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**Policy and Regulatory Framework**

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## **OPEN NETWORK PROVISION COMMITTEE**

### **Working Document**

**Subject: The 2003 regulatory framework for electronic communications – Implications for broadcasting**

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## INTRODUCTION

This note presents the 2003 regulatory framework for electronic communications networks and services in particular as regards its impact on the broadcasting sector.

The document is subdivided into three parts: some background information and the general scope of the framework (section 1); an overview of institutional provisions and other common provisions (section 2); a more in-depth analysis of issues specific to broadcasting (section 3).

Texts of the 2003 regulatory framework are available on the web site

[http://europa.eu.int/information\\_society/topics/telecoms/regulatory/new\\_rf/index\\_en.htm](http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/index_en.htm)

### 1. BACKGROUND INFORMATION AND GENERAL SCOPE OF THE FRAMEWORK

#### 1.1. Background and general scope

The new regulatory framework builds on the conclusions of the Convergence Green Paper consultation<sup>1</sup>, as developed through the Communications Review<sup>2</sup>.

First, a coherent regulatory framework will apply to all transmission infrastructures, irrespective of the types of services carried over them (the so-called 'horizontal' approach). The new framework will therefore cover all electronic communications networks, associated facilities and electronic communications services, including those used to carry broadcasting content such as cable television networks, terrestrial broadcasting networks, and satellite broadcasting networks.

Secondly, regulation of content broadcast over electronic communications networks (e.g. radio and television programmes or TV bouquets) remains outside the scope of the 2003 regulatory framework. The framework is without prejudice to EU or national broadcast content regulation adopted in conformity with Community law.

Thirdly, the 2003 regulatory framework takes account of the links between transmission and content regulation. These links concentrate on the following areas: authorisation of networks and services, allocation and assignment of radio spectrum; must-carry; access to networks and associated facilities, including access to application program interfaces (API) and electronic programme guides (EPG) for interactive digital television.

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<sup>1</sup> See the Green Paper on the convergence of the telecommunications, media and information technology sectors, and the implications for regulation towards an Information Society approach (COM(97)623) and the Commission's Communication on the convergence of the telecommunications, media and information technology sectors, and the implications for regulation-Results of the public consultation on the Green Paper (COM(1999)108).

<sup>2</sup> Communication of the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions – Review of the telecommunications regulatory framework – a new framework for electronic communications infrastructure and associated services, the 1999 Communications Review (COM(1999)539).

## **1.2. The new legal framework :**

This document draws upon the following Directives :

- Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, (“Framework Directive”);
- Directive 2002/20/EC of the European Parliament and of the Council on the authorisation of electronic communications networks and services, (“Authorisation Directive”);
- Directive 2002/19/EC of the European Parliament and of the Council on access to, and interconnection of, electronic communications networks and associated facilities (“Access Directive”);
- Directive 2002/22/EC of the European Parliament and of the Council on universal service and users’ rights relating to electronic communications networks and services (“Universal Service Directive”).
- Directive 2002/58/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)

In the case of the first four directives mentioned, Member States have to adopt and publish the laws, regulations and administrative provisions necessary to comply with the directives 15 months after the date of their entry into force, i.e 25 July 2003. In the case of the Data Protection Directive, the ultimate date of transposition is 31 October 2003.

## **2. INSTITUTIONAL PROVISIONS AND OTHER COMMON PROVISIONS**

The following paragraphs provide a brief overview of the main proposals of the Framework Directive.

The Framework Directive aims at establishing a harmonised regulatory framework for all electronic communications networks and services across the European Union. As an overarching text, it determines the general scope of application of the various directives. It sets out a number of principles and objectives for regulators to follow. It contains also a number of definitions and horizontal provisions common to more than one measure in the package, such as the market definition and analysis procedures for the designation of SMP operators.

### **2.1. Regulatory model in the Framework Directive**

The primary responsibility for implementing the new framework will rely, as in the current framework, on national regulatory authorities (NRAs). NRAs are best placed to assess the specific conditions in their national markets, and the measures best suited to address them.

The new framework therefore establishes a more flexible set of rules at Community level, and gives NRAs a degree of discretion in choosing the tools most appropriate to deal with regulatory concerns as they arise.

But as a counterweight to this increased flexibility, the new framework seeks to improve co-operation between the Commission and national regulators using a new consultation and transparency mechanism (see section 2.2 below).

#### *2.1.1. Rights and obligations of national regulatory authorities (NRAs)*

An important new element is that policy objectives and principles for NRAs to follow are now explicitly incorporated into the Framework, in particular Article 8 of the Framework Directive.

In terms of objectives, NRAs must promote competition; must contribute to the development of the internal market; and must promote the interests of European citizens.

They may also contribute within their competencies to ensuring the implementation of policies aimed at the promotion of cultural and linguistic diversity, as well as media pluralism.

Action by the NRAs must be based on clearly defined policy objectives, proportionate (the minimum necessary) and as far as possible, technologically neutral (Article 8.1 of the Framework Directive). As in the existing regime, NRAs must be independent of all operators and suppliers of services.

Note that the term “national regulatory authority” is used in a functional manner to denote the body or bodies charged by a Member State with the regulatory tasks assigned under the new framework. In addition to an independent regulatory agency, it may also include ministries, for instance, insofar as they allocate and assign frequencies or authorise providers of electronic communications services or networks.

Requirements for consultation and for co-operation between NRAs and other national authorities (in particular national competition authorities) are also more detailed compared to the current framework, as are the provisions on appeal.

#### *2.1.2. Dispute resolution mechanisms*

The Framework Directive sets out two dispute resolution procedures. The first (Article 20 of the Framework Directive) covers disputes between undertakings providing electronic communications networks or services within a Member States where that dispute falls within the competence of a single NRA and establishes a time limit of four months for that NRA to issue a binding decision, except in exceptional cases. The second (Article 21 of the Framework Directive) establishes a procedure for cross-border disputes between parties falling within the competence of NRAs from more than one Member State. In both cases there is provision for Member States to allow for alternative dispute resolution mechanisms, including mediation, subject to time limit.

#### *2.1.3. Communications Committee and European Regulators Group*

A Communications Committee will be set up to assist the Commission in carrying out its executive powers under the Directives in accordance with the rules on comitology. The Communications Committee covers an area of activity broadly equivalent to that of the existing two committees under the current framework (ONP and Licensing Committees) (Article 22 of the Framework Directive).

The Commission has indicated its intention to set up a European Regulators Group for Electronic Communications networks and services under a Commission decision<sup>3</sup>. The aim of the group is to establish a “mechanism for encouraging co-operation and co-ordination of national regulatory authorities, in order to promote the development of the internal market for electronic communications networks and services, and to seek to achieve consistent application, in all Member States, of the provisions set out in this directive and the Specific directives, in particular in areas where national law implementing Community law gives national regulatory authorities considerable discretionary powers in application of the relevant rules” (Recital 36 of the Framework Directive).

NRAs with responsibility for issues relating to broadcasting infrastructure will be fully associated with the Communications Committee and the European Regulators Group. The Digital Broadcast Expert Group (DBEG) has already proved itself a valuable forum for debate on digital broadcasting issues. The Commission is reflecting on the precise arrangements for carrying forward the work of DBEG.

#### *2.1.4. Harmonisation procedures*

Article 19 of the Framework Directive provides that the Commission can produce recommendations to promote the harmonised application of the new framework in accordance with its stated objectives. It can also take technical implementing measures in accordance with the regulatory comitology procedure, where necessary to achieve harmonisation of numbering resources for pan-european services.

### **2.2. Public consultation and transparency mechanism**

Member States are required to ensure that where NRAs intend to take measures which have a significant impact on the relevant market, they give interested parties the opportunity to comment on the draft measure within a reasonable period. National consultation procedures must be published, and a single information point established through which all current consultations can be accessed. The results of the consultation procedure must be made publicly available by the national regulatory authority (Article 6 of the Framework Directive).

NRAs are required in Article 7(2) to contribute to the development of the internal market by co-operating with each other and with the Commission in a transparent manner to ensure the consistent application, in all Member States, of the provisions of the Directives. In particular NRAs must seek to agree on the types of instruments and remedies best suited to address particular types of situations in the marketplace (Article 7 of the Framework Directive). The European Regulators Group, to be established by the Commission in due course, will provide a useful forum for encouraging cooperation and coordination of NRAs, and assisting NRAs in their tasks (see section 2.1.3).

### **2.3. The new procedure for *ex ante* obligations**

The approach underlying the 2003 regulatory framework is that certain specific *ex ante* obligations will fall on those operators with significant market power (SMP) on given markets.

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<sup>3</sup> Commission decision of 29 July 2002 establishing the European Regulators Group for Electronic Communications Networks and Services, OJ L 200, 30/7/02 p. 38

Under the current regulatory framework, regulated markets are pre-defined in the applicable Directives and may differ from those markets that would be defined using the strict methodologies of competition law. Moreover, the SMP designation is based on a 25% market share threshold, though NRAs have some flexibility to deviate from this.

Under the new framework the national markets to be regulated will be identified in the first instance by the Commission, in a Recommendation on relevant markets (Article 15 of the Framework directive), and by the NRAs in accordance with the procedures set out in Article 7 of the Framework Directive. Transnational markets, on the other hand, will be identified by the Commission where appropriate in a Decision. These markets will have to be defined using competition law methodologies. The trigger for SMP designation has also been changed as it is now aligned with the competition law concept of dominance, whether single or joint (that is where an undertaking enjoys, individually or jointly with others, a position equivalent to dominance, i.e. a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, costumers and ultimately consumers – Article 14 of the Framework Directive). The Commission will also produce Guidelines to assist NRAs with market analysis and the assessment of significant market power, which must be in accordance with the principles of competition law (Article 15 of the Framework Directive).

Article 16 provides the procedure to be used by NRAs when deciding whether to impose, maintain, amend or withdraw *ex ante* obligations on specific undertakings on the basis of its analysis of whether a relevant market is effectively competitive. (Recital 27 of the Framework Directive clarifies that a market that is effectively competitive is one where there are no undertakings with significant market power).

Where competition is not effective, NRAs will impose on companies that are dominant in specific markets and are classified as having significant market power, specific obligations set out in the Access Directive (Articles 9 to 13) and in the Universal Service Directive (Articles 16,17, 18 and 19), such as transparency; non-discrimination; accounting separation; access to and use of, specific network facilities; price control and cost accounting obligation, etc. If competition is effective, existing obligations must be removed. NRAs' decisions on market definition, designation of companies with significant market power and imposition or otherwise of *ex ante* obligations will have to be notified in accordance with the procedures provided in Article 7 of the Framework Directive.

#### **2.4 Consolidating the internal market (Article 7 of Framework Directive)**

Where a national regulatory authority intends to take a measure which :

- falls within the scope of Article 15 or 16 of the Framework Directive, Article 5 or 8 of the Access Directive or Article 16 of the Universal Service Directive; and
- would affect trade between Member States<sup>4</sup>,

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<sup>4</sup> Defined in Recital (38) as “measures that may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in a manner which might create a barrier to the single European market. They comprise measures that have a significant impact on operators or users in other Member States, which include, inter alia: measures which affect prices for users in other Member States; measures which affect the ability of an undertaking established in another Member State to provide an electronic communications service, and in particular measures which affect the ability to offer

it shall at the same time make the draft measure available to the Commission and the national regulatory authorities in other Member States, together with the reasoning on which the measure is based, and inform the Commission and other national regulatory authorities thereof. NRAs and the Commission may make comments to the national regulatory authority concerned only within one month or within the national consultation period referred to in section 2.2 above, if that period is longer (Article 7(3) of the Framework Directive).

With the exception of two specific cases, explained in the following paragraph, Article 7(5) of the Framework Directive allows an NRA to adopt the measure after having taken account of views expressed during the mandatory consultation. The final measure must then be communicated to the Commission without delay.

Under the terms of Article 7(4) of the Framework Directive, where the measure concerns either the definition of a relevant market which differs from those defined in the Recommendation in accordance with Article 15(1), or a decision as to whether to designate, or not to designate, an undertaking as having, either individually or jointly with others, significant market power under Article 16(3), 16(4) or 16(5), and where that measure would affect trade between Member States, and where the Commission has indicated to the NRA that it considers that the draft measure would create a barrier to the single European market or it has serious doubts as to its compatibility with Community law and in particular the objectives referred to in Article 8, the adoption of the measure must be delayed by a further two months, during which time the Commission may, after consulting the Communications committee, take a decision requiring the NRA to withdraw the draft measure.

If the Commission does not take a decision within that period, the draft measure may be adopted by the NRA. The Commission's decision will be accompanied by a detailed and objective analysis of why it considers that the draft measure should not be adopted together with specific proposals for amending the draft measure.

In exceptional circumstances, Article 7(6) of the Framework Directive allows NRAs to act urgently in order to safeguard competition and protect the interest of users. An NRA may exceptionally therefore adopt proportionate and provisional measures without consulting either the interested parties, the NRAs in other Member States, or the Commission. Where an NRA has taken such urgent action, it must, without delay, communicate these measures, with full reasons, to the Commission, and to the other NRAs. The Commission will verify the compatibility of those measures with Community law and in particular will assess their proportionality in relation to the policy objectives of Article 8 of the Framework Directive. If the NRA wishes to make the exceptional measures permanent, or extend the time for which it is applicable, it must go through the full procedure set out above.

The system aims at combining the principle that regulatory decisions be taken "as close to the market as possible" with the requirement for consistency across the European Union.

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services on a transnational basis; and measures which affect market structure or access, leading to repercussions for undertakings in other Member States".

### 3. ISSUES SPECIFIC TO BROADCASTING

Hereafter is an overview of provisions of particular importance or specific to the broadcasting sector : authorisation of networks and services and allocation and assignment of radio spectrum ; must-carry obligations ; access to networks and associated facilities.

It should be noted that article 1(3) of the Framework Directive states : “This Directive as well as the specific Directives are without prejudice to measures taken at Community or national level, in compliance with Community law, to pursue general objectives, in particular relating to content regulation and audio-visual policy.”

#### **3.1 Authorisation of electronic communications networks and services and rights of use for radio frequencies**

The authorisation of electronic communications networks and services, including networks used for radio and television broadcasting, as well as the allocation and assignment of spectrum used for the provision of transmission services for broadcasting, are covered by the new regulatory framework as explained below.

##### *3.1.1 Authorisation of electronic communications networks and services used for the provision of broadcast content*

The Authorisation Directive aims at a single European market for electronic communications services and networks by harmonising the rules for authorising the provision of such services and networks. The networks and services used for the transmission of radio and television broadcast content, such as satellite broadcasting networks, terrestrial broadcasting networks or cable television networks, will be subject to the general authorisation regime provided in the Authorisation Directive.

The authorisation procedures for the provision of broadcast content to the public lie outside the scope of the framework, while remaining subject to the relevant provisions of Community law.

The provision of electronic communications networks – defined in Article 2(m) of the Framework Directive as “the establishment, operation, control or making available of such a network”- or the provision of electronic communications services can no longer be subject to an individual licence (Article 3 (2) of the Authorisation Directive). Where an individual licence currently includes both an authorisation to provide an electronic communications network or service and an authorisation to provide broadcast content to the public, the former authorisation will need to be separated from the individual licence.

Member States will have the possibility to attach conditions to the general authorisation for the provision of electronic communications networks or services. An exhaustive list of the conditions that can be attached to the general authorisation is provided for in Part A of the Annex of the Authorisation Directive.

An undertaking providing electronic communications networks or services, that also provides broadcast content may face additional conditions relating to content stemming from national or European broadcasting legislation (e.g. the “Television Without Frontiers” Directive 89/552/EC) insofar as these conditions are attached to the provision of broadcast content, and not of electronic services or networks.

The authorisation of conditional access systems is covered by 98/84/EC<sup>5</sup> Directive. Recital 6 of the Authorisation Directive clarifies that : “Provisions regarding the free movement of conditional access systems and the free provision of protected services based on such systems are laid down in Directive 98/84/EC of 20 November 1998 on the legal protection of services based on or consisting of conditional access. The authorisation of such systems and services does not need to be covered by this [Authorisation] Directive”.

### *3.1.2 Assignment of radio frequencies for broadcasting purposes*

The Framework Directive and the Authorisation Directive set out the regime for the use of radio frequencies for electronic communications networks and services, including for broadcasting purposes.

As a general rule, the allocation and assignment of radio frequencies must be based on objective, transparent, non-discriminatory and proportionate criteria (Article 9 (1) of the Framework Directive).

The Authorisation Directive provides for more details as regards the assignment procedures and criteria. The granting of individual “rights of use” of radio frequencies, i.e. assignment<sup>6</sup>, must be done according to “open, non-discriminatory and transparent procedures” but is “without prejudice to specific criteria and procedures adopted by Member States to grant rights of use of radio frequencies to providers of radio or television broadcast content services with a view to pursuing general interest objectives in conformity with Community law (...)” (Article 5(2) of the Authorisation Directive).

While rights of use would generally be granted to providers of electronic communications networks or services, they can also be granted to broadcasters not themselves operating electronic communications networks or electronic communications services. In particular, Member States may grant directly to broadcasters, in charge of a public service remit, the rights of use of radio frequencies necessary to achieve such a remit. Recital (12) of the Authorisation Directive clarifies this: “This directive does not prejudice whether radio frequencies are assigned directly to providers of electronic communication networks or services or to entities that use these networks or services. Such entities may be radio or television broadcast content providers (...) The responsibility for compliance with the conditions attached to the rights to use a radio frequency and the relevant conditions attached to the general authorisation should in any case lie with the undertaking to whom the right of use for the radio frequency has been granted”.

When the granting of the rights of use for radio frequencies needs to be limited, Member States, in accordance with Articles 5(2) and 7(3) of the authorisation Directive, shall grant such rights on the basis of selection criteria which must be objective, transparent, non-discriminatory and proportionate (Article 7(3) of the Authorisation Directive).

Recital (12) of the Authorisation directive clarifies those provisions : “(...) In accordance with case law of the Court of Justice, any national restrictions on the rights guaranteed by Article 49 of the Treaty should be objectively justified, proportionate and not exceed what is

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<sup>5</sup> Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access OJ L 320, 28/11/1998 p. 54.

<sup>6</sup> The granting of individual rights of use is synonymous with the assignment of a frequency, i.e. the authorisation to use a radio frequency under specified conditions.

necessary to achieve general interest objectives as defined by Member States in conformity with Community law (...)

The Authorisation Directive explicitly provides for the possibility for Member States to attach conditions to the rights of use of radio frequencies (Article 6). These conditions must be objectively justified in relation to the service concerned, non-discriminatory and transparent (Article 6 (1) of the Authorisation Directive). An exhaustive list of these conditions is provided in Part B of the Annex of the Directive. These conditions include in particular : “designation of service or type of network or technology for which the rights of use for the frequency have been granted, including, where applicable, the exclusive use of a frequency for the transmission of specific content or specific audiovisual services”.

Finally, it should be noted that rights and obligations relating to the provision of a network or service must be included in the general authorisation and not in the individual rights of use. (Article 6(4) of the Autorisation Directive).

### **3.2 Must-carry and the Universal Service Directive**

The Universal Service Directive sets out the rights that users have in respect of electronic communications services, in particular in respect of universal service. It includes a provision on so-called “must-carry” rules bearing on certain network operators. (Article 31 of the Directive)

Must-carry rules seek to ensure that certain radio and television broadcast channels and services are made universally available to users. Article 31 of the Universal Service Directive aims at ensuring that these obligations shall be “reasonable”. They “shall only be imposed where they are necessary to meet clearly defined general interest objectives, and shall be proportionate and transparent”. The obligation “shall be subject to periodical review”. Member States have the ability “to determine appropriate remuneration, if any, in respect of measures taken in accordance with this Article while ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks. Where remuneration is provided for, Member States shall ensure that it is applied in a proportionnate and transparent manner”.

Recital 43 of the Universal Service Directive supports this provision : “Currently, Member States impose certain « must-carry » obligations on networks for the distribution of radio or television broadcasts to the public. Member States should be able to lay down proportionate obligations on undertakings under their jurisdiction, in the interest of legitimate public policy considerations, but such obligations should only be imposed where they are necessary to meet general interest objectives clearly defined by Member States in conformity with Community law and should be proportionate, transparent and subject to periodical review. « Must-carry » obligations imposed by Member States should be reasonable, that is they should be proportionate and transparent in the light of clearly defined general interest objectives, and could, where appropriate, entail a provision for proportionate remuneration. « Must-carry » obligations may include the transmission of services specifically designed to enable appropriate access by disabled users”.

Article 31 of the Universal Service Directive concerns obligations that are imposed on undertakings providing electronic communications networks. But, the issue of which broadcasters have must-carry rights, in line with the regulatory framework, is not addressed.

Article 31 does not cover rules on the presentation of broadcast content in associated facilities, such as the prominence or visibility given to certain broadcasters' services within an electronic programme guide (EPG).

As regards the networks covered by Article 31, must-carry obligations may only be placed on “electronic communications networks used for the distribution of radio or television broadcasts to the public where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts”. Recital 44 makes clear that this includes cable, satellite and terrestrial broadcasting networks and “might also cover other networks to the extent that a significant number of end-users use such networks as their principal means to receive radio and television broadcasts”.

Currently the vast majority of households use a traditional “broadcast” platform for reception of broadcast channels and services, and are expected to continue to do so for some time to come. The use of other networks (e.g. 3G mobile networks or fixed telecommunications networks using DSL technologies) for broadcasting purposes is so far very limited, and extension of must-carry rules to such networks would be disproportionate at the present stage of technological and market development. Extension of these obligations to other networks would only be legitimate if a significant number of end-users were to use such networks as their principal means to receive radio and television broadcasts.

As regards the services eligible for must-carry rules, Article 31 of the Directive states that “Member States may impose reasonable « must-carry » obligations, for the transmission of specified radio and television broadcasts channels and services (...)”. It is explicitly mentioned in Recital 43 that such « must-carry » obligations may include the transmission of services designed to enable appropriate access by disabled users.

The radio and television broadcast channels and services benefiting from « must-carry » must be “specified”, i.e. they should be identified in advance by Member States.

Article 31 of the Universal Service Directive does not give broadcast content providers access to associated facilities<sup>7</sup>, such as conditional access systems<sup>8</sup> (CAS). Access to such facilities is covered by Article 6 of the Access Directive (see point 3.3 below) which requires any broadcast content provider, including the ones that benefit from a must-carry regime, to be granted access to CAS under fair, reasonable and non-discriminatory conditions. Under certain conditions, this latter regime may be extended nationally to other associated facilities for digital broadcasting, such as application program interfaces<sup>9</sup> (APIs) and EPGs (See Articles 5 and 6 of the Access Directive, and section 3.3.3 below). Taken together, those

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<sup>7</sup> “Associated facilities” means those facilities associated with an electronic communications network and/or an electronic communications service which enable and/or support the provision of services via network and/or services. It includes conditional access systems, application programme interfaces and electronic programme guides (Article 2(e) of the Framework Directive).

<sup>8</sup> “Conditionnal access system” means any technical measure and/or arrangement whereby access to a protected radio or television broadcastingservice in intelligible form is made conditional upon subscription or other form of prior individual authorisation (Article 2(f) of the Framework Directive).

<sup>9</sup> “Application Program Interface” (API) means the software interface between applications, made available by broadcasters or service providers, and the resources in the enhanced digital television equipment for digital television and radio services (Article 2(p) of the Framework Directive).

provisions do not allow must-carry obligations to be placed on CAS or other associated facilities, such as APIs or EPGs.

The Commission made a statement concerning Must-Carry obligations to the European Parliament on 12 December 2001 before the second reading vote on the Universal Service Directive. The Commission undertook to monitor the application of these provisions at Member State level, including must-carry obligations, taking into account any problems that public service or other specified broadcasters may have in gaining access to satellite and other broadcast networks. The possibility of Guidelines for Member States was mentioned.

### **3.3 Access to networks and associated facilities**

The Access Directive establishes a framework for access and interconnection agreements across the European Union. It foresees that access obligations can be imposed on operators that have significant market power (SMP). It should be noted that the Access Directive also applies where a third party requires access to a network traditionally used for broadcasting purposes in order to distribute electronic communications services as opposed to broadcast content. The Directive also takes over the specific regime for access to conditional access systems in Directive 95/47/EC<sup>10</sup> on the use of standards for the transmission of television signals.

#### *3.3.1 General framework on access*

The Access Directive establishes a general access regime based on the assumption that negotiations between market players should be undertaken on a commercial basis first. When competition is not effective on specific markets, access remedies can be imposed on operators that have been designated as having significant market power on a specific market following a market analysis by national regulatory authorities (see Article 8 of the Access Directive and point 2.3 above). A list of product and service markets whose characteristics may be such as to justify the imposition of sector specific regulatory obligation will be identified in a Commission Recommendation pursuant the Article 15 of the Framework Directive. The access remedies are : transparency ; non-discrimination ; accounting separation ; access to, and use of, specific network facilities ; price control and cost accounting obligations (see Articles 9-13 of the Access Directive) or other types of obligations in exceptional circumstances and with the agreement of the Commission (Article 8.3 of the Access Directive).

This procedure under Article 8 could be used, for instance, to impose obligations on operators, designated as having significant market power in a particular market, to meet reasonable requests for access to, and use of, specific network elements and associated facilities, inter alia in situations where the NRA 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 or would not be in the end-user's interest (Article 12 of the Access Directive).

#### *3.3.2 Specific provisions for conditional access systems to digital radio and TV broadcasts*

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<sup>10</sup> 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).

As regards conditional access issues, the key measures on conditional access systems contained in Directive 95/47/EC have been carried over into the Access Directive (Article 6 and Annex I, part I)<sup>11</sup>. The main provisions of this specific regime are as follows:

- As regards conditional access, CAS operators are required to provide services to other broadcasters on “fair, reasonable and non-discriminatory” terms, and to license their intellectual property rights to manufacturers on the same basis.
- Moreover, cost-effective transcontrol between CAS providers and other local network operators has to be possible, so that for example cable operators can directly manage CAS services offered to their own customers.

Compared to the general access regime, the CAS regime applies to all service providers, and not only to those with significant market power.

Notwithstanding the above-mentioned provisions, Member States may permit their national regulatory authority, to roll back these obligations following a market analysis in accordance with Article 16 of the Framework Directive. It may determine whether to maintain, amend or withdraw the conditions applied to non-SMP operators subject to the consultation and transparency mechanism (Articles 6 and 7 of the Framework Directive).

Before removing the obligations, however, the regulator must ensure that there would be no adverse effects of such amendment or withdrawal on accessibility for end-users to radio and TV broadcasts and broadcasting channels and services specified in accordance with Article 31 of the Universal Service Directive; the NRA must also conclude that the prospects for effective competition in the markets for retail digital television and radio broadcasting services and conditional access systems and other associated facilities are not unduly compromised or diminished.

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

Finally, the Commission can in the light of market and technological developments, using its powers under comitology (Regulatory procedure), review the conditions contained in Annex I (Conditions for access to digital television and radio services broadcast to viewers and listeners in the Community) in order to have the most suitable harmonised basis across the Community (Article 6(2) of the Access Directive).

### *3.3.3 Access to other associated facilities for digital television interactive services*

Technological and market developments, in particular the emergence of competitive interactive digital television services, make it necessary to include flexible mechanisms to enable the situation regarding access to other associated facilities such as APIs and EPGs to be reviewed.

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<sup>11</sup> Note that the wide-screen requirement of Article 2(c) of the Standards Directive has been taken over in Article 4 of the Access Directive. The Universal Service Directive has taken on board the interoperability requirements of the same Directive 95/47/EC (see Article 20).

Where access to other associated facilities is necessary, it may be sufficient in many cases to impose access rules only on SMP providers of the associated facilities concerned, under Articles 8 to 13 of the Access Directive, subject to the market analysis regime in the Framework Directive.

The Access Directive also provides the possibility for NRAs to impose fair, reasonable and non-discriminatory obligations and conditions on operators to provide access to other associated facilities such as APIs and EPGs (referred to in Annex I, Part II), to the extent that this is necessary to ensure accessibility for end-users to digital radio and television broadcasting services specified by the Member State (Article 5 (1) (b) of the Access Directive). All obligations and conditions imposed shall be objective, transparent, proportionate and non-discriminatory, and shall be implemented in accordance with the procedure in Article 6 and 7 of the Framework Directive (Article 5(3) of the Access Directive).

Content and presentational issues related to CAS and other associated facilities are not covered by the Access Directive. In particular, rules providing for the prominence or the visibility of certain broadcast contents on electronic programme guides (EPGs) are not affected by Article 6 or 8 of the Access Directive (Article 6(4))

### **3.4 Interoperability of digital interactive television services**

The Framework Directive establishes an industry-led approach to standardisation (Article 17 of the Framework Directive).

Beyond this general standardisation procedure, Article 18 of the Framework Directive sets out specific obligations on Member States related to standardisation and interoperability of APIs for digital interactive television services. It requires Member States to encourage :

- “- providers of digital interactive television services for distribution to the public in the Community on digital interactive television platforms, regardless of the transmission mode, to use an open API ;
- providers of all enhanced digital television equipment deployed for the reception of digital interactive television services on interactive digital television platforms to comply with an open API in accordance with the minimum requirements of the relevant standards or specifications”.

Article 18 (2) provides that “without prejudice to Article 5(1)(b) of the Access Directive, Member States are required to encourage proprietors of APIs to make available on fair, reasonable and non-discriminatory terms, and against appropriate remuneration, all such information as is necessary to enable providers of digital interactive TV services to provide all services supported by the API in a fully functional form (...)”

The Commission will publish the relevant MHP standards in the list of standards published in the Official Journal of the European Communities under Article 17 of the Framework Directive. Member States have to encourage implementation of standards contained in the List of Standards.

Article 18 also provides for a review of these provisions one year after the date of application, to which the Commission referred in its statement in the European Parliament on 12 December 2001 at the 2<sup>nd</sup> reading vote on the Framework Directive. The Commission undertook to examine whether interoperability and freedom of choice for users have been

adequately achieved in the Member States. The Commission recalled that, if not, it could propose to make implementation of relevant European standards mandatory, according to the provisions of Article 17 of the Framework Directive.

### **3.5 Interoperability of consumer digital television equipment**

Article 24 of the Universal Service Directive addresses these issues, requiring compliance with the terms of Annex VI. The reasoning behind Article 24 is explained in Recital 33.

In its current form, Annex VI carries over and develops provisions that already existed in Directive 95/47/EC. Annex VI, paragraph 1 requires the inclusion of the common scrambling algorithm in all receivers that include descrambling (i.e excluding receivers intended for free to air reception, without conditional access). It also requires all such receivers to be capable of displaying free-to-air services.

Annex VI, paragraph 2 addresses the interoperability of analogue and digital television sets, building on provisions from Directive 95/47/EC. It sets out requirements for open interface sockets on analogue and digital television sets in order to facilitate the connection of additional equipment like digital decoders. Such sockets have to be standardised by a recognised European Standards Organisation. The analogue requirement cites the SCART/Peritel connector as an example ; this has been widely implemented by industry for many years. The requirement for a digital connector cites the DVB common interface as an example for digital TV sets in relation to conditional access and interactive television services. Recital 33 emphasises that interoperability is an evolving concept in dynamic markets and that standards need to catch up with new facilities like digital rights management, which have not yet been standardised. Sockets and systems for interoperability are an area where industry needs to undertake further work and other connectors may emerge, beyond the common interface.

Article 6.1 of the Access Directive requires Member States to ensure that provides of conditional access systems for television and radio services conform to conditions set out in Annex I of that Directive. Part I, paragraph (c) of that Annex requires that those holding industrial property rights should not deter the inclusion of a common interface socket or means specific to another conditional access system, when licensing their own conditional access system to manufacturers. This would encourage manufacturers either to include a common interface socket permitting different conditional access modules to be used with the receiver or to embed several conditional access systems within the same receiver.

### **3.6 Wide-screen television**

Article 4(2) of the Access Directive addresses wide-screen television, as explained by the relevant parts of Recitals 4 and 8.

Article 4(2) places an obligation on networks established for the distribution of television services to have the capability to redistribute wide-screen TV services and programmes in the appropriate wide-screen format. As Recital 8 makes clear, this obligation is intended to ensure that users are able to receive wide-screen programmes and services as they were originated by the broadcaster. Otherwise some network operators might convert wide-screen

services and programmes back to the traditional 4:3 format before (re)transmission. The provision provides a measure of consumer protection for those who buy wide-screen sets<sup>12</sup>.

Recital 4 recalls that the 16:9 aspect ratio is the reference format for wide-screen services and programmes. This coincides with the screen proportions of wide-screen TV sets. Even wider formats are sometimes used for transmitting films, notably the 2.35:1 aspect ratio.<sup>13</sup>

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<sup>12</sup> Wide-screen TV sets are expected to account for around 25% of the TV sets sold in Europe during 2002.

<sup>13</sup> Wide-screen combines two elements: (1) the use of a wide-screen aspect ratio such as the 16:9 format, or even wider film aspect ratios such as 2.35:1, for programme origination; (2) use of a wide-screen display format, such as the 16:9 scanning raster on a 16:9 wide-screen receiver.