 75. (Same justif as to AM 73.)
[78] DR AM 76. (Same justif as to AM 73.)
[79] AM 621 Kumpula-Natri and AM 632 Reimon would add mobile coverage along railroads. Addressed in 45(2)(a). Excluded as per input.
[80] DR AM 77
[81] AM 636 Kallas (as amended).

– ***deleted***[82]

– ***deleted***[83]

– ***deleted***[84]

– ***deleted***[85]

Member States shall minimise restrictions to the use of radio spectrum by taking full account of technological solutions for managing harmful interference so as to impose the least onerous authorisation regime possible.[86] 2. ***Member States*** shall ensure that the rules and conditions for the shared use of radio spectrum***, where shared use is applied,*** are clearly set out and specified in the acts of authorisation.[87] [88] ***Such rules and conditions shall facilitate efficient use, competition and innovation and include fair and non-discriminatory wholesale access conditions.***[89]

3. The Commission ***shall***, taking utmost account of the opinion of the Radio Spectrum Policy Group, adopt implementing measures on the modalities of application of the criteria, rules and conditions referred to in paragraphs 1 and 2 with regard to harmonised radio spectrum. It shall adopt these measures in accordance with the examination procedure referred to in Article 110(4). ***Those measures shall be adopted by [insert date].***[90]

Article 47

Conditions attached to general authorisations and to rights of use for radio spectrum

1. Competent authorities shall attach conditions to individual rights and general authorisations to use radio spectrum in accordance with Article 13(1) in such a way as to ensure ***optimal, efficient*** use of radio spectrum by the beneficiaries of the general authorisation or the holders of individual rights or by any third party to which an individual right or part thereof has been traded or leased. They shall clearly define any such conditions including the level of use required and the possibility to trade and lease in relation to this obligation in order to ensure the implementation of those conditions in line with Article 30***. In the case of individual rights any such conditions must be clearly defined before the award, assignment or renewal***. ***The conditions may be amended by the competent authority in the mid-term review if necessary for achieving general interest objectives in accordance with Article 3.*** Conditions attached to renewals of right of use for radio spectrum may not provide undue advantages to existing holders of those rights.[91]

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[82] DR AM 78
[83] DR AM 79
[84] DR AM 80
[85] DR AM 81
[86] DR AM 82. (Same justif as to AM 73.)
[87] DR AM 83
[88] AM 646 Kumpula-Natri suggests text on wholesale access
[89] AM 646 Kumpula-Natri (as amended). Cf Art 52
[90] DR AM 84. Justif: *Horizontal AM applicable to all mandates to the Commission. Any mandate given to the Commission should be necessary. In order to enable scrutiny, mandates should lead to measures by a date certain.* DLA input.
[91] DR AM 85

Any such conditions shall specify any applicable parameters, including the period for putting the rights into use, the non-fulfilment of which would entitle the competent authority to withdraw the right of use or impose other measures, such as shared use.[92]

In order to maximise radio spectrum efficiency, when determining the amount and type of radio spectrum to be assigned, the competent authority shall have regard in particular to:

a. the possibility to combine complementary bands in a single assignment process; and

b. the relevance of the size of radio spectrum blocks or of the possibility to combine such blocks in relation to the possible uses thereof, considering in particular the needs of new emerging communications systems.

Competent authorities shall timely consult and inform interested parties regarding conditions attached to individual usage rights and general authorisations in advance of 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 these conditions.

2. When attaching conditions to individual rights of use for radio spectrum, competent authorities may authorise the sharing of passive or active infrastructure, or of radio spectrum, as well as commercial roaming access agreements, or the joint roll-out of infrastructures for the provision of services or networks which rely on the use of radio spectrum, in particular with a view to ensuring effective and efficient use of radio spectrum or promoting coverage. Conditions attached to the rights of use shall not prevent the sharing of radio spectrum. Implementation by undertakings of conditions attached pursuant to this paragraph shall remain subject to competition law.[93]

3. The Commission may adopt implementing measures in order to specify the modalities of applying the conditions that Member States may attach to authorisations to use harmonised radio spectrum in accordance with paragraphs 1 and 2, with the exception of fees pursuant to Article 42.

With regard to the coverage requirement under Part D of Annex I, any implementing measure shall be limited to specifying criteria to be used by the competent authority to define and measure coverage obligations, taking into account similarities of regional geographical characteristics, population density, economic development or network development for specific types of electronic communications and evolution of demand. Implementing measures shall not extend to the definition of specific coverage obligations.

Those implementing measures shall be adopted in accordance with the examination procedure referred to in Article 110(4), taking utmost account of any opinion of the Radio Spectrum Policy Group.

[92] AM 423 Del Castillo ("use it or lose it")

[93] AM 655 Kumpula-Natri refers to close to 100% population coverage. However, this par is a "may" and relates solely to individual rights. Perhaps consider in recital relating to Art 1 ("ensure provision throughout the Union") and/or in Art 3(2)?

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 networks or services under the general authorisation referred to in Article 12, subject to the provisions of Articles 13, 54 and 21(1)(c) and 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 rights of use for radio spectrum to providers of radio or television broadcast content services with a view to pursuing general interest objectives in conformity with Union law, the rights of use for radio spectrum shall be granted through open, objective, transparent, non-discriminatory and proportionate procedures, and, in the case of radio frequencies, in accordance with the provisions of Article 45.

3. An exception to the requirement of open procedures may apply in cases 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 defined by ***the Union or by***[94] Member States in conformity 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. They shall be able to request all necessary information from applicants to assess, on the basis of said criteria, applicants' ability to comply with the conditions. Where on the basis of the assessment, the authority concludes that an applicant does not possess the required ability, it shall provide a duly reasoned decision to that effect.

5. When granting rights of use, Member States shall specify whether those rights can be transferred or leased by the holder of the rights, and under which conditions. In the case of radio spectrum, such provision shall be in accordance with Articles 45 and 51 of this Directive.

6. Decisions on the granting of rights of use shall be taken, communicated and made public as soon as possible after receipt of the complete application by the national regulatory authority, within six weeks in the case of radio spectrum declared available for electronic communications services in their national frequency allocation plan. This time limit shall be without prejudice 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 of time, they shall ensure that the authorisation is granted for a period that is appropriate in view of the objective pursued taking due account of the need to ensure

[94] AM 662 Reimon, as proposed amended

competition as well as effective and efficient use and promote efficient investments, including by allowing for an appropriate period for investment amortisation***, and innovation***.[95]

2. Where Member States grant rights of use for harmonised radio spectrum those rights of use for harmonised radio spectrum shall***, subject to Article 47,*** be valid for a duration of at least ***~~3025~~*** years, ***subject to a mid-term review no later than after 10 years of granting the rights of use,*** except in the case of temporary rights, temporary extension of rights pursuant to paragraph 3 and rights for secondary use in harmonised bands.[96] [97]

Rights of use may be withdrawn or adjusted by the Member States after the mid-term assessment if such rights prevent:

(a) ensuring the efficient and effective use of radio spectrum in particular in light of technological and market evolutions;

(b) pursuing a general interest objective, such as the achievement of the Union connectivity targets; or

(c) organising and using radio spectrum for public order, public security purposes or defence.

The rights of use shall be revoked only after a transitional period.[98]

3. Member States may extend the duration of rights of use for a short period of time to ensure the simultaneous expiry of rights in one or several bands.

Article 50

Renewal of rights

1. ***Without prejudice to renewal clauses applicable to existing rights,*** competent authorities shall ***consider*** the renewal of ***~~existing~~*** individual rights of use for harmonised radio spectrum at their own initiative or upon request by the right holder~~, in the latter case not earlier than 5 years prior to expiry of the rights concerned~~.[99] [100]

2. ***deleted***[101]

3. When considering possible renewal of individual rights of use for ***harmonised*** radio spectrum, competent authorities shall***:***[102]

(a) give all interested parties, including users and consumers, the opportunity to express their views through a public consultation in accordance with article 23; and

[95] 664 Kumpula-Natri, AM 663 Kallas (as amended).
[96] DR AM 86
[97] ECR preference for not indicating single duration. ECR also suggest linking to Art 54.
[98] DLA input.
[99] DR AM 87. Justif: *Clarity and predictability in the possibility to have spectrum usage rights renewed is essential in supporting and encouraging investments. The AM further clarifies the conditions and the procedure for renewal.*
[100] AM 676 Tosenovsky (partly)
[101] DR AM 88
[102] DR AM 89

(b) ***have regard to the following considerations:***

(i) fulfilment of the objectives of Articles 3, 45(2) and 48(2), as well as public policy objectives under national or Union law;

(ii) implementation of a measure adopted pursuant to Article 4 of Decision No 676/2002/EC;

(iii) a review of the appropriate implementation of the conditions attached to the right concerned;

(iv) the need to promote, or avoid any distortion of, competition pursuant to Article 52;[103]

(v) rendering the use of radio spectrum more efficient in light of technological or market evolution;

(vi) the need to avoid severe service disruption;

(vii) existence of market demand from undertakings other than those holding rights of use for spectrum in the band concerned;

(viii) the need to limit the number of rights in accordance with Article 46.[104]

deleted[105]

3 a. At least three years before expiry of the rights involved, the competent authority shall decide whether to renew the existing rights based on the outcome of the public consultation and the review of the considerations under sub-paragraph 2(b) and shall provide reasons for its decision accordingly.[106]

Where the competent authority decides that the spectrum rights are not to be renewed, and that the number of rights has to be limited, the competent authority shall grant the rights pursuant to Article 54.[107]

4. A decision to grant a renewal of rights shall be accompanied by a review of the fees attached thereto. Where appropriate, competent authorities may adjust the fees for the rights of use in compliance with the principles set out in Article 42(1) and (2).

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 ~~in accordance with conditions attached to the rights of use for radio spectrum and in accordance with national procedures~~ individual rights of use for radio spectrum ~~in the bands for which this is provided in the implementing measures adopted pursuant to paragraph 4 or by any other~~

[103] AM 679 Kumpula-Natri?
[104] DR AM 90. Justif: *Inextricably linked to other admissible AMs.* DLA input.
[105] DR AM 91
[106] ECR suggests that renewal decision be taken closer to expiry. DLA input.
[107] DR AM 92. (Same justif as to AM 90.) DLA input.

~~Union measure such as the a radio spectrum policy programme adopted pursuant to Article 4(4).~~[108]

deleted[109]

deleted[110]

deleted[111]

2. Member States shall ensure that an undertaking's intention to transfer rights of use for radio spectrum, as well as the effective transfer thereof is notified in accordance with national procedures to the national regulatory authority and to the competent authority responsible for granting individual rights of use if different and is made public ***by entry on the register kept pursuant to paragraph 3***. Where the use of radio spectrum has been harmonised through the application of the Decision No 676/2002/EC (Radio Spectrum Decision) or other Union measures, any such transfer shall comply with such harmonised use.[112]

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 of this Directive, Member States shall:

(a) submit ***transfers and leases*** to the least onerous procedure possible;[113]

(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;[114]

(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 conditions for the right of use***;***[115]

(ca) not refuse a transfer or lease to an existing holder of rights of use for radio spectrum.[116]

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, in total, cover only the administrative costs, including any necessary ancillary steps, incurred in processing the application, and comply with Article 16.[117]

Points (a) to ***(ca)*** are without prejudice to the Member States' competence to enforce compliance with the conditions attached to the rights of use at any time.[118]

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

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[108] DR AM 93. Justif: *The AMs to Art 51 aim at further strengthening the possibility to trade spectrum, with a view to enabling its optimal use. They are inextricably linked to other admissible AMs.*
[109] DR AM 94
[110] DR AM 95
[111] DR AM 96
[112] DR AM 97
[113] DR AM 98
[114] DR AM 99
[115] DR AM 100
[116] DR AM 101
[117] DR AM 102
[118] DR AM 103

In view of any transfer or lease of rights of use for radio spectrum, competent authorities shall make all details relating to tradable individual rights publicly available in a standardised electronic format when the rights are created and keep those details ***current*** as long as the rights exist.[119]

4. The Commission may adopt appropriate implementing measures to identify the bands for which rights of use for radio frequencies may be transferred or leased between undertakings. These measures shall not cover frequencies which are used for broadcasting.

These technical implementing measures shall be adopted in accordance with the examination procedure referred to in Article 110(4).

Article 52

Competition

1. National regulatory authorities shall promote effective competition and avoid distortions of competition in the internal market when deciding on the grant, amendment or renewal of rights of use for radio spectrum for electronic communications services and networks in accordance with this Directive.

2. When Member States grant, amend or renew rights of use for radio spectrum, their national regulatory authorities ***shall, taking into utmost account the guidelines for market analysis and the assessment of significant market power published by the Commission pursuant to Article 62(2), conduct an objective and forward-looking assessment of the market competitive conditions, and shall take one of the*** measures ***set out in points (a) to (e) only where such a measure is necessary to maintain or achieve effective competition ~~and will not have undue negative effects on existing and future investments by operators in particular for network roll-out~~.***[120]

(a) limiting the amount of radio spectrum for which rights of use are granted to any undertaking, or***, in exceptional 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;[121] [122]

(b) reserving, if appropriate in regard to an exceptional situation in the national market, a certain part of a frequency band or group of bands for assignment to new entrants;[123]

(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 radio spectrum uses, in order to avoid the distortion of competition by any assignment, transfer or accumulation of rights of use;

[119] DR AM 104

[120] DR AM 105. Justif: *In order avoid inconsistent approaches, the guidelines for market analysis and the assessment of significant market power should be duly taken into account also in this context, as well as the need to safeguard investment.* DLA input.

[121] DR AM 106. Justif: *Conditions of rights of use for spectrum should only involve access obligations etc in exceptional cases in order not to discourage investment.*

[122] AM 689 Kumpula-Natri

[123] AM 693 Kumpula-Natri unclear

(d) prohibiting or imposing conditions on transfers of rights of use for radio spectrum, not subject to national or Union 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.

deleted[124]

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

SECTION 3 PROCEDURES

Article 53

Coordinated timing of assignments

In order to ***ensure efficient and coordinated***[125] ~~the~~ use of harmonised radio spectrum in the Union and taking due account of the different national market situations, the Commission may, by way of an implementing measure:

(a) establish one, or, where appropriate, several common maximum dates by which the use of specific harmonised radio spectrum bands shall be authorised;

(b) where necessary to ensure the effectiveness of coordination, adopt any transitional measure regarding the duration of rights pursuant to Article 49, such as an extension or a reduction of their duration, in order to adapt existing rights or authorisations to such harmonised date.

Those implementing measures shall be adopted in accordance with the examination procedure referred to in Article 110(4), taking utmost account of the opinion of the Radio Spectrum Policy Group.

Article 54

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

1. Without prejudice to any implementing act adopted pursuant to Article 53, where a Member State concludes that a right to use radio spectrum cannot be granted pursuant to Article 46 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

[124] DR AM 107. Justif: *Amended and integrated into the introductory part of Art 52(2).*
[125] AM 696 Hokmark (adapted)

competition, and review the limitation ~~at~~ ***as appropriate*** ~~regular intervals~~ or at the reasonable request of affected undertakings;[126] [127]

(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. In the case of harmonised radio spectrum, this public consultation shall start within six months of the adoption of the implementing measure under Decision No 676/2002/EC unless technical reasons therein require a longer deadline;

2. When a Member State concludes that the number of rights of use has to be limited, it shall clearly define and justify the objectives pursued with the selection procedure, 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 design the specific selection procedure shall be limited to one or more of the following:

(a) promoting coverage;

(b) required quality of service;

(c) promoting competition;

(d) promoting innovation and business development; and

(e) ensuring that fees promote optimal use of radio spectrum in accordance with Article 42;

The national regulatory 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 elements, clearly stating the reasons therefor and how it has taken into account the measure adopted by the national regulatory authority in accordance with Article 35. It shall also publish the conditions that will be attached to the rights of use.

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

5. Where a Member State concludes that further rights of use for radio spectrum or a combination of different types of rights can be granted, taking into consideration advanced methods for protection against harmful interference, 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 procedure determined by their national regulatory authorities pursuant to Article 35, which must be objective, transparent, non-discriminatory and proportionate. Any such selection criteria must give due weight to the achievement of the objectives and requirements of Articles 3, 4, 28 and 45.

7. The Commission may adopt implementing measures setting criteria in order to coordinate the implementation of the obligations under paragraphs 1 to 3 by Member States. The implementing measures shall be adopted in accordance with the procedure referred to in Article 110(4) and taking utmost account of the opinion of the Radio Spectrum Policy Group.

[126] DR AM 108
[127] S&D, ALDE comment

8. 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.

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

CHAPTER III

DEPLOYMENT AND USE OF WIRELESS NETWORK EQUIPMENT

Article 55

Access to radio local area networks

1. Competent authorities shall allow the provision of access through radio local area networks to a public communications network as well as the use of the harmonised radio spectrum for that provision, subject only to applicable general authorisation conditions.

Where that provision is not commercial in character or is ancillary to another commercial activity or public service which is not dependent on the conveyance of signals on those networks, any undertaking, public authority or end-user[128] 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 III of Part III of this Directive nor to obligations to interconnect their networks pursuant to Article 59 (1).

1a. In any event, Article 12 of Directive 2000/31/EC shall apply.[129]

2. Competent authorities shall not prevent providers of public communications networks or publicly available electronic communications services from allowing access to their networks to the public, through radio local area networks, 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.

3. In line in particular with Article 3(1) of Regulation 2015/2120 of the European Parliament and of the Council,[130] competent authorities shall ensure that providers of public

[128] AM 702 Reimon would change "end-user" to "user" throughout Art 55. But "user" is defined in 2(13) to include other operators, and this subpar is about non-commercial/ancillary provision of access.

[129] AM 702 Reimon, 703 Kallas, as proposed amended, and as rephrased by the DLA. DLA input.

[130] Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union, OJ L 310, 26.11.2015, p. 1

communications networks or publicly available electronic communications services[131] do not unilaterally restrict:

a) the right of end-users to accede to radio local area networks of their choice provided by third parties;

b) the right of end-users to allow reciprocally or more generally access to the networks of such providers by other end-users through radio local area networks, including on the basis of third-party initiatives which aggregate and make publicly accessible the radio local area networks of different end-users.[132]

To that end, providers of public communications networks or publicly available electronic communications services shall make available and actively offer, clearly and transparently, products or specific offers allowing its end-users to provide access to third parties through a radio local area network.[133]

4. Competent authorities shall not restrict the right of end-users to allow reciprocally or more generally access to their radio local area networks by other end-users, including on the basis of third-party initiatives which aggregate and make the radio local area networks of different end-users publicly accessible.

5. Competent authorities shall not restrict the provision of access to radio local area networks to the public:

(a) by public authorities on or in the immediate vicinity of premises occupied by such public authorities, when that provision is ancillary to the public services provided on those premises;

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

Article 56

Deployment and operation of small-area wireless access points

1. Competent authorities shall allow the deployment, connection and operation of unobtrusive small-area wireless access points under the general authorisation regime and shall not unduly restrict that deployment, connection or operation through individual town planning permits or in any other way, whenever such use is in compliance with implementing measures adopted pursuant to paragraph 2. The small-area wireless access points shall not be subject to any fees or charges going beyond the administrative charge that may be associated to the general authorisation in accordance with Article 16.

This paragraph is without prejudice to the authorisation regime for the radio spectrum employed to operate small-area wireless access points.

[131] ECR queries applicability to number-independent ECS

[132] AM 710 (to delete point b) Tosenovsky? Alternatively, ECR suggest to add "on a strictly non-commercial basis" before reciprocally.

[133] AM 712 Tosenovsky and 713 Reimon?

2. In order to ensure the uniform implementation of the general authorisation regime for the deployment, connection and operation of small-area wireless access points, the Commission may, by means of an implementing act, specify technical characteristics for the design, deployment and operation of small-area wireless access points, which shall at a minimum comply with the requirements of Directive 2013/35/EU[134] and take account of the thresholds defined in Council Recommendation No 1999/519/EC.[135] The Commission shall specify those technical characteristics by reference to the maximum size, power and electromagnetic characteristics, as well as the visual impact, of the deployed small-area wireless access points. Compliance with the specified characteristics shall ensure that small-area wireless access points are unobtrusive when in use in different local contexts.

The technical characteristics specified in order for the deployment, connection and operation of small-area wireless access point to benefit from paragraph 1 shall be without prejudice to the essential requirements of Directive 2014/53/EU.[136]

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 110(4).

2a. Member States shall, when applying where relevant the procedures adopted in conformity with Directive 2014/61/EU, ensure that operators have the right to access physical infrastructure controlled by public national, regional or local 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, tramway stops, metro stations. Public authorities shall meet all reasonable requests for access on fair reasonable and non-discriminatory terms and conditions. Those conditions shall be made transparent at a central access point. Any financial charge shall reflect only costs incurred by the public authority from the provision of such access.[137]

Article ~~78i~~56a[138]

Technical regulations on electromagnetic fields

The procedures laid down in Directive 2015/1535 (EU) shall apply with respect to any draft Member State measure that would impose more stringent requirements with respect to electromagnetic fields than those provided for in Council Recommendation 1999/519/EC.[139]

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134 Directive 2013/35/EU of the European Parliament and of the Council of 26 June 2013 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (electromagnetic fields) (20th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) and repealing Directive 2004/40/EC (OJ L 179, 29.6.2013, p. 1).

135 Recommendation 1999/519/EC of the Council of 12 July 1999 on the limitation of exposure of the general public to electromagnetic fields (0 Hz to 300 GHz) (OJ L 1999, 30.7.1999, p. 59).

136 Directive 2014/53/EU of the European Parliament and of the Council of 16 April 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment and repealing Directive 1999/5/EC (OJ L 153, 22.5.2014, p.62)

137 DR AM 109. Justif: *The AM establishes an obligation and conditions for accessing public building and other public infrastructure for deploying small-cells with a view to complement the Cost Reduction Directive. This obligation will ensure that these public buildings, which are socio-economic enablers, can be equipped with very high capacity connectivity. Inextricably linked to other admissible AMs.* DLA input.

138 Renumbered as a consequence of not introducing a new Title III

139 DR AM 142. Justif: *This AM aims to ensure, subject to any necessary further technical work, that the well-established process under Directive 2015/1535 (which codified Directive 98/34) on a procedure for the provision of information in the field of technical regulations and of rules on Information Society services would also apply*

with respect to protection against electromagnetic fields. This provides transparency as MS measures in this respect (which may also constitute an obstacle to trade) are notified to other MS and the Commission, and enables the Commission and other MS to comment. It would thereby also allow an overview at Union level of the implementation of Council Recommendation No 1999/519/EC. DLA input.

FINAL
CA5

Radio Spectrum Coordination among Member States

The CA covers Art 2(20), 2(27), 28 and related recitals. All relevant AMs, including AMs 328-331, as well as CULT 32-33, fall.

Recitals

(67) Lack of coordination between Member States ***with respect to their approaches to the assignment and authorisation for the use of radio*** spectrum ***as well as with respect to*** large-scale interference issues ***can have a*** severe ***impact on*** the development of the Digital Single Market. Member States should ***therefore cooperate with each other taking full advantage of the good offices of the Radio Spectrum Policy Group (RSPG). Furthermore, coordination between*** Member States ***to resolve harmful interference*** should be ***made more efficient, by using the RSPG as a means to facilitate dispute resolution. Taking into account the Union's specific concerns and objectives preference should be given to such a*** Union ***process of dispute settlement on cross border issues between*** Member States***, in priority to any dispute settlement under international law***.[1]

(68) The Radio Spectrum Policy Group (RSPG) is ~~***currently***~~ a Commission high-level advisory group which was created by Commission Decision 2002/622/EC[30] to contribute to the development of the internal market and to support the development of a Union-level radio spectrum policy, taking into account economic, political, cultural, strategic, health and social considerations, as well as technical parameters. ***For the purposes of its role in the further strengthening of cooperation between Member States and the RSPG should be established in this Directive.*** It should be composed of the heads of the bodies that have overall political responsibility for strategic spectrum policy. It should ***assist and*** advise the ***Member States and the Commission with respect to*** spectrum policy. This should further increase the visibility of spectrum policy in the various EU policy areas and help to ensure cross-sectorial coherence at national and Union level. It should also provide advice to the European Parliament and the Council upon their request. Moreover, the RSPG should also be the forum for the coordination of implementation by Member States of their obligations related to radio spectrum under this Directive and should play a central role in fields essential for the internal market such as cross-border coordination or standardisation. Technical or expert working groups could also be created to assist plenary meetings, at which strategic policy is framed through senior-level representatives of the Member States and the Commission.[2]

(112) Radio spectrum should be managed so as to ensure that harmful interference is avoided. This basic concept of harmful interference should therefore be properly defined to

[1] DR AM 9. DLA input.
[2] DR AM 10

ensure that regulatory intervention is limited to the extent necessary to prevent such interference, having regard also to the need for network equipment and end-user devices to incorporate resilient receiver technology. ***The ITU Radio Regulations define harmful interference, inter alia,***[3] ***as any interference which endangers the functioning of safety services, which are themselves defined as any radiocommunications services used permanently or temporarily for the safeguarding of human life or property; for the protection of life or property harmful interference should therefore be avoided in particular in critical situations whenever the functioning of a safety service is put in danger. While this includes, under the ITU definition, radiodetermination, which is essential to transport and navigation, it should cover any mission-critical aspects of the operation of electronic communications services or networks when life or propery is at stake, also beyond the field of transport, such as in health services.*** Transport has a strong cross-border element and its digitalisation brings challenges. Vehicles (metro, bus, cars, trucks, trains, etc) are becoming more and more autonomous and connected. In an EU single market, vehicles travel beyond national borders more easily. Reliable communications, and avoiding harmful interferences, are critical for the safe and good operation of vehicles and their on-board communications systems.

Articles

Art 2(20), 2(27) (Definitions)

(20) ‘harmful interference’ means interference which endangers the functioning of a radio navigation service or of other safety services or which otherwise seriously degrades, obstructs or repeatedly interrupts a radio communications service operating in accordance with the applicable international, Union or national regulations;[4]

(27) 'harmonised radio spectrum' means radio spectrum for whose availability and efficient use harmonised conditions have been established by way of a technical implementing measure in line with Article 4 of Decision No 676/2002/EC (Radio Spectrum Decision).

Article 28

Radio Spectrum Coordination among Member States

1. Member States and their competent authorities shall ensure that the use of radio spectrum is organised on their territory in a way that no other Member State is impeded~~, in particular due to cross-border harmful interference between Member States,~~ from allowing on its territory the use of[5]radio spectrum***, in particular of harmonised radio spectrum,*** in accordance with Union legislation***, especially due to harmful cross-border interference between Member States***.[6]

[3] DLA input.
[4] AM 328 Reimon, 330 Kumpula-Natri.
[5] AM 499 Kumpula-Natri.
[6] DLA input.

They shall take all necessary measures to this effect without prejudice to their obligations under international law and relevant international agreements such as the ITU Radio Regulations.

2. Member States shall cooperate with each other, ***and***[7] through the Radio Spectrum Policy Group ***established pursuant to paragraph 4a***, in the cross-border coordination of the use of radio spectrum in order to:[8]

(a) ensure compliance with paragraph 1;

(b) solve any problem or dispute in relation to cross-border coordination or cross-border harmful interference***;***

(c) contribute to the development of the internal market.[9]

2a. Member States shall also cooperate with each other, and through the Radio Spectrum Policy Group, with respect to aligning their approaches to the assignment and authorisation of use of radio spectrum.[10]

3. Any Member State concerned as well as the Commission may request the Radio Spectrum Policy Group to use its good offices and, where appropriate, to propose a coordinated solution in an opinion, in order to assist Member States in complying with paragraphs 1 and 2***, including where the problem or dispute involves third countries***.[11] ***Member States shall refer any unresolved dispute between them to the Radio Spectrum Policy Group, in priority to any available dispute settlement process provided under international law.***[12]

4. At the request of a Member State or upon its own initiative, the Commission may, taking utmost account of the opinion of the Radio Spectrum Policy Group, adopt implementing measures to resolve cross-border harmful interferences between two or several Member States which prevent them from using the harmonised radio spectrum in their territory. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 110(4).[13]

4a. An advisory group on radio spectrum policy, called the Radio Spectrum Policy Group, consisting of one high level governmental expert from each Member State as well as of a high-level representative from the Commission is hereby established.

The group shall assist and advise ~~the~~Member States and the Commission on cross-border coordination of the use of radio spectrum, on aligning their approaches to the assignment and authorisation of use of radio spectrum and on other radio spectrum policy and coordination issues.

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[7] AM 502 Kumpula-Natri

[8] DR AM 54. Justif: *In order to enhance the role of the RSPG it should be created in the EECC itself and the secretariat (currently provided by the Commission) should be discussed, as reflected in this amendment and in the amendment for a new paragraph 4a (the Rapporteur is aware that full implementation of this idea might require further technical work at a later stage). Further, the opportunity should be taken of expanding this structured cooperation to spectrum issues more generally.*

[9] AM 504 Kallas

[10] DR AM 55. Justif: *Inextricably linked to other admissible AMs.*

[11] 505 Kallas, suggested amended

[12] DR AM 56. Justif: *Coordination between Member States to resolve interference when authorising harmonised spectrum uses should be strengthened by requiring more prominently recourse to RSPG in the case of lengthy and problematic cases. The proposed amendment aims at giving precedence to an EU process of dispute settlement. Suggested addition of "between them" if 505 Kallas is included.*

[13] 507 Beres and 508 Niebler et all delete 28(4) entirely. To discuss.

The secretariat of the Radio Spectrum Policy Group shall be provided by [the BEREC Office/BEREC].[14]

[14] DR AM 57. Justif: *Inextricably linked to other admissible AMs. Formulation within brackets depends on the outcome on the BEREC Regulation.* DLA input.

FINAL
CA6
Security

The CA covers Art 2(22), 40-41 and related recitals. All relevant AMs, including AMs 213, 214, 332, 565-581, 732 as well as IMCO 97-113, 13-14, LIBE 9, 17, 26-35, fall.

Recitals

(90) Providers of public electronic communications networks or publicly available electronic communications services, or of both, should be required to take measures to safeguard the security of their networks and services, respectively***, and to prevent or minimise the impact of security incidents, including incidents caused by hijacking of devices.***[1] Having regard to the state of the art, those measures should ensure a level of security of networks and services appropriate to the risks posed. Security measures should take into account, as a minimum, all the relevant aspects of the following elements: as regards security of networks and facilities: physical and environmental security, security of supplies, access control to networks and integrity of networks; as regards incident handling: incident-handling procedures, incident detection capability, incident reporting and communication; as regards business continuity management: service continuity strategy and contingency plans, disaster recovery capabilities; and as regards monitoring, auditing and testing: monitoring and logging policies, exercise contingency plans, network and service testing, security assessments and compliance monitoring; and compliance with international standards.

(91) Given the growing importance of number-independent interpersonal communications services, it is necessary to ensure that they are also subject to appropriate security requirements in accordance with their specific nature and economic importance. Providers of such services should thus ensure a level of security commensurate with the degree of risk posed to the security of the electronic communications services they provide. Given that providers of number-independent interpersonal communications services normally do not exercise actual control over the transmission of signals over networks, the degree of risk for such services can be considered in some respects lower than for traditional electronic communications services. Therefore, whenever it is justified by the actual assessment of the security risks involved, the security requirements for number-independent interpersonal communications services should be lighter. In that context, the providers should be able to decide about the measures they consider appropriate to manage the risks posed to the security of their services. The same approach should apply mutatis mutandis to interpersonal communications services which make use of numbers and which do not exercise actual control over signal transmission.

(91a) Providers of public communications networks or publicly available electronic communications services should inform users of measures they can take to protect the security of their communications, for instance by using specific types of software

[1] To reflect AM 580 Kumpula-Natri. DLA input.

or encryption technologies. The requirement to inform users of particular security risks should not discharge a provider from the obligation to take, at its own costs, appropriate and immediate measures to seek to prevent or remedy any new, unforeseen security risks and restore the normal security level. The provision of information about security risks to the subscriber should be free of charge.[2]

(91b) In order to safeguard security and integrity of networks and services, the use of end-to-end encryption should be promoted and, where necessary, should be mandatory in accordance with the principles of security and privacy by default and design;[3]

(92) Competent authorities should ensure that the integrity and availability of public communications networks are maintained. The European Network and Information Security Agency ('ENISA') should contribute to an enhanced level of security of electronic communications by, amongst other things, ***assisting Member States in preventing and resolving potential internal market problems due to conflicting particular security measures, issue guidelines, in close cooperation with BEREC and the Commission on security criteria,***[4] providing expertise and advice, and promoting the exchange of best practices. The competent authorities should have the necessary means to perform their duties, including powers to request the information necessary to assess the level of security of networks or services. They should also have the power to request comprehensive and reliable data about actual security incidents that have had a significant impact on the operation of networks or services. They should, where necessary, be assisted by Computer Security Incident Response Teams (CSIRTs) established under Article 9 of Directive (EU) 2016/1148. In particular, CSIRTs may be required to provide competent authorities with information about risks and incidents affecting public communications networks and publicly available electronic communications services and recommend ways to address them.

Articles

Art 2(22) (Definitions)

'security' of networks and services means the ability of electronic communications networks and services to resist, at a given level of confidence, any action that compromises the availability, authenticity, integrity or confidentiality of stored or transmitted or processed data or the related services offered by, or accessible via, those networks or services.

TITLE V: SECURITY AND INTEGRITY

Article 40

Security of networks and services

1. Member States shall ensure that undertakings providing public communications networks or publicly available electronic communications services take appropriate ***and proportionate***[5]

[2] AM 213 Kumpula-Natri. DLA input.
[3] Part of AM 214 Kallas (slightly amended). Linked AM 565/566/568, 567, 570. The phrase "...principles of data protection by design and privacy by design..." could possibly be replaced by "principle of security by design" for the purpose of the EECC
[4] Poss additional text, cf AM 578
[5] Cf Presidency 12/4 doc

technical and organisational measures to appropriately manage the risks posed to security of networks and services. Having regard to the state of the art, these measures shall ensure a level of security appropriate to the risk presented. In particular, measures shall be taken to ***ensure that, when necessary for confidentiality, electronic communications content is encrypted from end-to-end by default, in order to***[6] prevent and minimise the impact of security incidents on users***,*** other networks ***or*** services.

1a. Member States shall not impose any obligation on undertakings providing public communications networks or publicly available electronic communications services that would result in a weakening of the security of their networks or services.[7]

Where Member States impose additional security requirements on undertakings providing public communications networks or publicly available electronic communications services in more than one Member State, they shall notify those measures to the Commission and ENISA. ENISA shall assist Member States in coordinating the measures taken to avoid duplication or diverging requirements that may create security risks and barriers to the internal market.[8]

2. Member States shall ensure that undertakings providing public communications networks take all appropriate steps to guarantee the integrity of their networks, and thus ensure the continuity of supply of services provided over those networks.[9]

3. Member States shall ensure that undertakings providing public communications networks or publicly available electronic communications services notify without undue delay the competent authority of a security ***incident***[10] ***or loss of integrity***[11] that has had a significant impact on the operation of networks or services.

In order to determine the significance of the impact of a security incident, the following parameters shall, in particular, be taken into account:

(a) the number of users affected by the ***incident***;[12]

(b) the duration of the ***incident***;

(c) the geographical spread of the area affected by the ***incident***;

(d) the extent to which the functioning of the ***network or***[13] service is ***affected***.[14]

(e) the impact on economic and societal activities.

Where appropriate, the competent authority concerned shall inform the competent authorities in other Member States and the European Network and Information Security Agency (ENISA). The competent authority concerned may inform the public or require the ***providers***[15] to do so, where it determines that disclosure of the ***incident*** is in the public interest.

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[6] AM 565/566 Kumpula-Natri, 567 Reimon, 568 Kallas
[7] AM 570 Kallas (sligthly amended)
[8] AM 577 Kallas (moved and slightly amended)
[9] Presidency 12/4 doc proposes to delete this par
[10] AM 571 Tošenovský, leading to consequential changes later on
[11] Possible addition of "integrity", cf AM 214. To add "or loss of integrity" would mean retaining the current wording of FD Art 13a proposed deleted by the COM
[12] Consequence of AM 571
[13] AM 572 Tošenovský
[14] Cf Presidency 12/4 doc
[15] Cf Presidency 12/4 doc

Once a year, the competent authority concerned shall submit a summary report to the Commission and ENISA on the notifications received and the action taken in accordance with this paragraph.

Member States shall ensure that, in the case of a particular risk of a security incident in public communications networks or publicly available electronic communications services, providers of such networks or services inform their users of such a risk and of any possible protective measures or remedies which can be taken by the users.[16]

4. This Article is without prejudice to Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector.

5. The Commission, shall adopt delegated acts in accordance with Article 109 with a view to specifying the measures referred to in paragraphs 1 and 2, including measures defining the circumstances, format and procedures applicable to notification requirements. The delegated acts shall be based on European and international standards to the greatest extent possible, and shall not prevent Member States from adopting additional requirements in order to pursue the objectives set out in paragraphs 1 and 2. ***The first such delegated acts shall be adopted by [insert date].***[17]

5a. In order to contribute to the consistent application of measures for the security of networks and services, ENISA shall, by...[date], after consulting stakeholders and in close cooperation with the Commission and BEREC, issue guidelines on minimum criteria and common approaches for the security of networks and services and the promotion of the use of end-to-end encryption.[18]

Article 41

Implementation and enforcement

1. Member States shall ensure that in order to implement Article 40, the competent authorities have the power to issue binding instructions, including those regarding the measures required to ***prevent or***[19] remedy ***an incident*** and time-limits for implementation, to undertakings providing public communications networks or publicly available electronic communications services.2. Member States shall ensure that competent authorities have the power to require undertakings providing public communications networks or publicly available electronic communications services to:

(a) provide information needed to assess the security and/or integrity of their services and networks, including documented security policies; and

(b) submit to a security audit carried out by a qualified independent body or a competent authority and make the results thereof available to the competent authority. The cost of the audit shall be paid by the undertaking.

3. Member States shall ensure that the competent authorities have all the powers necessary to investigate cases of non-compliance and the effects thereof on the security of the networks and services.

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[16] AM 575 Kumpula-Natri (slightly amended). Proposed deletion of "end" as 40(1) refers to "users".
[17] AM 84 Del Castillo (a horizontal AM to oblige the COM to adopt delegated/implementing acts by a certain date where it's considered necessary to have such acts, as opposed to merely giving the COM the possibility to do so).
[18] AM 578 Kallas
[19] AM 579 Tošenovský

4. Member States shall ensure that, in order to implement Article 40, the competent authorities have the power to obtain the assistance of Computer Security Incident Response Teams ('CSIRTs') under Article 9 of Directive (EU) 2016/1148/EU in relation to issues falling within the tasks of the CSIRTs pursuant to Annex I, point 2 of that Directive.

5. The competent authorities shall, whenever appropriate and in accordance with national law, consult and cooperate with the relevant national law enforcement authorities, the competent authorities as defined in Article 8 (1) of Directive (EU) 2016/1148 and the national data protection authorities.

FINAL

CA7

Article 3 General objectives

The CA covers Art 3 and related recitals. All relevant AMs, including AMs 2-3, 31-35, 178-185, 337-391 as well as IMCO 84-85, 8, CULT 23-27, 34, 5-8, LIBE 18, fall.

(21) National regulatory and other competent authorities should have a harmonised set of objectives and principles to underpin their work, and should, where necessary, coordinate their actions with the authorities of other Member States and with BEREC in carrying out their tasks under this regulatory framework.

(22) The activities of competent authorities established under this Directive contribute to the fulfilment of broader policies in the areas of culture, employment, the environment, social cohesion and town and country planning.

(23) ~~In order to translate the political aims of the Digital Single Market strategy into regulatory terms,~~ ***T***he framework should, in addition to the existing three primary objectives of promoting competition, internal market and end-user interests, pursue an additional ~~connectivity~~ objective, articulated in terms of outcomes: widespread access to and take-up of very high capacity ~~fixed and mobile connectivity~~ ***networks*** for all Union citizens and businesses***. Together with the existing general objectives, this will support the enhancement of the Union economy and in particular its industry,*** on the basis of reasonable price and choice, ~~enabled by~~ effective and fair competition, ~~by efficient investment and~~ open innovation[1]~~, by~~ efficient use of spectrum, ~~by~~ common rules and predictable regulatory approaches in the internal market and ~~by~~ the necessary sector-specific rules to safeguard the interests of citizens. For the Member States, the national regulatory authorities and other competent authorities and the stakeholders, that connectivity objective translates on the one hand into aiming for the highest capacity networks and services economically sustainable in a given area, and on the other hand into pursuing territorial cohesion, in the sense of convergence in capacity available in different areas. ***Progress towards the achievement of the general objectives of this Directive should be supported by a robust system of continuous assessment and benchmarking of Member States with respect to the availability of very high capacity connectivity in all major socio-economic drivers such as schools, transport hubs and major providers of public services, and highly digitized business, uninterrupted 5G coverage for urban areas and major terrestrial transport paths and the availability of electronic communications networks which are capable to provide at least 100 Mbps ~~downlink~~,[2] and which are promptly upgradeable to gigabit speeds, to all households in each Member State. To that end, the Commission should promptly present ~~a legislative proposal, which should include~~ detailed policy orientations, establishing methods and objective, concrete and quantifiable criteria for benchmarking the effectiveness of Member State measures towards achieving***

[1] ALDE comment. DLA input.
[2] id

those objectives and identify best practices, as well as providing for a yearly qualitative and quantitative assessment of the state of progress of each Member State.[3]

(24) The principle that Member States should apply EU law in a technologically neutral fashion, that is to say that a national regulatory or other competent authority neither imposes nor discriminates in favour of the use of a particular type of technology, does not preclude the taking of proportionate steps to promote certain specific services where this is justified in order to attain the objectives of the regulatory framework, for example digital television as a means for increasing spectrum efficiency. Furthermore, it does not preclude taking into account ~~that certain transmission media have~~ ***differing*** physical characteristics and architectural features ~~that can be superior in terms of quality of service, capacity, maintenance cost, energy efficiency, management flexibility, reliability, robustness and scalability, and ultimately in terms of performance, which can be reflected in actions taken in view of pursuing the various regulatory objectives~~ ***of electronic communications networks of relevance for other objectives of the framework***.[4]

(25) Both efficient investment and competition should be encouraged in tandem, in order to increase economic growth, innovation and consumer choice.

(26) 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.

(27) It is necessary to give appropriate incentives for investment in new very high capacity 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***, as bottlenecks and physical barriers to entry remain at the infrastructure level,***[5] and boosting consumer choice through regulatory predictability and consistency.

(28)[6] 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 on the ~~retail~~ markets concerned. ***The objective of ex ante regulatory intervention is to produce benefits for end-users by making retail markets effectively competitive on a sustainable basis. It is likely that national regulatory authorities will gradually be able to find retail markets to be competitive even in the absence of wholesale***

[3] DR AM 2. Justif: *A mechanism for measuring and benchmarking Member State progress with respect to the general objectives should be established, which among other things requires the setting of objective, concrete and quantifiable criteria.* As discussed 7/7

[4] DR AM 3.

[5] ALDE comment (w/o "long-term")

[6] Agreed techmeet 14/7 to request DLA to recommend textual improvements and distribution of text between this recital and recital 155 in the Access CA.

~~*regulation, especially taking into account expected improvements in innovation and competition.*~~[7] ***To that end, national regulatory authorities should take into account the interests of consumers and end-users, irrespective of the market in which the regulatory obligations are imposed, and consider whether an obligation imposed on a wholesale market also has the effect of promoting the interests of consumers and end-users on a retail market not identified as susceptible to ex ante regulation. Obligations at wholesale level should*** ~~*only*~~ ***be imposed where otherwise one or more retail markets are not likely to become effectively competitive in the absence of those obligations.***[8] ***It is likely that national regulatory authorities will gradually, through the process of market analysis, be able to find retail markets to be competitive even in the absence of wholesale regulation, especially taking into account expected improvements in innovation and competition. In such a case, the national regulatory authority should conclude that regulation is no longer needed at wholesale level, and assess the corresponding relevant wholesale market with a view to withdrawing ex ante regulation. In doing so, it should take into account any leverage effects between wholesale and related retail markets which may require the removal of barriers to entry at the infrastructure level in order to ensure long-term competition at the retail level.*** [9] (29) Electronic communications are becoming essential for an increasing number of sectors. The Internet of Things is an illustration of how the radio signal conveyance underpinning electronic communications continues to evolve and shape societal and business reality. To derive the greatest benefit from those developments, the introduction and accommodation of new wireless communications technologies and applications in spectrum management is essential. As other technologies and applications relying on spectrum are equally subject to growing demand, and can be enhanced by integration of or combination with electronic communications, spectrum management should adopt, where appropriate, a cross-sectorial approach to improve spectrum usage efficiency.

Article 3

General objectives

1. Member States shall ensure that in carrying out the regulatory tasks specified in this Directive, the national regulatory and other competent authorities take all reasonable measures which are necessary and proportionate for achieving the objectives set out in paragraph 2. Member States***, the Commission*** and BEREC shall also contribute to the achievement of these objectives.[10]

National regulatory and other competent authorities ~~may~~ ***shall***[11] contribute within their competencies to ensuring the implementation of policies aimed at the promotion of ***freedom of expression and information,***[12] cultural and linguistic diversity, as well as media pluralism.

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[7] ~~Cf recital 2 of the 2014 Market Recommendation for preceding two sentences. The COM reproduces substantially identical text in recital 154 (in the Access part), which could be deleted~~ ALDE comment. Cf also EFDD input

[8] Cf BEREC in their paper on the market review process

[9] DLA 19/7 input incorporated.

[10] DR AM 31.

[11] AM 345 Reimon

[12] AM 343 Kallas

2. The national regulatory and other competent authorities as well as BEREC***, the Commission and the Member States*** shall ***pursue each of the general objectives listed below, without the order in which they are listed indicating any order of priority:***[13] [14]

(a) promote access to, and~~***, as far as practicable,***~~[15] take-up of, very high capacity ~~data connectivity, both fixed and mobile~~ ***networks***, by all Union citizens and businesses;[16] [17]

(b) promote competition in the provision of electronic communications networks and associated facilities, including efficient infrastructure-based competition, and in the provision of electronic communications services and associated services;

(c) contribute to the development of the internal market by removing remaining obstacles to, and facilitating convergent conditions for, investment in and the provision of electronic communications networks, associated facilities and services and electronic communications services throughout the Union, by developing common rules and predictable regulatory approaches, by favouring the effective, efficient and coordinated use of spectrum, open innovation, the establishment and development of trans-European networks, the ***provision,***[18] availability and interoperability of pan-European services, and end-to-end connectivity;[19]

(d) promote the interests of the citizens of the Union~~, including in the long term,~~ by ensuring widespread availability and~~***, as far as practicable,***~~[20] take-up of very high capacity ***networks*** ~~connectivity, both fixed and mobile,~~ and of ~~interpersonal~~ ***electronic*** communications services, by enabling maximum benefits in terms of choice, price and quality on the basis of effective competition, by maintaining security of networks and services, by ensuring a high and common level of protection for end-users through the necessary sector-specific rules***, by ensuring equivalent access and choice for end-users with disabilities*** and by addressing the needs, such as for affordable prices, of specific social groups, in particular ~~disabled~~ users ***with disabilities***,[21] elderly users and users with special social needs.[22]

2 a. The Commission may submit ~~legislative proposals to the European Parliament and the Council for establishing programmes for enhanced cooperation between Member States.~~

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[13] DR AM 32

[14] AM 349/350 Kumpula-Natri/Reimon (using the shorter form of AM 353 as amended to express that the list does not indicate any priority between the objectives).

[15] ECR comment

[16] DR AM 33. Justif: "*This addresses what appears to have been an inadvertent error in the proposal. Very high capacity networks is a defined term which includes both fixed and mobile networks and those networks offer correspondingly high capacity connectivity (in a broad sense). To not use the defined term in the new general objective would appear liable to cause confusion.*"

[17] AM 356/357 Reimon/Kumpula-Natri would add availability and affordability. But provision throughout the Union and affordability in general is addressed in Art 1(2); "access" covers "availability"; "availability" is addressed from the citizen perspective in 3(2)(d), as well as affordability for specific groups. AM 356 Reimon would also add provision of interpersonal ECS, but this point is about infrastructure, and provision of all ECS is addressed in Art 1(2). ALDE would keep "both fixed and mobile", but both are included in the definition of VHCN

[18] AM 365 Kallas.

[19] AM 364 Reimon would remove references to investment, regulatory approaches and open innovation

[20] ECR comment

[21] IMCO

[22] DR AM 34. Justif: "*Promotion of the interests of citizens automatically includes the long term without that needing to be said. Promotion of investment and competition are already addressed in e.g. 3(2)(b)-(c) and should otherwise be addressed directly in the relevant provisions, not indirectly through an emphasis of a particular time horizon. Regardless of the outcome of the discussion on ECS and possible subcategories thereof, it is clear that the interest of citizens extend to electronic communications services generally.*" AM 367 Reimon similar, but would also add "***minimum*** level of" end-user/consumer protection, as would 369 Kumpula-Natri. However, the level of harmonisation of consumer protection is for IMCO.

~~***Such programmes shall include***~~ ***detailed policy orientations for achieving the objectives referred to in paragraph 2, establish methods and objective, concrete and quantifiable criteria for benchmarking the effectiveness of Member State measures towards achieving those objectives and identify best practices. They shall also provide for a yearly qualitative and quantitative assessment of the state of progress of each Member State. The programmes shall be without prejudice to the independence of national regulatory authorities and other competent authorities.***[23]

3. The national regulatory and other competent authorities shall, in pursuit of the policy objectives referred to in paragraph 2, and specified in this paragraph~~, apply objective, transparent, non-discriminatory and proportionate regulatory principles, by~~, inter alia:

(a) promoting regulatory predictability by[24] ensuring a consistent regulatory approach over appropriate review periods and through cooperation with each other, with BEREC and with the Commission;[25]

(b) ensuring that, in similar circumstances, there is no discrimination in the treatment of ~~undertakings providing~~ ***providers of*** [26] electronic communications networks and services;

(c) applying EU law in a technologically neutral fashion, to the extent that this is consistent with the achievement of the objectives of paragraph 1;

(d) promoting efficient investment and innovation in new and enhanced infrastructures, including by ensuring that any access obligation takes appropriate account of the risk incurred by the investing undertakings and by permitting various cooperative arrangements between investors and parties seeking access to diversify the risk of investment, whilst ensuring that competition in the market and the principle of non-discrimination are preserved;

(e) taking due account of the variety of conditions relating to infrastructure, competition***, end-user*** and consumer ***circumstances*** that exist in the various geographic areas within a Member State ***including local infrastructure managed by individuals on a not-for-profit basis***;[27]

(f) imposing *ex ante* regulatory obligations only to the extent necessary to secure effective and sustainable competition ***in the end-user interest***[28] ~~on the retail market concerned~~ and relaxing or lifting such obligations as soon as that condition is fulfilled.[29]

Member States shall ensure that the national regulatory authorities and other competent authorities act impartially, objectively, transparently and in a non-discriminatory and proportionate manner.[30]

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[23] DR AM 35. Justif: "*This AM follows the model of the 2009 framework review providing the basis for the Radio Spectrum Policy Programme. The Commission proposal would be for a decision by the European Parliament and Council establishing a co-operative method towards the general objectives of the Directive, providing for the necessary level of detail to enable benchmarking of progress. The achievement in particular of the new objective relating to very high capacity networks ultimately depends on demand and supply, which are factors beyond the powers of the NRAs and other relevant authorities. It should be made clear that the programme for cooperation envisaged by this AM in no way prejudices their independence. Inextricably linked to other admissible AMs.*" DLA input.

[24] AM 373/374 Reimon/Kumpula-Natri. ECR comment to keep

[25] AM 375 Reimon would add a new item about safeguarding competition etc. But compare 3(2)(b)

[26] AM 376 Tosenovsky (horizontal change)

[27] AM 381 Reimon (amended), also 298, 316, 333 Reimon

[28] As discussed at 28/6 Shadows

[29] AM 382 Reimon, 384 Kumpula-Natri, 385 Kallas. Also 389 Reimon and 390 Kumpula-Natri

[30] DLA input.

FINAL
CA8

Geographical surveys and forecasts of network deployments[1]

The CA covers Art 22, 22a and related recitals. All relevant AMs, including AMs 7-8, 195-208, 48-53, 444-494 as well as IMCO 90, fall.

Recitals

(60) Electronic communications broadband networks are becoming increasingly diverse in terms of technology, topology, medium used and ownership, therefore, regulatory intervention must rely on detailed information regarding network roll-out in order to be effective and to target the areas where it is needed. That information ***is essential for the purpose of promoting investment, increasing connectivity across the Union and providing information to all relevant authorities and citizens. It***[2] should include ***surveys*** regarding both deployment of very high capacity networks, as well as significant upgrades or extensions of existing copper or other networks which might not match the performance characteristics of very high capacity networks in all respects, such as roll-out of fibre to the cabinet coupled with active technologies like vectoring. The level of detail and territorial granularity of the information that national regulatory authorities should gather should be guided by the specific regulatory objective, and should be adequate for the regulatory purposes that it serves. Therefore, the size of the territorial unit will also vary between Member States, depending on the regulatory needs in the specific national circumstances, and on the availability of local data. Level 3 in the Nomenclature of Territorial Units for Statistics (NUTS) is unlikely to be a sufficiently small territorial unit in most circumstances. National regulatory authorities should be guided by BEREC guidelines on best practice to approach such a task, and such guidelines will be able to rely on the existing experience of national regulatory authorities in conducting geographical surveys of networks roll-out. ***Without prejudice to confidentiality requirements, the n***ational regulatory authorities ***should, where the information is not already available on the market, make available in an open data format and without restrictions on reuse the information gathered in such surveys and***[3] should make available tools to end-users as regards quality of service to contribute towards the improvement of their awareness of the available connectivity services. ***Where the national regulatory authorities deem it to be appropriate, they may also collect publicly available information on plans to deploy very high capacity networks.***[4]***In gathering any of that information, all authorities concerned should***

[1] Integrating the forecast part as Art 22a as a consequence of not introducing a new Title III
[2] AM 198 Kumpula-Natri et al (adjusted)
[3] AM 201 Kallas et al (adjusted)
[4] DR AM 7

respect the principle of confidentiality, and should avoid causing competitive disadvantages to any operator.[5]

(61) ***Bridging the digital divide in the Union is essential to enable all ~~Europeans~~ citizens of the Union to have access to state-of-the-art internet and digital services. To that end, i***n[6] the case of specific and well defined digital exclusion areas, national regulatory authorities should have the possibility to organise a call for declarations of interest with the aim of identifying undertakings that are willing to invest in very high capacity networks. In the interests of predictable investment conditions, national regulatory authorities should be able to share information with undertakings expressing interest in deploying very high-speed networks on whether other types of network upgrades, including those below 100 Mbps download speed, are present ~~or foreseen~~ in the area in question.[7]

Articles

~~It is proposed to move the forecast aspect of the geographical surveys, primarily concerned with VHCN, to the new Title on VHCN. That part is included as Part B below for completeness.~~

~~Part A (current deployment status)~~

Article 22

Geographical surveys of network deployments

1. National regulatory authorities shall conduct a geographical survey of the reach of electronic communications networks capable of ***at least***[8] delivering broadband ("broadband networks") within three years from [deadline for transposition of the Directive] and shall update it at least every three years.

This geographical survey shall consist of a survey of the current geographic reach of ***such*** networks within their territory, ***as required*** for the ***tasks provided for in this Directive and for*** surveys for the application of State aid rules.[9]

b) ***deleted***[10]

The information collected in the survey shall be at an appropriate level of local detail and shall include sufficient information on the quality of service and parameters thereof.

2. ***deleted***[11]

3. ***deleted***[12]

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[5] AM 195 Niebler at al (adjusted). DLA input.
[6] AM 205 Kumpula-Natri et al (adjusted). DLA input.
[7] DR AM 8
[8] To address AM 446 Tosenovsky without excluding non-VHCN from the survey of the current situation
[9] To address AM 449 Kumpula-Natri and 450 Kallas, as well as to simplify. DLA input.
[10] DR AM 48. Justif: *Art 22 is simplified to only concern current conditions. The forward looking part is amended and moved to the new Title III of Part II on very high capacity networks.* AM 454-458 Tosenovsky.
[11] DR AM 49. Justif: *This part is moved to the new Title III of Part II on very high capacity networks.* AM 471 Tosenovsky.
[12] DR AM 50. (Same justif as to AM 49.) AM 475 Tosenovsky.

4. ***deleted***[13]

5. Member States shall ensure that local, regional and national authorities with responsibility for the allocation of public funds for the deployment of electronic communications networks, for the design of national broadband plans, for defining coverage obligations attached to rights of use for radio spectrum and for verifying availability of services falling within the universal service obligation in their territory take into account the results of the ***survey*** conducted in accordance with ***paragraph 1*** and that national regulatory authorities supply such results subject to the receiving authority ensuring the same level of confidentiality and protection of business secrets as the originating authority ***and inform the parties which provided the information***. These results shall also be made available to BEREC and the Commission upon their request and under the same conditions.[14]

6. ***If the relevant information is not available on the market,***[15] ***the n***ational regulatory authorities ~~may~~ ***shall make data from the geographical surveys which is not subject to confidentiality directly accessible online in an open and machine readable format to allow for its reuse.***[16] ***They shall also, where such tools are not available on the market,*** make available information tools ***enabling*** end-users to determine the availability of connectivity in different areas, with a level of detail which is useful to support their choice ***of operator or service provider***, ***without prejudice to*** national regulatory authority´s obligations regarding the protection of confidential information and business secrets.[17]

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

~~**Part B (forecasts)**~~

Article 22a ~~78d~~

Geographical ~~surveys~~ forecasts

1. In conducting a geographical survey pursuant to Article 22, the national regulatory authorities may include a three-year forecast of the reach of very high capacity networks within their territory~~, relying on publicly available information~~.

That forecast may also include information on planned deployments by any undertaking or public authority, in particular in order to include very high capacity networks and significant upgrades or extensions of legacy broadband networks to at least the performance of next-generation access networks.

The information collected shall be at an appropriate level of local detail and include sufficient information on the quality of service and parameters thereof.

2. The national regulatory authorities may designate a "digital exclusion area" corresponding to an area with clear territorial boundaries where, on the basis of the information gathered pursuant to paragraph 1, it is determined that for the duration of the

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[13] DR AM 51. AM 480 Tosenovsky.
[14] DR AM 52
[15] AM 493 Kumpula-Natri et al (adjusted)
[16] AM 491 Kallas (adjusted). DLA input.
[17] DR AM 53. Justif: *While "connectivity" as opposed to "coverage" might work in the context of end-user information tools and availability, given that lack of coverage is immediately noticeable, such end-user tools should be able to cover what's useful in terms of choice in the circumstances and not limited to undefined "connectivity services".*

relevant forecast period, no undertaking or public authority has deployed or is planning to deploy a very high capacity network or has significantly upgraded or extended its network to a performance of at least 100 Mbps download speeds, or is planning to do so. The national regulatory authorities shall publish the designated digital exclusion areas.

3. Within a designated digital exclusion area, the national regulatory authorities may issue a call open to any undertaking to declare their intention to deploy very high capacity networks over the duration of the relevant forecast period. The national regulatory authority shall specify the information to be included in such submissions, in order to ensure at least a similar level of detail as that taken into consideration in the forecast. It shall also inform any undertaking expressing its interest of whether the designated digital exclusion area is covered or likely to be covered by an NGA network offering download speeds below 100 Mbps on the basis of the information gathered.

4. Where national regulatory authorities take measures pursuant to paragraph 3, they shall do so in accordance with an efficient, objective, transparent and non-discriminatory procedure, whereby no undertaking is excluded a priori.[18]

[18] DR AM 137. DLA input.

FINAL
CA9A
Penalties

The CA covers Art 29. All relevant AMs, including AMs 58, 866-867, 424 (last sentence) and 509, fall.

Article 29

Penalties *and compensation*

1. Member States shall lay down rules on penalties, ***including*** fines and periodic penalties, where necessary***, in order to prevent*** infringements of national provisions adopted pursuant to this Directive ~~or of any relevant legally binding decision of the national regulatory or other competent authority~~[1] and shall take all measures necessary to ensure that they are implemented. ***Without prejudice to Article 30, those rules shall ensure that the national regulatory authorities and other competent authorities have the power, if appropriate when imposing an obligation, to impose predetermined financial penalties to be paid to the relevant authority, to end-users, and/or to other undertakings for the infringement of the relevant obligation.***[2] ~~Within the limits of national constitutional law, national regulatory and other competent authorities shall have the power to impose such penalties.~~ The penalties provided for must be appropriate, effective, proportionate and dissuasive. ~~The Member States shall notify those provisions to the Commission by [date for transposition] and shall notify it without delay of any subsequent amendment affecting them.~~

2. Member States shall ensure that any user who has suffered material or non-material damage as a result of an infringement of this Directive has the right to receive compensation from the infringer for the damage suffered, unless the infringer proves that it is not in any way responsible for the event giving rise to the damage.[3] ***Any predetermined financial penalties payable to the user pursuant to paragraph 1 shall be deducted from the compensation referred to in this paragraph.***[4]

3. A holder of rights of use for radio spectrum shall be compensated with regard to investments made following any amendment, restriction or withdrawal of such rights in infringement of Article 18 or 19.[5]

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[1] DR AM 58. DLA input.
[2] AM 866 (Langen et al)/867 (Lopez et al) (as amended). DLA input.
[3] AM 509 (Kumpula-Natri) (as amended)
[4] DLA input
[5] Shadows 11/7; tech 12/7. DLA input.

260917 v3

S&D, Greens

FINAL
CA9B
Penalties

The CA covers Art 29. All relevant AMs, including AMs 58, 866-867, 424 (last sentence) and 509, fall.

Article 29

Penalties *and compensation*

1. Member States shall lay down rules on penalties, ***including*** fines and periodic penalties, where necessary***, in order to prevent*** infringements of national provisions adopted pursuant to this Directive ~~or of any relevant legally binding decision of the national regulatory or other competent authority~~[1] and shall take all measures necessary to ensure that they are implemented. ***Without prejudice to Article 30, those rules shall ensure that the national regulatory authorities and other competent authorities have the power, if appropriate when imposing an obligation, to impose predetermined financial penalties to be paid to the relevant authority, to end-users, and/or to other undertakings for the infringement of the relevant obligation.***[2] ~~Within the limits of national constitutional law, national regulatory and other competent authorities shall have the power to impose such penalties.~~ The penalties provided for must be appropriate, effective, proportionate and dissuasive. ~~The Member States shall notify those provisions to the Commission by [date for transposition] and shall notify it without delay of any subsequent amendment affecting them.~~

2. Member States shall ensure that any user who has suffered material or non-material damage as a result of an infringement of this Directive has the right to receive compensation from the infringer for the damage suffered, unless the infringer proves that it is not in any way responsible for the event giving rise to the damage.[3] ***Any predetermined financial penalties payable to the user pursuant to paragraph 1 shall be deducted from the compensation referred to in this paragraph.***[4]

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[1] DR AM 58. DLA input.
[2] AM 866 (Langen et al)/867 (Lopez et al) (as amended). DLA input.
[3] AM 509 (Kumpula-Natri) (as amended)
[4] DLA input

FINAL
CA10

Internal market procedures

The CA covers Art 32-34 and related recitals. All relevant AMs, including AMs 59, 510-535, as well as CULT 35-36, fall.

Recitals

(74a) Transparency in the application of the Union mechanism for consolidating the internal market for electronic communications should be increased in the interest of citizens and stakeholders and to enable parties concerned to make their views known, including by way of requiring the national regulatory authorities to publish any draft measure at the same time as it is communicated to the Commission, BEREC, and the national regulatory authorities in other Member States. Any such draft measure should be reasoned and should contain a detailed analysis .[1]

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

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

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

(78) The Union mechanism allowing the Commission to require national regulatory authorities to withdraw planned measures concerning market definition and the designation of operators having significant market power has contributed significantly to a consistent approach in identifying the circumstances in which ex ante regulation may be applied and those in which the operators are subject to such regulation. The experience of the procedures under Article 7 and 7a of Directive 2002/21/EC (Framework Directive) has shown that inconsistencies in the national regulatory

[1] To reflect AMs 510-511. DLA input.

authorities' application of remedies under similar market conditions undermine the internal market in electronic communications. Therefore the Commission and BEREC should participate in ensuring, within their respective responsibilities, a higher level of consistency in the application of remedies concerning draft measures proposed by national regulatory authorities. In addition, where BEREC shares the Commission's concerns, the Commission should be able to require a national regulatory authority to withdraw a draft measure. In order to benefit from the expertise of national regulatory authorities on the market analysis, the Commission should consult BEREC prior to adoption of its decisions and/or recommendations.

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

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

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

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

Articles

Article 32

Consolidating the internal market for electronic communications

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

2. National regulatory authorities shall contribute to the development of the internal market by working with each other and with the Commission and BEREC in a transparent manner so as to ensure the consistent application, in all Member States, of the provisions of this Directive.

To this end, they shall, in particular, work with the Commission and BEREC to identify the types of instruments and remedies best suited to address particular types of situations in the marketplace.

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

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

(b) would affect trade between Member States;

it shall ***publish*** the draft measure ***and make it***[2] accessible to the Commission, BEREC, and the national regulatory authorities in other Member States, at the same time, together with the reasoning ***and detailed analysis*** on which the measure is based, in accordance with Article 20(3), and inform the Commission, BEREC and other national regulatory authorities thereof. National regulatory authorities, BEREC and the Commission may make comments to the national regulatory authority concerned only within one month. The one-month period may not be extended.[3]

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

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

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

and would affect trade between Member States, and the Commission has ***notified***[4] the national regulatory authority that it considers that the draft measure would create a barrier to the single market or if it has serious doubts as to its compatibility with Union law and in particular the objectives referred to in Article 3, the draft measure shall not be adopted for a further two months. This period may not be extended. The Commission shall inform ***BEREC and*** national regulatory authorities of its reservations in such a case ***and simultaneously make them public***.[5]

4a. Within six weeks from the beginning of the two month period referred to in paragraph 4, BEREC shall issue an opinion on the Commission's notification referred to in paragraph 4, indicating whether it considers that the draft measure should be amended or withdrawn and shall, where appropriate, provide specific proposals to that end. The opinion shall be reasoned and made public.[6]

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

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

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

The Commission shall take utmost account of the opinion of BEREC before issuing a decision. The decision shall be accompanied by a detailed and objective analysis of why the Commission

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[2] AM 510 Kumpula-Natri et al and 511 Borrelli et al (adjusted)
[3] DR AM 59. Justif: *It follows from the internal logic of the text that the reasoning on which the measure is based also should include the underlying detailed analysis.*
[4] Consequence of poss 32(4a)
[5] AM 514 Kumpula-Natri et al and 515 Borrelli (adjusted)
[6] AM 519 Kumpula-Natri et al. DLA input.

considers that the draft measure should not be adopted, together with specific proposals for amending the draft measure.

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

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

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

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

9a. A national regulatory authority may withdraw a draft measure at any time.[7]

Article 33

Procedure for the consistent application of remedies

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

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

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

[7] AM 523 Kumpula-Natri et al (adjusted)

3. Within six weeks from the beginning of the three month period referred to in paragraph 1, BEREC shall, acting by a ***two-thirds*** majority of ~~its component~~ members ***of the Board of Regulators***,[8] issue an opinion on the Commission's notification referred to in paragraph 1, indicating whether it considers that the draft measure should be amended or withdrawn and, where appropriate, provide specific proposals to that end. This opinion shall be reasoned and made public.

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

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

(b) maintain its draft measure.

5. The Commission may, within one month following the end of the three month period referred to in paragraph 1 and taking utmost account of the opinion of BEREC if any:

(a) issue a recommendation requiring the national regulatory authority concerned to amend or withdraw the draft measure, including***, where relevant,*** specific proposals ***for amending the draft measure***[9] and providing reasons justifying its recommendation, in particular where BEREC does not share the serious doubts of the Commission;

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

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

6. Within one month of the Commission issuing the recommendation in accordance with paragraph 5(a) or lifting its reservations in accordance with paragraph 5(b) of this Article, the national regulatory authority concerned shall ***withdraw the draft measure or adopt, publish and***[10] communicate to the Commission and BEREC the adopted final measure.

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

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

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

[8] BEREC alignment point (ECR)
[9] AM 529 Kumpula-Natri et al (adjusted)
[10] AM 534 Kumpula-Natri et al (adjusted)

Article 34

Implementing provisions

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

FINAL
CA11

Harmonisation procedures

The CA covers Art 38 and related recitals. All relevant AMs, including AMs 559-562, as well as IMCO 95, fall.

Recital

(87) Any Commission decision under Article 38(1) 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.

Article

Article 38

Harmonisation procedures

1. Without prejudice to Articles 37, 45, 46(3), 47(3), 53, where the Commission finds that divergences in the implementation by the national regulatory authorities or by other competent authorities of the regulatory tasks specified in this Directive may create a barrier to the internal market, the Commission may, taking the utmost account of the opinion of BEREC, issue a recommendation or a decision on the harmonised application of the provisions in this Directive and in order to further the achievement of the objectives set out in Article 3.

2. Member States shall ensure that national regulatory and other competent authorities take the utmost account of recommendations pursuant to paragraph 1 in carrying out their tasks. Where a national regulatory authority or other competent authority chooses not to follow a recommendation, it shall inform the Commission, giving the reasons for its position.

3. The decisions adopted pursuant to paragraph 1 may include only the identification of a harmonised or coordinated approach for the purposes of addressing the following matters:

(a) the inconsistent implementation of general regulatory approaches by national regulatory authorities on the regulation of electronic communications markets in the application of Articles 62 and 65, where it creates a barrier to the internal market. Such decisions shall not refer to specific notifications issued by the national regulatory authorities pursuant to Article 33;

In such a case, the Commission shall propose a draft decision only:

– after at least two years following the adoption of a Commission Recommendation dealing with the same matter, and

– taking utmost account of an opinion from BEREC on the case for adoption of such a decision, which shall be provided by BEREC within three months of the Commission's request;

(b) numbering, including number ranges, portability of numbers and identifiers, number and address translation systems, and access to 112 emergency services.

4. The decision referred to in paragraph 1, shall be adopted in accordance with the examination procedure referred to in Article 110(4).

5. BEREC may on its own initiative***, including following a complaint lodged by an undertaking providing electronic communications networks or services,*** advise the Commission on whether a measure should be adopted pursuant to paragraph 1.

5a. Without prejudice to the Commission's powers under paragraphs 1, 2 and 3 and the Treaty on the Functioning of the European Union, where BEREC adopts an opinion indicating the existence of divergences in the implementation by the national regulatory authorities or by other competent authorities of the regulatory tasks specified in this Directive, and such divergences could create a barrier to the internal market, the Commission shall either adopt a recommendation pursuant to paragraph 1 or, where it has adopted a recommendation on the same matter more than two years earlier, adopt a decision in accordance with paragraph 3, without requesting a further opinion from BEREC.

If the Commission has not, pursuant to the first subparagraph, either adopted a recommendation or a decision within one year from the date of adoption of the opinion by BEREC, it shall inform the European Parliament and the Council of its reasons for not doing so, and make those reasons public.

Where the Commission has adopted a recommendation but the inconsistent implementation creating barriers to the internal market persists for two years thereafter, the Commission shall either, within a further year, adopt a decision in accordance with paragraph 3 or, where the Commission chooses not to adopt a decision, shall inform the European Parliament and the Council of its reasons for not doing so, and make those reasons public.

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CA12A
Article 59(3)

The CA covers Art 59(3) and recital 142. All relevant AMs, including AMs 784-788 as well as CULT 44, fall.

Recitals

(142) Sharing of passive ~~or active~~ infrastructure used in the provision of wireless electronic communications services, ~~or the joint roll-out of such infrastructures,~~ in compliance with competition law principles can be particularly useful to maximise very high capacity connectivity throughout the Union, especially in less dense areas where replication is impracticable and end-users risk being deprived of such connectivity. National regulatory authorities should, exceptionally, be enabled to impose such sharing ~~or joint roll-out~~, or localised roaming access, in compliance with Union law, ***if that possibility has been clearly established in the original conditions for the granting of the right of use and*** they demonstrate the benefits of such sharing ~~or access~~ in terms of overcoming ~~very significant~~ ***insurmountable economic or physical obstacles and access to networks or services is therefore severely deficient or absent*** ~~barriers to replication and of addressing otherwise severe restrictions on end-user choice or quality of service, or both, or on territorial coverage~~, and taking into account several elements, including in particular ***the need for coverage along major transport paths, choice and higher quality of service for end-users as well as***[1] the need to maintain infrastructure roll-out incentives. ***In circumstances where there is no access ~~to 5G technologies~~ by end-users, and sharing of passive infrastructure alone does not suffice to address the situation, the national regulatory authorities should be able to impose obligations on the sharing of active infrastructure. ~~Any such obligations shall be limited to the minimum necessary.deleted~~***[2][3]

Article 59(3)

3. Member States shall ensure that national regulatory authorities have the power to impose on undertakings providing or authorised to provide electronic communications networks obligations in relation to the sharing of passive ~~or active~~ infrastructure ***or*** ~~,~~ obligations to conclude localised roaming access agreements ***for the provision of very high capacity networks***, ~~or the joint roll-out of infrastructures~~ ***in both cases*** if directly necessary for the local provision of services which rely on the use of spectrum, in compliance with Union law ***and provided that***[4] ***no viable and similar alternative means of access to end-users is made available***

[1] Techmeet 14/7
[2] DR AM 19. Updated after 28/6 Shadows and again after 7/7 techmeet. DLA input.
[3] Shadows 11/7
[4] DLA input

to any undertaking on fair and reasonable terms and conditions.~~, where it is justified on the grounds that,~~

National regulatory authorities may impose such obligations provided that this possibility has been clearly provided for when granting the rights of use for radio spectrum and only where justified on the grounds that, in the area subject to such obligations, the market-driven deployment of infrastructure for the provision of services or networks 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 ~~***therefore***~~ ***severely deficient or absent. In those circumstances where access*** ~~***to new wireless communications technologies by end-users is absent,***~~ ***and sharing of passive infrastructure alone does not suffice to address the situation, national regulatory authorities may impose obligations on sharing of active infrastructure.*** ~~***Any such obligations shall be limited to the minimum necessary.***~~[5]

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

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

National regulatory authorities shall have regard to:

(a) the need to maximise connectivity throughout the Union***, 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;***[6]

(b) the efficient use of radio spectrum;

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

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

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

(f) technological innovation;

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

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

[5] As discussed 7/7. Shadows 11/7. DLA input
[6] id

260917 S&D, Greens

FINAL
CA12B
Article 59(3)

The CA covers Art 59(3) and recital 142. All relevant AMs, including AMs 784-788 as well as CULT 44, fall.

Recitals

(142) Sharing of passive or active infrastructure used in the provision of wireless electronic communications services, or the joint roll-out of such infrastructures, in compliance with competition law principles can be particularly useful to maximise very high capacity connectivity throughout the Union, especially in less dense areas where replication is impracticable and end-users risk being deprived of such connectivity. National regulatory authorities should, exceptionally ***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***, be enabled to impose such sharing or joint roll-out, or localised roaming access, in compliance with Union law, if they demonstrate the benefits of such sharing or access in terms of overcoming very significant barriers to replication and of addressing otherwise severe restrictions on end-user choice or quality of service, or both, or on territorial coverage, and taking into account several elements, including in particular ***the need for coverage along major transport paths, choice and higher quality of service for end-users as well as***[1] the need to maintain infrastructure roll-out incentives.

Article 59(3)

3. Member States shall ensure that national regulatory authorities have the power to impose on undertakings providing or authorised to provide electronic communications networks obligations in relation to the sharing of passive or active infrastructure ***or*** ~~,~~ obligations to conclude localised roaming access agreements, or the joint roll-out of infrastructures if directly necessary for the local provision of services which rely on the use of spectrum, in compliance with Union law ***and provided that***[2] ***no viable and similar alternative means of access to end-users is made available to any undertaking on fair and reasonable terms and conditions***, where it is justified on the grounds that,

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

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

[1] Techmeet 14/7
[2] DLA input

National regulatory 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;***[3]

(b) the efficient use of radio spectrum;

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

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

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

(f) technological innovation;

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

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

[3] id

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FINAL
CA13A

Art 74 - Regulatory treatment of new network elements

The CA covers Art 74 and Annex IV. The related recital 184 is part of the Access CA (and works regardless of the outcome on Art 74). All relevant AMs, including AMs 133, 139, 1000-1037, 1110-1143 as well as IMCO 126, fall.

Article 74

Article 74

Regulatory treatment of new *very high capacity* network elements

1. ***Without prejudice to the assessment by national regulatory authorities of co-investment in other types of networks,*** ~~A~~ ***a*** national regulatory authority ~~shall~~ ***may determine*** not ***to*** impose obligations as regards new ***very high capacity*** network***s which, if fixed, extend to the premises or, if mobile, to the base station,*** ~~elements~~ that are part of the relevant market on which it intends to impose or maintain obligations in accordance with ~~Articles 66 and~~ Articles ~~67~~ ***70*** to 72 and that ~~the~~ ***a relevant*** operator ~~designated as significant market power on that relevant market~~ has deployed or is planning to deploy, if ***it concludes that*** the following cumulative conditions are met:

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

(aa) at least one co-investment agreement based on an offer made pursuant to (a) has been concluded and the co-investors are or intend to be service providers, or to host such providers, in the relevant retail market and have a reasonable prospect of competing effectively;

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

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

National regulatory authorities shall determine whether the conditions above are met, including by consulting with relevant market participants in accordance with the provisions of Article 65(1) and (2).

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

2. Paragraph 1 is without prejudice to the power of a national regulatory authority to take decisions pursuant to the first paragraph of Article 26 in the event of a dispute arising between undertakings in connection with a co-investment agreement deemed by it to comply with the conditions set out in that paragraph and with the criteria set out in Annex IV.

Annex IV

CRITERIA FOR ASSESSING CO-INVESTMENT OFFERS

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

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

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

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

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

- All undertakings have to be offered fair, reasonable and non-discriminatory terms and conditions for participation in the co-investment agreement relative to the time they join, including in terms of financial consideration required for the acquisition of specific rights, in terms of the protection awarded to the co-investors by those rights both during the building phase and during the exploitation phase, for example by granting indefeasible rights of use (IRUs) for the expected lifetime of the co-invested network and in terms of the conditions for joining and potentially terminating the co-investment agreement. Non-discriminatory terms in this context do not entail that all potential co-investors must be offered exactly the same terms, including financial terms, but that all variations of the terms offered must be justified on the basis of the same objective, transparent, non-discriminatory and predictable criteria such as the number of end user lines committed for.
- ~~The offer~~ ***It*** must allow flexibility in terms of the value and timing of the commitment provided by each co-investor, for example by means of an agreed and potentially increasing percentage of the total end user lines in a given area, to which co-investors have the possibility to commit gradually and which shall be set at a unit level enabling smaller co-investors to gradually increase their participation while ensuring adequate levels of initial commitment. The determination of the financial consideration to be provided by each co-investor needs to reflect the fact that early investors accept greater risks and engage capital sooner.

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

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

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

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

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Art 74 - Regulatory treatment of new network elements

The CA covers Art 74 and Annex IV. The related recital 184 is part of the Access CA (and works regardless of the outcome on Art 74). All relevant AMs, including AMs 133, 139, 1000-1037, 1110-1143 as well as IMCO 126, fall.

Article 74

Article 74

Regulatory treatment of new *very high capacity* network elements

1. ***Without prejudice to the assessment by national regulatory authorities of co-investment in other types of networks,*** ~~A~~ ***a*** national regulatory authority shall not impose obligations as regards new ***very high capacity*** network***s which, if fixed, extend to the premises or, if mobile, to the base station,*** ~~elements~~ that are part of the relevant market on which it intends to impose or maintain obligations in accordance with Articles 66 and Articles 67 to 72 and that ~~the~~ ***a relevant SMP*** operator ~~designated as significant market power on that relevant market~~ has deployed or is planning to deploy, if the following cumulative conditions are met:

(a) the deployment of the new network elements is open to co-investment ***at any point during their lifetime by any operator*** ~~offers~~ according to a transparent process and on terms which ***the national regulatory authority considers capable of ensuring*** ~~favour~~ sustainable competition in the long term including inter alia fair, reasonable and non-discriminatory terms offered to potential co-investors; flexibility in terms of the value and timing of the commitment provided by each co-investor; possibility to increase such commitment in the future; reciprocal rights awarded by the co-investors after the deployment of the co-invested infrastructure;

(aa) at least one co-investment agreement based on an offer made pursuant to (a) has been concluded and the co-investors are or intend to be service providers, or to host such providers, in the relevant retail market and have a reasonable prospect of competing effectively;

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

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

National regulatory authorities shall determine whether the conditions above are met, including by consulting with relevant market participants. When assessing co-investment offers, processes and agreements referred to in the first subparagraph, national regulatory

authorities shall ensure that those offers, processes and agreements comply with the criteria set out in Annex IV.

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

3. Paragraph 1 is without prejudice to the power of a national regulatory authority to take decisions pursuant to the first paragraph of Article 26 in the event of a dispute arising between undertakings in connection with a co-investment agreement deemed by it to comply with the conditions set out in that paragraph and with the criteria set out in Annex IV.

4. Paragraph 1 is without prejudice to the power of a national regulatory authority to impose, following the next market review cycle after the co-investment is made, appropriate remedies pursuant to Article 66 and Articles 67 to 72 in circumstances where it determines that the continued application of the conditions set out in paragraph 1 and of the criteria set out in Annex IV would not be sufficient to ensure effective competition.

5. Paragraph 1 shall not prevent a national regulatory authority from maintaining or adapting remedies in accordance with Articles 66 and Articles 67 to 72 on an operator designated as having significant market power on a relevant wholesale market for inputs which, by virtue of the corresponding retail demand, are highly specialised as regards parameters such as quality or location and would not, by virtue of the limited number of addressable clients, justify on their own a commitment to even the reasonable minimum number of end user lines referred to in Annex IV.

Annex IV

CRITERIA FOR ASSESSING CO-INVESTMENT OFFERS

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

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

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

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

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

- All undertakings have to be offered fair, reasonable and non-discriminatory terms and conditions for participation in the co-investment agreement relative to the time they join, including in terms of financial consideration required for the acquisition of specific rights, in terms of the protection awarded to the co-investors by those rights both during the building phase and during the exploitation phase, for example by granting indefeasible rights of use (IRUs) for the expected lifetime of the co-invested network and in terms of the conditions for joining and potentially terminating the co-investment agreement. Non-discriminatory terms in this context do not entail that all potential co-investors must be offered exactly the same terms, including financial terms, but that all variations of the terms offered must be justified on the basis of the same objective, transparent, non-discriminatory and predictable criteria such as the number of end user lines committed for.
- ~~The offer~~ ***It*** must allow flexibility in terms of the value and timing of the commitment provided by each co-investor, for example by means of an agreed and potentially increasing percentage of the total end user lines in a given area, to which co-investors have the possibility to commit gradually and which shall be set at a unit level enabling smaller co-investors to gradually increase their participation while ensuring adequate levels of initial commitment. The determination of the financial consideration to be provided by each co-investor needs to reflect the fact that early investors accept greater risks and engage capital sooner.

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

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

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

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