

## Draft CA X

### Access

The CA covers Art 2(3), (8)-(13) and (28)-(31), 43-44, 57-78, 114(1), Annex II-III and related recitals. All relevant AMs, including AMs 326, 335, 590-591, 716-1055, 1105-1109 as well as IMCO xx, CULT yy, LIBE zz, 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.<sup>1</sup>

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

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 to the internal market, Member States should be barred from imposing obligations in addition to any such implementing measures.**<sup>2</sup>

(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 end-user interest**,<sup>3</sup> 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 only be taken where this is justified and proportionate to achieve sustainable competition in the relevant markets.**<sup>4</sup> 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.**<sup>5</sup>

(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.**<sup>6</sup>

(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 defined in the original conditions for the granting of the right of use and** they demonstrate the benefits of such sharing ~~or access~~ in

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)

3 AM 233/234 Kumpula-Natri/Reimon (part, as amended)

4 AM 235 Kallas (amended)

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

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

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 to maintain infrastructure roll-out incentives. ***In those circumstances where access to 5G technologies by end-users is absent, and sharing of passive infrastructure alone does not suffice to address the situation, national regulatory authorities should be able to impose obligations on sharing of active infrastructure. Any such obligations shall be limited to the minimum necessary.***~~deleted~~<sup>78</sup>

- (143) While it is appropriate in some circumstances for a national regulatory authority to impose obligations on operators that do not have significant market power in order to achieve goals such as end-to-end connectivity or interoperability of services, it is however necessary to ensure that such obligations are imposed in conformity with the regulatory framework and, in particular, its notification procedures.
- (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.<sup>9</sup>
- (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***

7 DR AM 19. Updated after 28/6 Shadows [and again after 7/7 techmeet](#)

8 [Shadows 11/7](#)

9 DR AM 20. Justif: *In this case, "connectivity" clearly means "networks". Clarification is necessary as the text addresses obligations.*

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.<sup>10</sup>

- (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~~,<sup>11</sup> and where national and Union competition law remedies are not sufficient to address the problem. The Commission has drawn up guidelines at Union level in accordance with the principles of competition law for national regulatory authorities to follow in assessing whether competition is effective in a given market and in assessing significant market power. National regulatory authorities should analyse whether a given product or service market is effectively competitive in a given geographical area, which could be the whole or a part of the territory of the Member State concerned or neighbouring parts of territories of Member States considered together. An analysis of effective competition should include an analysis as to whether the market is prospectively competitive, and thus whether any lack of effective competition is durable. Those guidelines should also address the issue of newly emerging markets, where de facto the market leader is likely to have a substantial market share but should not be subjected to inappropriate obligations. The Commission should review the guidelines regularly, in particular on the occasion of a review of the existing legislation, taking into account evolving case law, economic thinking and actual market experience and with a view to ensuring that they remain appropriate in a rapidly developing market. National regulatory authorities will need to cooperate with each other where the relevant market is found to be transnational.
- (149) In determining whether an undertaking has significant market power in a specific market, national regulatory authorities should act in accordance with Union law and take into the utmost account the Commission guidelines on market analysis and the assessment of significant market power.
- (150) National regulatory authorities should define relevant geographic markets within their territory taking into utmost account the Commission Recommendation on Relevant Product and Service Markets adopted in accordance with this Directive and taking into account national and local circumstances. Therefore, national regulatory authorities should at least analyse the markets that are contained in the Recommendation, including those markets that are listed but no longer regulated in the specific national or local context. National regulatory authorities should also analyse markets that are not contained in that Recommendation, but are regulated within the territory of their jurisdiction on the basis of previous market analyses, or other markets, if they have sufficient grounds to consider that the three criteria test provided in this Directive may be met.
- (151) Transnational markets can be defined when it is justified by the geographic market definition, taking into account all supply-side and demand-side factors in accordance with competition law principles. BEREC is the most appropriate body to undertake

10 [Shadows 11/7](#)

11 Art 3 CA alignment

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~~<sup>12</sup>

(153) ~~deleted~~<sup>13</sup>

~~(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.<sup>14</sup>~~

~~(155) For national regulatory authorities the starting point for the identification of wholesale markets susceptible to *ex ante* regulation is the analysis of corresponding retail markets. The analysis of effective competition at the retail and at the wholesale level is conducted from a forward-looking perspective over a given time horizon, and is guided by competition law, including the relevant case-law of the Court of Justice, as appropriate. **If it is concluded that a retail markets would be effectively competitive in the absence of *ex ante* wholesale regulation on the corresponding relevant market(s), this should lead the national regulatory authority to conclude that regulation is no longer needed at the relevant wholesale level.**<sup>15</sup>~~

(156) During the gradual transition to deregulated markets, commercial agreements, **including for co-investment and access**,<sup>16</sup> 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

12 ~~DR AM 21. Justif: In accordance with amendment deleting Article 64. Art 64 alignment~~

13 DR AM 22. (Same justif as to AM 21.)

14 Alignment to Art 3 CA

15 Alignment to Art 3 CA. ~~Entirely moved to Art 3 CA (recital 28) following Shadows 11/7~~

16 Cf fn 51



should take into account that the prospect of regulation can be a motive for network owners to enter into commercial negotiations. With a view to ensure adequate consideration of the impact of regulation imposed on related markets when determining whether a given market warrants *ex ante* regulation, national regulatory authorities should ensure markets are analysed in a coherent manner and where possible, at the same time or as close as possible to each other in time.

- (157) When assessing wholesale regulation to solve problems at the retail level, national regulatory authorities should take into account that several wholesale markets can provide wholesale upstream inputs for a particular retail market, and conversely, one wholesale market can provide wholesale upstream inputs for a variety of retail markets. Furthermore, competitive dynamics in a particular market can be influenced by markets that are contiguous but not in a vertical relationship, such as can be the case between certain fixed and mobile markets. National regulatory authorities should conduct that assessment for each individual wholesale market considered for regulation, starting with remedies for access to civil infrastructure, as such remedies are usually conducive to more sustainable competition including infrastructure competition, and thereafter analysing any wholesale markets considered susceptible to *ex ante* regulation in order of their likely suitability to address identified competition problems at retail level. When deciding on the specific remedy to be imposed, national regulatory authorities should assess its technical feasibility and carry out a cost-benefit analysis, having regard to its degree of suitability to address the identified competition problems at retail level, **and enabling competition based on differentiation and technological neutrality**.<sup>17</sup> 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, national regulatory authorities should provide incentives through the remedies imposed, and where it is 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.**<sup>18</sup> 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<sup>19</sup>-market concerned** effectively competitive, **taking into account also** 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, aimed at ensuring 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.**<sup>20</sup> Even if such differences do not result in the definition of distinct geographic markets, they may justify differentiation in the appropriate remedies imposed in the light of the differing intensity of competitive constraints. **The obligations set out in Articles 67 to 75 of this Directive represent a**

17 252 Kallas (part)

18 id

19 Art 3 CA alignment

20 As discussed 7/7. [Shadows 11/7](#)



~~*scale of obligations ranking from the least burdensome, obligations of transparency, to the most burdensome, functional separation.*~~<sup>2122</sup>

- (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.<sup>23</sup>
- (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

21 ~~DR-AM-23~~

22 ~~Shadows 11/7~~

23 Linked to COM proposed deletion of USD Art 17. Exclusive IMCO competence.

market analysis will not be considered to have satisfied that obligation. *In the case of dynamic markets the maximum period allowed for market analyses should however remain at three years. A market should be considered 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.*<sup>24</sup>

- (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.~~<sup>25</sup>
- (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.*~~<sup>26</sup>
- (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

24 DR AM 24

25 Art 3 CA alignment

26 DR AM 25. Alignment to substantive agreement

made available, and whether or not it is free of charge, taking into account the nature and purpose of the information concerned.

- (168) In light of the variety of network topologies, access products and market circumstance that have arisen since 2002, the objectives of Annex II of the Directive 2002/19/EC, concerning local loop unbundling, and access products for providers of digital television and radio services, can be better achieved and in a more flexible manner, by providing guidelines on the minimum criteria for a reference offer to be developed by and periodically updated by BEREC. Annex II of the Directive 2002/19/EC should therefore be removed.
- (169) The principle of non-discrimination ensures that undertakings with market power do not distort competition, in particular where they are vertically integrated undertakings that supply services to undertakings with whom they compete on downstream markets.
- (170) In order to address and prevent non-price related discriminatory behaviour, equivalence of inputs (EoI) is in principle the surest way to achieve effective protection from discrimination. On the other hand, providing regulated wholesale inputs on an EoI basis is likely to trigger higher compliance costs than other forms of non-discrimination obligations. Those higher compliance costs should be measured against the benefits of more vigorous competition downstream, and of the relevance of non-discrimination guarantees in circumstances where the operator with significant market power is not subject to direct price controls. In particular, national regulatory authorities might consider that the provision of wholesale inputs over new systems on an EoI basis is more likely to create sufficient net benefits, and thus be proportionate, given the comparatively lower incremental compliance costs to ensure that newly built systems are EoI-compliant. On the other hand, national regulatory authorities should also 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 available for reuse where technical or physical constraints prevent functional access to it.***<sup>27</sup>

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.<sup>28</sup>

- (173) National regulatory authorities should, when imposing obligations for access to new and enhanced infrastructures, ensure that access conditions reflect the circumstances underlying the investment decision, taking into account, *inter alia*, the roll-out costs, the expected rate of take up of the new products and services and the expected retail price levels. Moreover, in order to provide planning certainty to investors, national regulatory authorities should be able to set, if applicable, terms and conditions for access which are consistent over appropriate review periods. In the event that price controls are deemed appropriate, such terms and conditions can include pricing arrangements which depend on volumes or length of contract in accordance with Union law and provided they have no discriminatory effect. Any access conditions imposed should respect the need to preserve effective competition in services to consumers and businesses.
- (174) Mandating access to network infrastructure, *such as e.g. dark fibre*, 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.<sup>29</sup>~~

- (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

28 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.

29 [Shadows 11/7](#)

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

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

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.

- (180) The charging system in the Union for wholesale voice call termination is based on Calling Party Network Pays. An analysis of demand and supply substitutability shows that currently or in the foreseeable future, there are as yet no substitutes at wholesale level which might constrain the setting of charges for termination in a given network. Taking into account the two-way access nature of termination markets, further potential competition problems include cross-subsidisation between operators. These potential competition problems are common to both fixed and mobile voice call termination markets. Therefore, in the light of the ability and incentives of terminating operators to raise prices substantially above cost, cost orientation is considered the most appropriate intervention to address this concern over the medium term.
- (181) In order to reduce the regulatory burden in addressing the competition problems relating to wholesale voice call termination coherently across the Union, this Directive should lay down a common approach as a basis for setting price control obligations, to be completed by a binding common 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, it should disregard any unjustified exceptional national deviation from that trend.***<sup>31</sup>
- (183) ~~deleted~~<sup>32</sup>
- (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~~

31 [As discussed 7/7](#)

32 DR AM 27

~~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.<sup>33</sup>~~

- (185) The purpose of functional separation, whereby the vertically integrated operator is required to establish operationally separate business entities, is to ensure the provision of fully equivalent access products to all downstream operators, including the operator's own vertically integrated downstream divisions. Functional separation has the capacity to improve competition in several relevant markets by significantly reducing the incentive for discrimination and by making it easier to verify and enforce compliance with non-discrimination obligations. In exceptional cases, functional separation may be justified as a remedy where there has been persistent failure to achieve effective non-discrimination in several of the markets concerned, and where there is little or no prospect of infrastructure competition within a reasonable time frame after recourse to one or more remedies previously considered to be appropriate. However, it is very important to ensure that its imposition preserves the incentives of the concerned undertaking to invest in its network and that it does not entail any potential negative effects on consumer welfare. Its imposition requires a coordinated analysis of different relevant markets related to the access network, in accordance with the market analysis procedure set out in Article 67. When undertaking the market analysis and designing the details of this remedy, national regulatory authorities should pay particular attention to the products to be managed by the separate business entities, taking into account the extent of network roll-out and the degree of technological progress, which may affect the substitutability of fixed and wireless services. In order to avoid distortions of competition in the internal market, proposals for functional separation should be approved in advance by the Commission.
- (186) The implementation of functional separation should not prevent appropriate coordination mechanisms between the different separate business entities in order to ensure that the economic and management supervision rights of the parent company are protected.
- (187) Where a vertically integrated undertaking chooses to transfer a substantial part or all of its local access network assets to a separate legal entity under different ownership or by establishing a separate business entity for dealing with access products, the national regulatory authority should assess the effect of the intended transaction, including any access commitments offered by this undertaking, on all existing regulatory obligations imposed on the vertically integrated operator in order to ensure the compatibility of any new arrangements with this Directive. The national regulatory authority concerned should undertake a new analysis of the markets in which the segregated entity operates, and impose, maintain, amend or withdraw obligations accordingly. To this end, the national regulatory authority should be able to request information from the undertaking.
- (188) Binding commitments can add predictability and transparency to the process of voluntary separation by a vertically integrated undertaking which has been designated



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

- (189) The commitments can include the appointment of a monitoring trustee, whose identity and mandate should be approved by the national regulatory authority and the obligation on the operator offering them to provide periodic implementation reports.
- (190) **Network owners that do not have retail market activities, ~~and 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,~~<sup>34</sup> 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.<sup>35</sup>
- (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~~<sup>36</sup> 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, but not required, to upgrade their access to any regulated product with higher capacity, should they wish to do so. In that case, 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.***

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](#)

- (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.***

## Articles

### Article 2

#### Definitions

- (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~~<sup>37</sup> 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 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,~~<sup>38</sup> 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 responsible for granting the rights referred to in paragraph 1 from the activities associated with ownership or control.

***2 a. Member States shall ensure that an effective mechanism exist 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.***<sup>39</sup>

#### *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.

#### *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.***<sup>40</sup>

## **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***,<sup>41</sup> 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***.<sup>42</sup>

40 Along the lines discussed at 16/6 techmeet.

41 AM 717 Martin (as moved)

42 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.

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

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

(c) in justified cases, **where the reach, coverage, quality of service<sup>43</sup> 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,<sup>44</sup> 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<sup>45</sup> providers of number-independent interpersonal communications services to make their services interoperable;<sup>46</sup>**

(d) to the extent that is necessary to ensure accessibility for end-users to digital radio and television broadcasting services **and related complementary services<sup>47</sup>** 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 implementation of~~ standards or specifications listed in Article 39(1)<sup>48</sup> 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,<sup>49</sup>** 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<sup>50</sup>~~ 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 may not impose obligations with respect to the nature and scope of any obligations going beyond those implementing measures.<sup>51</sup>**

43 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.)

44 [ECR input](#)

45 ECR input

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

47 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.](#)

48 [\\_AM 731 Reimon](#) (as amended). Further amendment after 26/6 techmeet

49 As discussed at 16/6 techmeet

50 [\\_Error correction \(thanks ALDE\)](#)

51 [\\_AM 733 Kallas](#) (as amended). Further amended after 16/6 and 26/6 techmeets

2. **Without prejudice to Article 59(1),**<sup>52</sup> National regulatory authorities shall impose obligations upon **to meet** reasonable requests **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**<sup>53</sup> 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.**<sup>54</sup> 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 taking~~ into account risk factors.<sup>55</sup>

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.<sup>56</sup>

National regulatory authorities shall not impose obligations in accordance with the second subparagraph where:<sup>57</sup>

(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**<sup>58</sup>

(b) in the case of recently deployed network elements, in particular by smaller local projects<sup>59</sup> **where** the granting of that access would compromise the economic or financial viability of their deployment.<sup>60</sup>

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 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,~~

**National regulatory authorities may impose such obligations provided that this possibility has been clearly defined 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**

52 AM 736 Kumpula-Natri

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

54 ALDE

55 AM 736 Kumpula-Natri, 738 Reimon (as amended)

56 AM 753 Kumpula-Natri. S&D alternative of keeping COM proposal-

57 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.

58 DR AM 111. (Same justif as to AM 110.) Also AM 767 Reimon, 769 Tosenovsky. AM 773 Kumpula-Natri (as amended)

59 Reinstated after 16/6 techmeet

60 DR AM 112. (Same justif as to AM 110.)



*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.~~<sup>61</sup>*

~~(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;***<sup>62</sup>

(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.

~~deleted~~<sup>63</sup>

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

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

61 As discussed 7/7. [Shadows 11/7](#)

62 [id](#)

63 DR AM 113. Justif: *Unnecessary and unpredictable sharing obligations should be avoided in favour of investment certainty. Compare the AM to Article 18.*

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

#### *Article 60*

##### **Conditional access systems and other facilities**

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

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

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

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

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

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

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

(ii) conditional access systems and other associated facilities,

would not be adversely affected by such amendment or withdrawal.

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

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

### **CHAPTER III**

#### **MARKET ANALYSIS AND SIGNIFICANT MARKET POWER**

##### *Article 61*

##### **Undertakings with significant market power**

1. Where this Directive requires national regulatory authorities to determine whether operators have significant market power in accordance with the procedure referred to in Article 65, paragraph 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.*

*National regulatory authorities shall evaluate such market characteristics in the 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.*<sup>64</sup>

**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 aimed at preventing such leverage may be applied in the second market pursuant to this Directive.**<sup>65</sup>

## Article 62

### Procedure for the identification and definition of markets

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

64 Shadows 11/7

65 AM 797 Kumpula-Natri, 797 Kallas, 795 Reimon. The corresponding recital from Directive 2009/140 is #47.

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.<sup>66</sup>

2. ***After consulting with BEREC,*** ~~the~~ Commission shall publish, at the latest on the date of entry into force of this Directive, guidelines for market analysis and the assessment of significant market power (hereinafter ‘the SMP guidelines’) which shall be in accordance with the ***relevant*** principles of competition law.<sup>67</sup>

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,***<sup>68</sup> 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.~~<sup>69</sup> They shall follow the procedures referred to in Articles 23 and 32 before defining the markets that differ from those identified in the Recommendation.<sup>70</sup>

### 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,***<sup>71</sup> 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 markets, where they consider that market conditions in their respective jurisdictions are sufficiently homogeneous.

### Article 64

#### Procedure for the identification of transnational demand

66 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.*

67 AM 802 Kumpula-Natri (as amended). [Shadows 11/7](#)

68 Suggestion due to the AM 804/805/806 delete

69 AM 804/805/806 Kumpula-Natri, Kallas, Reimon

70 DR AM 115

71 ECR input

~~deleted~~<sup>72</sup>

~~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 this analysis**, it shall, after consulting stakeholders and in close cooperation with the Commission, issue guidelines on common approaches for 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 65 whether to amend regulated wholesale access products, 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.~~

~~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 on common approaches for national regulatory authorities to meet the identified transnational demand 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 National regulatory authorities **shall take these 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.<sup>73</sup>~~

## 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

<sup>72</sup> 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.*

<sup>73</sup> Kallas 811-813, 815 amended wording

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~~<sup>74</sup>

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;~~<sup>75</sup>

(b) all relevant competitive constraints, **on wholesale and** ~~including~~ at retail level,<sup>76</sup> irrespective of whether the sources of such constraints are deemed to be electronic communications networks, electronic communications services, or other types of services or applications which are comparable from the perspective of the end-user, and irrespective of whether such constraints are part of the relevant market;

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

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

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

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

74 DR AM 117. Text reinstated as per S&D and ALDE comments

75 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.

76 AM 832 Kumpula-Natri

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<sup>77</sup> 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 at the retail level,<sup>78</sup> the market analysis shall however be carried out every three years, subject to the same one-year extension possibility;<sup>79</sup>***

(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.<sup>80</sup>~~***

***~~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 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.<sup>81</sup>~~***

77 [Implementation of Art 3 CA](#)

78 [Id](#)

79 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.*

80 S&D, ECR, ALDE comment

81 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.*



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<sup>82</sup> 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.***<sup>83</sup>

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<sup>84</sup> containing obligations on undertakings other than those designated as having significant market power, or
- the need to comply with international commitments,

national regulatory authorities shall not impose the obligations set out in Articles 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

S&D, ECR, ALDE comment to delete

82 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".

83 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.](#)

84 OJ L 201, 31.7.2002, p. 37.

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**<sup>85</sup> 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~~.<sup>86</sup>

**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, or whether to decide that no, fewer or less onerous obligations shall be imposed with respect to a planned development. Such decisions shall only be made following consultation in accordance with Articles 23 and 32.**<sup>87</sup>

~~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 may impose an administrative charge pursuant to Article 16 in order to meet the cost of considering the request.~~<sup>88</sup>

## 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

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

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

87 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

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

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.***<sup>89</sup>

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.

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 National 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.<sup>90</sup>

89 AM 869 Reimon (partly, as amended)

90 As discussed techmeet 26/6

## 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<sup>91</sup> 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.<sup>92</sup>**

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

## Article 71

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

1. ~~Only where~~ A 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,<sup>93</sup> and would not be in the

91 Implementation of Art 3 CA

92 AM 892 Kallas (as amended). Ref to dark fibre proposed moved to recital 174. See also recital 172 re access limitations

93 Implementation of Art 3 CA

end-user's interest.<sup>94</sup> ***Prior to the imposition of 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.***<sup>95</sup>

Operators may be required *inter alia*:

(a) to give third parties ***appropriate, including physical (other than pursuant to Art 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;***<sup>96</sup>

***(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;***<sup>97</sup>

***(ac) to give third parties access to specified active or virtual network elements and services;***<sup>98</sup>

(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;***<sup>99</sup>

(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;~~<sup>100</sup>

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

(h) to interconnect networks or network facilities;

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

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

2. When national regulatory authorities are considering the appropriateness of imposing any of the possible specific obligations referred in paragraph 1, and in particular when assessing, in conformity with the principle of proportionality, whether and how such obligations should be imposed, they shall analyse whether other forms of access to wholesale inputs either on the same or a related wholesale market, would already be sufficient to address the identified

94 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.*

95 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](#)

96 AM 876 Kumpula-Natri (part). As discussed 7/7

97 id

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

99 ECR input

100 ECR input, consequence of change to definition

problem ~~at the retail level.~~<sup>101</sup> The assessment shall include ~~existing or prospective~~<sup>102</sup> 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;**<sup>103</sup>

(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;<sup>104</sup>

(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;<sup>105</sup>

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

(g) the provision of pan-European services.

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

## Article 72

### Price control and cost accounting obligations

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

~~In determining whether or not price control obligations would be appropriate, national regulatory authorities shall take into account long-term end-user interests related to the deployment and take-up of next-generation networks, and in particular of very high capacity~~

101 Implementation of Art 3 CA

102 S&D comment

103 AM 952 Kallas

104 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

105 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.*

~~networks. In particular,~~ **To** encourage investments by the operator, including in next-generation networks, national regulatory authorities shall take into account the investment made by the operator. Where the national regulatory authorities deem price controls appropriate, they shall allow the operator a reasonable rate of return on adequate capital employed, taking into account any risks specific to a particular new investment network project.<sup>106</sup>

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.

### Article 73

#### Termination rates

1. **By [transposition date] the Commission shall, after having consulted 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.**<sup>107</sup>

106 DR AM 126. Justif: *The reference to very high capacity networks is moved to the new Title III of Part II.*

107 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.*



2. *Those single maximum termination rates for fixed and mobile voice termination respectively 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 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.*<sup>108</sup>

3. *deleted*<sup>109</sup>

4. *deleted*<sup>110</sup>

5. *deleted*<sup>111</sup>

6. *deleted*<sup>112</sup>

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

#### [Article 74

### **Regulatory treatment of new network elements**

*deleted*<sup>113]</sup>

#### Article 75

### **Functional separation**

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

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

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

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

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

109 DR AM 129

110 DR AM 130

111 DR AM 131

112 DR AM 132

113 DR AM 133. Justif: *The Article is moved to the new Title III of Part II.*

- (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~~<sup>114</sup>**

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.

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. ***These provisions 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 Article 65 and 66.***~~deleted~~<sup>115</sup>

115 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

## 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 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)(BD)<sup>116</sup>**

(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.*<sup>117</sup>

116 [Error correction](#)

117 [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;
- (a) 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;
- (b) 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;
- (c) radio spectrum fees shall be excluded from the mobile termination increment;
- (d) 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;
- (e) 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;
- (f) for mobile network operators, the minimum efficient scale shall be set at a market share not below 20%;
- (g) 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