



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 12.7.2000
COM(2000) 384 final

2000/0186 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**on access to, and interconnection of, electronic communications networks and
associated facilities**

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. Summary

This Directive will establish a new regulatory framework for dealing with issues of access to, and interconnection of, electronic communications networks in the Community. It will ensure that, during a period of converging technologies and services and strong market growth, the market for electronic communications services continues to develop in a manner that stimulates innovation, competition and user choice.

The Directive builds on the premise that competition rules will be the prime vehicle for regulating the electronic communications market once the market becomes effectively competitive. However some sector specific *ex-ante* rules will continue to be appropriate during the transitional phase, in particular where former monopoly operators continue to benefit from inherited market power, such as in local access networks, or where firms are vertically integrated.

In such cases, the regulatory response should be specific to the problem, proportionate and maintained only for as long as necessary. This calls for transparent decision-making processes, with national regulatory authorities having to justify all decisions against the objectives of Community policy, and using *ex-ante* rules only where they are more effective than competition law remedies to address the market problems identified. The Directive requires *ex-ante* rules to be withdrawn once the desired objectives are met by the market.

The Directive lays down a framework of rules that are technologically neutral, but which may be applied to specific product or service markets in particular geographical areas, to address identified market problems.

In the area of digital television, the Directive maintains the approach set out in the TV Standards Directive 95/47/EC¹, and carries over the obligation to provide conditional access on fair reasonable and non-discriminatory terms. However, given the broad consensus that treatment of digital television gateways needs to take into account recent technological developments, provision is made in the new Directive to adapt the current obligations. It is anticipated that preliminary work in this area could begin in the near future, in order to prepare the ground for formal decisions that could be taken once the new regulatory framework is adopted.

The Directive provides legal certainty for market players by establishing clear criteria for regulatory intervention, and clear limitations on what obligations concerning access and interconnection can be imposed in which circumstances, whilst at the same time allowing for sufficient flexibility to allow regulatory authorities to deal effectively with new market problems that hinder effective competition.

¹ Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals (OJ L 281, 23.11.1995, p. 51, “the TV Standards Directive”).

2. Scope and context

The proposal for a Directive on Access to, and Interconnection of, Electronic Communications Networks harmonises the way in which Member States regulate the market between suppliers of communications networks and services in the Community. It applies to all forms of communications networks carrying publicly available communications services, whether used for voice, fax, data or images, including fixed and mobile telecommunications networks, cable TV networks, networks used for terrestrial broadcasting, satellite networks, networks using Internet protocol (IP). The proposed Directive is designed to provide a pro-competitive framework that will stimulate competing network infrastructures and the interoperability of services provided over those infrastructures, while ensuring that bottlenecks in the market do not constrain the emergence and growth of innovative services that benefit users and consumers.

The electronic communications sector is characterised by strong inter-dependencies between market players. Networks need to be interconnected either directly or indirectly to each other in order to allow customers to call each other and to complete transactions. Those providing communications services or broadcast services need access to network infrastructures in order to reach their customers. The owner or operator of the communications infrastructure stands in a critical position, either as provider of services to end users, or as provider of transmission service to others, or both.

The rules for access to and interconnection of networks, including emerging broadband networks, will affect the business models of all companies operating in the sector, and thereby the competitive dynamics of the future marketplace. Next generation communications services – fixed and mobile – will increasingly build on broadband delivery platforms or transport networks using the Internet Protocol (IP) for the delivery of multimedia services. This new broadband environment will be fundamentally different from the current narrow-band voice-centred market. The traditional simple value chain based on a limited number of products is evolving into a complex and highly intertwined set of commercial relationships between companies – operators, service providers, content providers, advertisers and broadcasters – delivering an ever-growing variety of services to users.

3. The proposed new regulatory framework for access and interconnection

Approach

The general objectives of regulation in this sector are to foster a dynamic marketplace with sustainable competition at network and services level, providing incentives for investments, guaranteeing user choice and maintaining public policy objectives in areas such as broadcasting and consumer protection. At Community level it is also important to ensure that Member States do not implement different patterns of regulation which lead to market variation, increasing cost to end-users and a fragmentation of the single market.

With the pace of change in markets and technologies today, it would not be appropriate to base the regulatory framework on predictions of the future marketplace. Instead, the proposed Directive lays down the processes by which market problems can be addressed, and where necessary regulated, to ensure pro-competitive outcomes.

In a competitive market, interconnection of and access to networks should in principle be agreed on the basis of commercial negotiation between the companies concerned. However, a number of factors constrain the competitiveness of the market at present. One is the existence of former monopolists that still provide the majority of connections, giving them a degree of bargaining power significantly greater than that of their competitors; another is the existence of bottleneck resources controlled by one or a few operators, such as the local access network in the telecommunications environment and conditional access systems in the digital television environment; and yet another is the existence of legal barriers to market entry that exist in the mobile sector, where currently the availability of spectrum means that the number of players is limited to four or five, which has not been enough to ensure competitive pricing in all segments of the mobile market, in particular for call termination services.

For these reasons there is a consensus that *ex-ante* sector specific rules will continue to be needed alongside competition rules to regulate access and interconnection, until such time as there is full and effective competition in all segments of the market.

The proposed Directive establishes clear criteria for regulatory intervention on access and interconnection issues, which will allow hitherto undefined issues to be addressed as they occur. It does not provide a set of ready-made solutions to pre-defined problems; instead it lays down the criteria for regulatory intervention, a maximum list of obligations that a national regulatory authority can impose, and identifies those undertakings upon which obligations can be placed. The whole procedure is transparent, with the regulator having to justify all its decisions against the objectives of Community policy for the sector.

In this way the Directive maintains a balance between providing legal certainty for market players and providing sufficient flexibility to allow regulatory authorities to adapt the rules in the light of changing circumstances.

Thresholds for *ex-ante* obligations

In its November Communication², the Commission had proposed two thresholds for the imposition of *ex-ante* rules. As a result of the public consultation, the Commission now proposes to have only one threshold for *ex-ante* obligations, called significant market power, but re-defined on the basis of the competition law concept of dominance. The new form of significant market power will embrace single company dominance, joint dominance and the leverage of a dominant position onto an associated market. National regulatory authorities will be able to notify companies as having significant market power and to impose *ex-ante* obligations where such firms would be considered to have a dominant position under competition law and where either there are problems of incumbency and/or problems of vertical integration, such that the *ex-post* remedies of competition law are not adequate to meet the market problems identified.

² COM(1999) 539.

In a rapidly changing world, the process of defining the markets upon which the market power of an undertaking is assessed has to be a dynamic and responsive process. This process is set out in the Framework Directive, and involves the Commission publishing a Decision on the product and service markets susceptible to *ex-ante* regulation. National regulatory authorities in the Member States have the responsibility to determine which undertakings have significant market power on those markets, and to impose obligations that are designed to counter the potential distortion of competition that could arise through misuse of that market power. The Framework Directive requires this to be done in a objective and transparent manner.

Continuity with current regulatory framework

Access and interconnection obligations imposed under the current Interconnection Directive 97/33/EC³, obligations on special access under Directive 98/10/EC⁴, obligations for the provision of leased transmission capacity under Directive 92/44/EC⁵ as well as on full local loop unbundling will be carried forward into the new framework, and kept under regular review in accordance with the above-mentioned market analysis procedure. In this way, obligations can be progressively relaxed as the market becomes more competitive. If and when new market situations arise justifying new *ex-ante* obligations, eg new bottlenecks linked to new technologies, the same market analysis procedure allows new obligations to be introduced, provided they are fully justified and focused on remedying the market problem identified.

In the case of digital television services, the existing *ex-ante* obligations on access serve a somewhat different purpose. The TV standards Directive 95/47/EC was designed to provide an initial regulatory framework for the nascent digital television industry. Its main focus was on behavioural rules for conditional access providers, in order to ensure market entry for other broadcasters. The intention was to provide certainty for investors in digital television while assuring market entry and safeguarding key public interests such as interoperability of consumer equipment, in a proportionate manner. The digital television market has made reasonable progress, driven in its first phase by substantial pay TV investments, and there remains broad support for the approach taken in Directive 95/47/EC, although some urge its extension to new gateways that have emerged since 1995, notably electronic programme guides (EPGs) and applications program interfaces (APIs). The proposed directive therefore carries over the main provisions of Directive 95/47/EC, notably the obligation to provide conditional access on fair reasonable and non-discriminatory terms, and will allow extension of these obligations, eg in relation to new gateways, to be imposed by NRAs where justified, following a regulatory committee procedure.

4. Summary of the contents of the proposed Directive

³ Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision, (OJ L 199, 26.7.1997, p. 32) as modified by Directive 98/61/EC of the European Parliament and of the Council of 24 September 1998 amending Directive 97/33/EC with regard to operator number portability and carrier pre-selection (OJ L 268, 3.10.1998, p. 37).

⁴ Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision to voice telephony and on universal service for telecommunications in a competitive environment (OJ L 101, 1.4.1998, p. 24).

⁵ Council Directive 92/44/EC of 5 June 1992 on the application of open network provision to leased lines (OJ L 165, 19.6.1992, p. 32), as amended by Directive 97/51/EC (OJ L 295, 29.10.1997, p. 23) and Commission Decision No 80/98/EC of 7 January 1998 (OJ L 14, 20.1.1998, p. 27).

Chapter I – Scope, aim and definitions

Article 1 (Scope and aim) establishes that the Directive covers access to and interconnection of electronic communications networks and associated facilities, including networks used for broadcast services. The aim is to establish a regulatory framework for the market between suppliers of networks and services, in accordance with internal market principles, that will result in sustainable competition, interoperability of services and consumer benefits.

Article 2 (Definitions) defines terms which are specific to this Directive, in particular the terms ‘access’ and ‘interconnection’.

Chapter II – General framework and principles

Article 3 (General framework for access and interconnection) carries over the provisions from the existing Directives establishing the freedom for parties to interconnect within and between Member States. It requires Member States to remove measures that link the interconnection charges paid by a new entrant to their level of investment in infrastructure.

Article 4 (Rights and obligations for undertakings) sets out the ‘primary interconnection rule’ i.e. that all network operators have a right and an obligation to negotiate interconnection with each other, taking as a principle a commercial basis. It also carries over obligations from the TV standards Directive 95/47/EC concerning network operators’ responsibilities with regard to distribution of wide screen television services and guarantees the confidentiality of information.

Article 5 (Powers and responsibilities of the national regulatory authorities) sets out the general role of the NRA with respect to access, interconnection and interoperability and its powers to intervene, in particular to impose obligations on market players and to resolve disputes.

Chapter III – Continuity with former obligations and market review procedures

Article 6 (Conditional access systems and other associated facilities) maintains the obligations from the TV standards Directive 95/47/EC for all operators of conditional access systems to provide access to broadcasters on fair, reasonable and non-discriminatory terms. Provision is made for reviewing these obligations in the light of market and technological developments and, if justified, extending them to cover similar facilities like application program interfaces (APIs) or electronic programme guides (EPGs).

Article 7 (Review of former obligations for access and interconnection) carries over the obligations imposed under the current ONP Directives 97/33/EC, 98/10/EC and 92/44/EC as well as the newly proposed Regulation on unbundled access to the local loop, in order to provide continuity in the transition from old to new regulatory framework, but requires national regulatory authorities to review all obligations on a regular basis, and in the light of the new definition of significant market power; national regulatory authorities have to decide whether to maintain, modify or withdraw them, following an analysis of the market.

Article 8 (Imposition, amendment or withdrawal of obligations) defines the conditions under which obligations can be imposed, and identifies the obligations that can be applied.

Article 9 (Obligation of transparency) allows national regulatory authorities to impose obligations for transparency, covering for example prices, terms and conditions for access or interconnection or interoperability, technical interfaces.

Article 10 (Obligation of non-discrimination) allows national regulatory authorities to impose obligations for non-discrimination, in situations where a market analysis indicates that discriminatory behaviour by the operator(s) concerned could lead to distortion of competition, with consequent disadvantages for end users.

Article 11 (Obligation of accounting separation) allows national regulatory authorities to impose obligations for accounting separation, in order to make transparent wholesale prices and internal cross transfers within a vertically integrated company, in situations where the operator concerned provides input facilities that are essential to other service providers, while competing with them on the same downstream market itself.

Article 12 (Obligations of access to, and use of, specific network facilities) allows national regulatory authorities to impose obligations on operators to grant access to, and use of, specific network elements and/or associated services or facilities, in situations where denial of access by the operator(s) concerned would hinder the development of a sustainable competitive market at the retail level, or would not be in the consumer interest.

Article 13 (Price control and cost accounting obligation) allows national regulatory authorities to impose price controls and cost accounting, and in particular obligations for cost orientation of prices for interconnection and/or access, in situations where lack of effective competition means that the operator concerned is capable of sustaining prices at an excessively high level, to the detriment of end users.

Chapter IV – Procedural provisions

Article 14 (Committee) describes the procedure to be used by the Communication Committee (set up under the Framework directive) when dealing with modifications of annex to this Directive.

Article 15 (Publication of and access to information) requires national regulatory authorities to ensure that adequate and up-to-date information is published, and to indicate where it is published.

Article 16 (Notification) requires Member States to notify to the Commission the authorities responsible for implementing the provisions of the Directive. It also requires national regulatory authorities to notify to the Commission the names of operators with specific obligations.

Article 17 (Review), Article 18 (Transposition), Article 19 (Entry into Force) and Article 20 (Addressees) are procedural measures.

5. Conclusion

The proposed EP and Council Directive on access and interconnection is considered to be the most effective way of laying down a harmonised framework for dealing with issues of access and interconnection in Member States, at the same time defining the role of the national regulatory authorities in this context, consistent with the principle of subsidiarity.

In summary, the regulatory framework set out in the proposed Directive for access and interconnection will be characterised by:

- priority given to full commercial negotiations between parties to agree on the terms and conditions for access and interconnection, subject to compliance with Community law;

- a defined framework for national regulatory authorities to address issues of access and interconnection;
- continuity with the current regulatory framework, with obligations for national regulatory authorities to review and when possible roll back certain obligations on operators with significant market power;
- possibility for national regulatory authorities to intervene to address identified market failures, acting in accordance with the principles of transparency, objectivity, and proportionality.

It will ensure that the communications market can develop along the lines of a healthy business-driven economic model that is self-sustainable, rewards investment risks and creates the competitive dynamics and entrepreneurial behaviour to the benefit of the users.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on access to, and interconnection of, electronic communications networks and associated facilities

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the Economic and Social Committee²,

Having regard to the opinion of the Committee of the Regions³,

Acting in accordance with the procedure laid down in Article 251 of the Treaty⁴,

Whereas:

- (1) Directive [...]/.../EC of the European Parliament and of the Council of ... on a common regulatory framework for electronic communications networks and services,⁵ lays down the objectives of a regulatory framework to cover electronic communications networks and services in the Community, including fixed and mobile telecommunications networks, cable television networks, networks used for terrestrial broadcasting, satellite networks and Internet networks, whether used for voice, fax, data or images. Such networks may have been authorised by Member States under Directive [...]/.../EC of the European Parliament and of the Council of ... on the authorisation of electronic communications networks and services⁶ or have been authorised under previous regulatory measures. The provisions of this Directive apply to those networks that are used for the commercial provision of publicly available electronic communications services or for transmission of broadcasting signals. This Directive covers access and interconnection arrangements between service suppliers. It does not apply to networks used for the provision of communications services available only to a specific end-user or to a closed user group, nor does it deal with access for end-users or others who are not supplying publicly available services.

¹ OJ C
² OJ C
³ OJ C
⁴ OJ C
⁵ OJ C
⁶ OJ C

- (2) 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 Community measures. The term 'operator' implies control of the relevant network or facilities, but does not imply ownership; a network operator may own the underlying network or facilities or may rent some or all of them.
- (3) Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals⁷ did not mandate any specific digital television transmission system or service requirement, and this opened an opportunity for the market actors to take the initiative and develop suitable systems. Through the Digital Video Broadcasting Group, European market actors have developed a family of television transmission systems that have been adopted by broadcasters throughout the world. These transmissions systems have been standardised by the European Telecommunications Standards Institute (ETSI) and have become International Telecommunications Union Recommendations. In relation to wide screen digital television, the 16:9 aspect ratio is the reference format for wide-format television services and programmes, and is now established in Member States' markets as a result of Council Decision 93/424/EEC of 22 July 1993 on an action plan for the introduction of advanced television services in Europe⁸.
- (4) 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 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. This would be the case for example if network operators were to unreasonably restrict end-user choice for access to Internet portals and services. The use of *ex-ante* rules by national regulatory authorities should be limited to those areas where *ex-post* application of the remedies available under competition law cannot achieve the same results in the same time-scale.
- (5) 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. In any case national regulatory authorities should take into account the case-law of the Court of Justice and Court of First Instance of the European Communities and may not confirm pricing practices or prices contrary to Article 81(1) or Article 82 of the Treaty.

⁷ OJ L 281, 23.11.1995, p. 51.

⁸ OJ L 196, 5.8.1993, p. 48.

- (6) Network operators who control access to their own customers do so on the basis of unique numbers or addresses from a published numbering or addressing range. Other network operators need to be able to deliver traffic to those customers, and so need to be able to interconnect directly or indirectly to each other. The existing rights and obligations to negotiate interconnection should therefore be maintained. It is also appropriate to maintain the obligations formerly laid down in Directive 95/47/EC requiring all electronic communications networks used for the distribution of digital television services to be capable of distributing wide-screen television services and programmes, so that users are able to receive such programmes in the format in which they were transmitted.
- (7) Directive 95/47/EC provided an initial regulatory framework for the nascent digital television industry which should be maintained, including in particular the obligation to provide conditional access on fair, reasonable and non-discriminatory terms. Technological and market developments make it necessary to review these obligations on a regular basis, in particular to determine whether there is justification for extending obligations to new gateways, such as electronic programme guides (EPGs) and applications program interfaces (APIs) for the benefit of European citizens.
- (8) In order to ensure continuity of existing agreements and to avoid a legal vacuum, it is necessary to ensure that obligations for access and interconnection imposed under Articles 4, 6, 7, 8, 11, 12, and 14 of Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP)⁹, as amended by Directive 98/61/EC¹⁰, obligations on special access imposed under Article 16 of Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment¹¹, and obligations concerning the provision of leased line transmission capacity under Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines¹², as last amended by Commission Decision No 98/80/EC¹³, are initially carried over into the new regulatory framework, but are subject to immediate review in the light of prevailing market conditions. Such a review should also extend to those organisations covered by Regulation .../... of the European Parliament and of the Council of ... on unbundled access to the local loop¹⁴. The review should be carried out using an economic market analysis based on competition law methodology. The aim is to reduce *ex-ante* sector specific rules progressively as competition in the market develops. However the procedure also takes account of the possibility of new bottlenecks arising as a result of technological development, which may require *ex-ante* regulation, for example in the area of broadband access networks. It may well be the case that competition develops at different speeds in different market segments and in different Member States, and national regulatory authorities should be able to relax regulatory obligations in those markets where competition is delivering the

⁹ OJ L 199, 26.7.1997, p. 32.

¹⁰ OJ L 268, 3.10.1998, p. 37.

¹¹ OJ L 101, 1.4.1998, p. 24.

¹² OJ L 165, 19.6.1992, p. 27.

¹³ OJ L 14, 20.1.1998, p. 27.

¹⁴ OJ L

desired results. In order to ensure that market players in similar circumstances are treated in similar ways in different Member States, the Commission should be able to ensure harmonised application of the provisions of this Directive. The Community and its Member States have taken commitments on interconnection of telecommunications networks in the context of the World Trade Organisation agreement on basic telecommunications that need to be respected.

- (9) Directive 97/33/EC laid down a range of obligations to be imposed on undertakings with significant market power, namely transparency, non-discrimination, accounting separation, access, and price control including cost orientation. This range of possible obligations should be maintained but, in addition, they should be established as a set of maximum obligations that can be applied to undertakings, in order to avoid over-regulation. Exceptionally, in order to comply with international commitments or Community law it may be appropriate to impose obligations for access or interconnection on all market players, as is currently the case for conditional access systems for digital television services. In all cases, *ex-ante* regulation is only justified where the remedies available under competition rules cannot achieve the desired results as quickly.
- (10) 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.
- (11) 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 competitors with whom they compete on downstream markets.
- (12) Accounting separation allows internal price transfers to be rendered visible, and allows national regulatory authorities to check compliance with obligations for non-discrimination where applicable. In this regard the Commission published Recommendation 98/322/EC of 8 April 1998 on interconnection in a liberalised telecommunications market (Part 2 - accounting separation and cost accounting)¹⁵.
- (13) Mandating access to network infrastructure can be justified as a means of increasing competition, but national regulatory authorities need to balance the rights of an infrastructure owner to exploit its infrastructure for its own benefit, and the rights of other service providers to access facilities that are essential for the provision of competing services. The imposition by national regulatory authorities of mandated access that increases competition in the short term should not reduce incentives for competitors to invest in alternative facilities that will secure more competition in the long term. The Commission has published a Notice on the application of the competition rules to access agreements in the telecommunications sector¹⁶, which addresses these issues.

¹⁵ OJ L 141, 13.5.1998, p. 6.

¹⁶ OJ C 265, 22.8.1998, p. 2.

- (14) Price control may be necessary when market analysis in a particular market reveals inefficient competition. The regulatory intervention may be relatively light, such as an obligation that prices for carrier selection are reasonable as laid down in Directive 97/33/EC, or much heavier such as an obligation that prices are cost oriented to provide full justification for those prices where competition is not sufficiently strong to prevent excessive pricing. In particular operators with significant market power should avoid a price squeeze whereby the difference between their retail prices and the interconnection prices charged to competitors who provide similar retail services is not adequate to ensure sustainable competition. In its Recommendation 98/195/EC of 8 January 1998 on interconnection in a liberalised telecommunications market (Part 1 – interconnection pricing)¹⁷, the Commission recommended the use of long-run average incremental costs, as the basis for interconnection prices in the Community that serves to promote efficiency and sustainable competition.
- (15) Publication of information by Member States will ensure that market players and potential market entrants understand their rights and obligations, and know where to find the relevant detailed information. Publication in the National Gazette helps interested parties in other Member States to find the relevant information.
- (16) In order to determine the correct application of Community law, the Commission needs to know which undertakings have been designated as having significant market power and what obligations have been placed upon market players by national regulatory authorities. In addition to national publication of this information, it is therefore necessary for Member States to send this information to the Commission.
- (17) Given the pace of technological and market developments, the implementation of this Directive should be reviewed within three years of its entry into force to determine if it is meeting its objectives.
- (18) Since the measures necessary for the implementation of this Directive are measures of general scope within the meaning of Article 2 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission¹⁸, they should be adopted by use of the regulatory procedure provided for in Article 5 of that Decision,

¹⁷ OJ L 73, 12.3.1998, p. 42.

¹⁸ OJ L 184, 17.7.1999, p. 23.

HAVE ADOPTED THIS DIRECTIVE:

Chapter I

Scope, aim and definitions

Article 1 *Scope and aim*

1. Within the framework set out in Directive [on a common regulatory framework for electronic communications networks and services], this Directive harmonises the way in which Member States regulate access to, and interconnection of, electronic communications networks and associated facilities. The aim is to establish a regulatory framework, in accordance with internal market principles, for the market between suppliers of networks and services that will result in sustainable competition, interoperability of services and consumer benefits.
2. The Directive establishes rights and obligations for undertakings owning or operating public communications networks and associated facilities, and undertakings seeking interconnection and/or access to those networks or associated facilities. It sets out objectives for national regulatory authorities with regard to network access and interconnection, and lays down procedures to ensure that obligations imposed by national regulatory authorities are reviewed and where appropriate withdrawn once the desired objectives have been achieved.

Article 2 *Definitions*

The definitions in Directive [on a common regulatory framework for electronic communications networks and services] shall apply, where relevant.

The following definitions shall also apply:

- (a) 'access' means the making available of facilities and/or services, to another undertaking, under defined conditions, on either an exclusive or non-exclusive basis, for the purpose of providing electronic communications services. It covers *inter alia*: access to network elements and associated facilities and services, which may involve the connection of equipment, by wire or wireless means; access to physical infrastructure including buildings, ducts and masts; access to software systems including operational support systems; access to number translation or systems offering equivalent functionality; access to mobile networks, in particular for roaming; access to conditional access systems for digital television services. Interconnection is a specific type of access implemented between public network operators. Access in this Directive does not refer to access by end-users.
- (b) 'interconnection` means the physical and logical linking of public electronic 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.
- (c) 'operator' means an undertaking providing, operating or controlling a publicly available electronic communications network or an associated facility such as a

conditional access system, by means of which it can restrict or deny service providers' access to the end-user or the end-user's choice of services.

- (d) 'wide-screen digital television service' means a television service that consists wholly or partially of programmes produced and edited to be displayed in a full height wide-screen format using anamorphic expansion. The 16:9 format is the reference format for wide-screen television services.
- (e) 'end-user' means a user not providing publicly available electronic communications networks or services.

Chapter II

General framework for regulating access and interconnection

Article 3

General framework for access and interconnection

1. Member States shall ensure that there are no restrictions which prevent undertakings in the same Member State or in different Member States from negotiating between themselves agreements on technical and commercial arrangements for access and/or interconnection, in accordance with Community law. The undertaking requesting access or interconnection does not need to be authorised to operate in the Member State where access or interconnection is requested, where it is not providing services in that Member State.
2. Without prejudice to Article 26 of Directive [on universal service and users' rights relating to electronic communications networks and services]¹⁹, Member States shall not maintain legal or other administrative measures obliging operators, when granting network access or interconnection, to offer different terms and conditions to different undertakings for the same services, and/or imposing obligations that are not related to the actual access and interconnection services provided.

Article 4

Rights and obligations for undertakings

1. All undertakings authorised to operate electronic communications networks for the provision of publicly available electronic communications services shall have a right and, when requested by other undertakings so authorised, an obligation to negotiate interconnection with each other for the purpose of providing the services in question, in order to ensure provision and interoperability of services throughout the Community.
2. Electronic communications networks used for the distribution of digital television services shall be capable of distributing wide-screen television services and programmes. Network operators that receive and re-distribute wide-screen television services or programmes shall maintain that wide screen format.

¹⁹ OJ L

3. Without prejudice to Article 11 of Directive on [authorisation of electronic communications networks and services], national regulatory authorities shall ensure that undertakings that acquire information from another undertaking during 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 information shall not be passed on to any other party, in particular other departments, subsidiaries or partners, for whom such information could provide a competitive advantage.

Article 5

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

1. National regulatory authorities shall, acting in pursuit of the objectives set out in Article 7 of Directive [on a common regulatory framework for electronic communications networks and services], encourage and secure adequate network access and interconnection, and interoperability of services, exercising their responsibility in a way that promotes efficiency, sustainable competition, and gives the maximum benefit to end-users.
2. Member States shall ensure that national regulatory authorities are empowered to impose the obligations identified in Articles 6 to 13 of this Directive on operators that have been designated as having significant market power in a relevant market. In the absence of agreement between undertakings on access and interconnection arrangements, Member States shall ensure that the national regulatory authority is empowered to intervene at the request of either of the parties involved or at its own initiative, taking account of the policy objectives and procedures included in Articles 6, 7, and 13 to 18 of Directive [on a common regulatory framework for electronic communications networks and services].

Chapter III

Obligations on operators and market review procedures

Article 6

Conditional access systems and other associated facilities

1. Member States shall ensure that, in relation to conditional access to digital television services broadcast to viewers in the Community, irrespective of the means of transmission, the conditions laid down in Part I of the Annex apply.
2. Conditions relating to access to other associated facilities referred to in Part II of the Annex may be adopted in accordance with the procedure referred to in Article 14(2).
3. In the light of market and technological developments, the Annex may be amended in accordance with the procedure referred to in Article 14(2).

Article 7
Review of former obligations for access and interconnection

1. Member States shall maintain all obligations on undertakings providing publicly available electronic communications networks concerning access and interconnection that were in force prior to the date of entry into force of this Directive under Articles 4, 6, 7, 8, 11, 12, and 14 of Directive 97/33/EC, Article 16 of Directive 98/10/EC, Articles 7 and 8 of Directive 92/44/EC and Article 3 of Regulation [on unbundled access to the local loop], until such time as these obligations have been reviewed and a determination made in accordance with paragraph 3.
2. The relevant markets for the obligations referred to in paragraph 1 will be included in the initial Decision on Relevant Product and Service Markets to be published by the Commission in accordance with the procedure laid down in Article 14 of Directive on [a common regulatory framework for electronic communications networks and services].
3. Member States shall ensure that, immediately following the entry into force of this Directive, and periodically thereafter, national regulatory authorities undertake a market analysis, in accordance with the procedure laid down in Article 14 of Directive [on a common regulatory framework for electronic communications networks and services] to determine whether to maintain, amend or withdraw these obligations. An appropriate period of notice shall be given to parties affected by such amendment or withdrawal of obligations.

Article 8
Imposition, amendment or withdrawal of obligations

1. Where an operator is deemed to have significant market power on a specific market as a result of a market analysis carried out in accordance with Article 14 of Directive [on a common regulatory framework for electronic communications networks and services], national regulatory authorities shall impose one or more of the obligations set out in Articles 9 to 13 of this Directive as appropriate, in order to avoid distortions of competition. The specific obligation(s) imposed shall be based on the nature of problem identified.
2. National regulatory authorities may, without prejudice to the provisions of Article 6, impose on operators, including operators other than those with significant market power, the obligations set out in Article 9 to 13 in relation to interconnection, in order to comply with international commitments.

Exceptionally, with the prior agreement of the Commission, national regulatory authorities may impose on operators with significant market power obligations for access or interconnection that go beyond those set out in Articles 9 to 13 of this Directive, provided that all such obligations are justified in the light of the objectives laid down in Article 1 of this Directive and in Article 7 of Directive [on a common regulatory framework for electronic communications networks and services], and are proportionate to the aim pursued.

3. In relation to the first subparagraph of paragraph 2, national regulatory authorities shall notify decisions to impose, modify or withdraw obligations on market players to the Commission, in accordance with the procedures in Article 6(2), (3) and (4) of Directive on [a common regulatory framework for electronic communications networks and services].

Article 9
Obligation of transparency

1. National regulatory authorities may, in accordance with the provisions of Article 8, impose obligations for transparency in relation to interconnection and/or network access, requiring operators to make publicly available specified information, such as technical specifications, network characteristics, terms and conditions for supply and use, 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, sufficiently unbundled, giving a description of the relevant offerings broken down into components according to market needs, and the associated terms and conditions including prices.
3. National regulatory authorities may specify the precise information to be made available, the level of detail required and the manner of publication.

Article 10
Obligation of non-discrimination

1. A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations of non-discrimination, in relation to interconnection and/or network access.
2. Obligations of non-discrimination shall ensure, in particular, that the operator applies similar conditions in similar circumstances to other undertakings providing similar services, and provides services and information to others under the same conditions and of the same quality as they provide for their own services, or those of their subsidiaries or partners.

Article 11
Obligation of accounting separation

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

In particular, a national regulatory authority may require a vertically integrated company to make transparent its wholesale prices and its internal transfer prices, in situations where a market analysis indicates that the operator concerned provides input facilities that are essential to other service providers, while competing itself on the same downstream market.

2. To facilitate the verification of compliance with obligations of transparency, national regulatory authorities shall have the power to require that accounting records, including data on revenues received from third parties, are provided on request. National regulatory authorities may publish such information as would contribute to an open and competitive market, while respecting national and Community rules on commercial confidentiality.

Article 12

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

1. A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations on operators to grant access to, and use of, specific facilities and/or associated services, *inter alia* in situations where the national regulatory authority considers that denial of access would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest.

Operators may be required *inter alia*:

- (a) to give third parties access to specified network elements and/or facilities;
- (b) not to withdraw access to facilities already granted;
- (c) to provide resale of specified services;
- (d) to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services;
- (e) to provide collocation or other forms of facility sharing, including duct, building or mast sharing;
- (f) to provide specified services needed to ensure interoperability of end-to-end services to users, including facilities for intelligent network services or roaming on mobile networks;
- (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.

National regulatory authorities may attach to those obligations conditions covering fairness, reasonableness, timeliness, transparency and/or non discrimination.

2. When imposing the obligations referred in paragraph 1, national regulatory authorities shall take account in particular of:
 - (a) the technical and economic viability of using or installing competing facilities, in the light of the rate of market development;
 - (b) the feasibility of providing the access proposed, in relation to the capacity available;
 - (c) the initial investment by the facility owner, bearing in mind the risks involved in making the investment;

- (d) the need to safeguard competition in the long term;
- (e) where appropriate, any relevant intellectual property rights.

Article 13

Price control and cost accounting obligations

1. A national regulatory authority may, in accordance with the provisions of Article 8, impose 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 network access, in situations where a market analysis indicates that a potential lack of effective competition means that the operator concerned might be capable of sustaining prices at an excessively high level, or applying a price squeeze, to the detriment of end users. National regulatory authorities shall take into account the investment made by the operator and the risks involved.
2. National regulatory authorities shall ensure that any pricing methodology that is mandated serves to promote efficiency and sustainable competition and maximise consumer benefits.
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. 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.

Chapter IV

Procedural provisions

Article 14

Committee

1. The Commission shall be assisted by the Communications Committee instituted by Article 19 of Directive [on a common regulatory framework for electronic communications networks and services].
2. Where reference is made to this paragraph, the regulatory procedure laid down in Article 5 of Decision 1999/468/EC shall apply, in compliance with Article 7 and 8 thereof.
3. The period provided for in Article 5(6) of Decision 1999/468/EC shall be three months.

Article 15
Publication of, and access to, information

1. Member States shall ensure that the specific obligations imposed on undertakings under this Directive are published and that the specific product/service and geographical markets are identified. They shall ensure that up-to-date information is made publicly available in a manner that guarantees all interested parties easy access to that information.
2. Member States shall send to the Commission a copy of all such information published. The Commission shall make this information available in a readily accessible form, and shall distribute the information to the Communications Committee and the High Level Communications Group as appropriate.

Article 16
Notification

1. Member States shall notify to the Commission by 31 December 2001 at the latest the national regulatory authorities responsible for the tasks set out in this Directive.
2. National regulatory authorities shall notify to the Commission the names of operators deemed to have significant market power for the purposes of this Directive, and the obligations imposed upon them under this Directive. Any changes affecting the obligations imposed upon undertakings or of the undertakings affected under the provisions of this Directive shall be notified to the Commission without delay.

Article 17
Review

The Commission shall periodically review the functioning of this Directive and report to the European Parliament and to the Council, on the first occasion not later than three years after the date of entry into force of this Directive. For this purpose, the Commission may request from Member States information, which shall be supplied promptly on request.

Article 18
Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 2001 at the latest. They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

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

Article 19
Entry into force

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

Article 20
Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament

For the Council

The President

The President

ANNEX

Conditions for access to digital television services broadcast to viewers in the Community

Part I – Conditions for conditional access systems to be applied in accordance with Article 6(1).

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

- (a) conditional access systems operated on the market in the Community shall have the necessary technical capability for cost-effective transcontrol allowing the possibility for full control by network operators at local or regional level of the services using such conditional access systems;
- (b) all operators of conditional access services, irrespective of the means of transmission, who produce and market access services to digital television services shall:
 - offer to all broadcasters, on a fair, reasonable and non-discriminatory basis compatible with Community competition law, technical services enabling the broadcasters' digitally-transmitted services to be received by viewers authorised by means of decoders administered by the service operators, and comply with Community competition law,
 - keep separate financial accounts regarding their activity as conditional access providers.
- (c) when granting licences to manufacturers of consumer equipment, holders of industrial property rights to conditional access products and systems shall ensure that this is done on fair, reasonable and non-discriminatory terms. Taking into account technical and commercial factors, holders of rights shall not 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 associated facilities to be considered under the review procedure in Article 6(2).

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

FINANCIAL STATEMENT

The financial implications of this Directive are covered by the Financial Statement in the Directive on *a common regulatory framework for electronic communications networks and services*.

IMPACT ASSESSMENT FORM

THE IMPACT OF THE PROPOSAL ON BUSINESS WITH SPECIAL REFERENCE TO SMALL AND MEDIUM-SIZED ENTERPRISES(SMEs)

TITLE OF PROPOSAL

Proposal for a Directive of the European Parliament and of the Council on Access to, and Interconnection of, electronic communications networks and associated facilities

DOCUMENT REFERENCE NUMBER

THE PROPOSAL

1. *Taking account of the principle of subsidiarity, why is Community legislation necessary in this area and what are its main aims?*

The Directive is one element in a new regulatory framework which seeks to ensure that the electronic communications sector continues to develop as a competitive market delivering benefits to all companies and individuals in the Community that use electronic communications services.

The importance of consolidating the single market in this area is widely supported, and adaptation of existing Community measures is recognised as the most effective way of achieving this.

THE IMPACT ON BUSINESS

2. *Who will be affected by the proposal?*

Business users of all sizes will benefit from the greater competition, innovative market offerings and better value for money that the new regulatory framework will provide.

Providers of electronic networks and services that have significant market power (ie based on the competition law concept of dominant position), such as ex-monopolists, will be most affected by the proposal. These undertakings will have obligations to interconnect and to give access to their networks to other firms. This creates opportunities for smaller firms that could not afford the massive investment needed to install communications network infrastructure.

3. *What will business have to do to comply with the proposal?*

The proposal carries forward existing obligations but does not immediately create new obligations. Providers of electronic networks and services that have significant market power (ie based on the competition law concept of dominant position), such as ex-monopolists, will have obligations to interconnect and to give access to their networks to other firms, and obligations for transparency, non-discrimination and cost orientation.

All providers of consumer equipment that implement 'conditional access systems', used for delivery of digital television services will have to give access to their systems on fair reasonable and non-discriminatory terms.

4. *What economic effects is the proposal likely to have?*

The proposal is designed to stimulate growth of the sector and thus to generate on employment both within the sector and in associated markets.

The proposal will ensure that European market for electronic communications networks and services continues to offer attractive investment opportunities at a global level.

The proposal will increase competitiveness of businesses within the sector, and by making them more efficient will benefit the economy as a whole, since all firms need efficient communications infrastructures.

5. *Does the proposal contain measures to take account of the specific situation of small and medium-sized firms (reduced or different requirements etc)?*

The proposal do not contain particular provisions on small and medium-sized firms but *ex-ante* obligations focus mainly on <fs with significant market power.

CONSULTATION

6. *List the undertakings which have been consulted about the proposal and outline their main views.*

The Commission consulted on many aspects of these proposals in the 1999 Communications Review Communication (COM(1999)539) in November 1999. 229 organisations or individuals responded. A list may be found at the following web address: <http://www.ispo.cec.be/infosoc/telecompolicy/review99/comments/comments.html>.

Their main views are summarised in the Communication reporting on the results of the public consultation (COM(2000)239). Furthermore, a working document summarising the key provisions of this proposal was issued on 28 April, to which 128 organisations or individuals responded. A list may be found at the following web address:

<http://www.ispo.cec.be/infosoc/telecompolicy/review99/nrfwd/comments.html>.