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From:	Presidency
To:	Delegations
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Subject:	Proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code (Recast) - Examination of the Presidency text (Spectrum)

Introduction

1. Following the discussion in WP TELE of 13/07/2017 and written comments from Member States **the Presidency intends to hold, in WP TELE of 5 / 6 September, a discussion of the Spectrum section of the Code.** The discussion will focus on the changes set out below, but comments are welcome on all parts of the text.
2. For ease of reading the amendments in Annex A have been made to st11067/17 as discussed in TELE WP on 13/07/2017. Changes to this text are underlined. Changes to the Commission recast are in **bold** and ~~striketrough~~. *Italics* represent text from the current framework that has been moved or reintroduced.

3. This text reflects several rounds of discussion on Spectrum in the Working Party during the Maltese and Estonian Presidencies, as well as guidance received during the TTE Council of 9 June and the informal Telecoms ministerial of 18 July.
4. The Presidency aims to reach a General Approach in October. With a view to this objective, **at the Working Party the Presidency will ask Member States to indicate, for each of the Articles in this section, if they could not support the proposed compromise text.**
5. Some key changes that have been made through this document are:
 - a. A more prominent role for the RSPG. This is included throughout the text including in Articles 28 and 35 as well as setting out the role of the RSPG in Article 4.
 - b. A reduction in implementing powers, removing implementing decisions from Articles 45, 46, 47, 53, 54 and 56 and tightening the processes for the two remaining implementing decisions in Articles 28 and 51.
 - c. The term "competent authorities" is now used instead of "national regulatory authorities" in areas where the political independence of the body undertaking a task is not essential, including in Articles 30, 35 and 48. This means NRAs are included only where necessary, in Articles 52, 54 and 59.
 - d. The replacement of a BEREC led peer review in Article 35 with an RSPG led peer review that has a non-binding nature.
 - e. The removal of a minimum licence duration in Article 49.
6. In addition to asking for delegations' assent to these changes, the Presidency requests **further guidance** from delegations on two questions further elaborated in subsequent sections of this cover note:
 - a. Following the removal of an implementing decision in **Article 53**, the addition of more detailed guidance on coordinated timing within the text of the Code itself.
 - b. Following the removal of a minimum license duration in **Article 49**, the consideration alternative measures to ensure investment certainty (e.g. automatic extensions of licenses under certain conditions).

Strategic Planning and Coordination (Article 4 and Recitals 30-32)

7. Following comments by many Member States about the importance of the RSPG in achieving the objectives of coordinated spectrum management, **Article 4** has been amended to include a description of the role of the RSPG, reflecting the functions established under Commission Decision [2002/622/EC](#) and extended under Commission Decision [2009/978/EC](#): This is not intended to change the function of the RSPG, but rather to give it greater prominence by establishing these key principles in the Code. Text has also been added to the first paragraph to make clear that the Article concerns the establishment and functioning of the internal market.
8. The words 'to the detriment' have been reinserted in **Recital 31**.

Restriction or Withdrawal of Rights (Article 19 and Recitals 53-54)

9. The additional text 'pursuant to paragraph 2' has been deleted from **Article 19(1)** as this is not necessary.

Radio Spectrum Coordination (Article 28 and Recitals 67-68)

10. The implementing decision in **Article 28(4)** has been further clarified in two ways. First, it has been made clearer that such a decision should only be used where other mechanisms for addressing coordination have been unsuccessful. Second, the process of the decision now more clearly specifies that such a decision must only come at the request of a Member State concerned and taking utmost account of an RSPG recommendation for a coordinated solution.
11. The text of **Article 28(5)** has now been brought fully into line with Article 10(2) of Decision [243/2014/EU](#).
12. Following these changes the square brackets in **Recital 67** have been deleted.

Compliance with Conditions (Article 30 and Recitals 70-71)

13. The scope of this article has been clarified in the title and by referring explicitly to rights of use for radio spectrum and for numbers.

Peer Review (Article 35 and Recital 84)

14. Following comments by many Member States, the Presidency proposes to substantially modify the peer review mechanism, in particular to meet the criteria discussed in the Working Party in July, namely that the peer review should be led by the RSPG, that is should provide useful feedback to Member States in conducting spectrum assignment, and that the process should be non-binding in nature. In order to do this, a number of changes have been made to the text:

- a. The scope of participants in the peer review has been broadened from NRAs to Competent Authorities throughout the article.
- b. The scope of the peer review has been clarified in paragraph 2. It is only triggered when a draft measure is in scope of Article 54(2). This requires a consultation under Article 23 to be notified to the RSPG (this text is included in st11679/17 on institutional arrangements).
- c. The RSPG is, on the basis of such notification, the body that determines whether it is necessary to invite a competent authority to participate in a peer review process.
- d. As an outcome of the peer review the RSPG may issue an opinion which may include specific recommendations, as it deems necessary.
- e. The ability of the authority to withdraw a measure and requirement to publish a decision have been deleted from paragraphs 6 and 8 as these points do not need repeating in this Article.
- f. Competent authorities are in no way obliged to delay their spectrum assignment procedures and may request the RSPG to reschedule the peer review to a later stage in the domestic spectrum assignment process.

15. None of these changes preclude a competent authority engaging with the RSPG or its members prior to notifying a draft measure.

16. **Recital 84** has been amended, where necessary, to reflect these changes.

Joint Authorisation (Article 37 and Recital 86)

17. The text in **Article 37** has been substantially redrafted to remove any text that might be considered to potentially increase barriers to Member States entering into joint authorisation. The text removed from the Article has been included in **Recital 86** where it has been adapted to make clear the non-binding nature of the criteria.

Fees for rights of use (Article 42 and Recitals 93-96)

18. The number of objectives that must be taken into account in this article have been reduced to a level closer to the existing framework through the deletion of references to articles 4 and 45 in **Article 42(2)**. In line with Member state comments, **Article 42(2)** has been further streamlined in order to retain some of the flexibility of the current framework. This is reflected in the recitals, and in particular **Recital 95** which now includes reference to the possible alternate uses of the resources.

Management of Spectrum (Article 45 and Recitals 101-111)

19. The main change to this article is the deletion of the implementing decision in **Article 45(4)**. This deletion is reflected in **Recital 103**.
20. In addition, the scope has been clarified in **Article 45(2)** and text in **Article 45(4)(d)** has been reinstated.
21. The reference to the Council Recommendation of 12 July 1999 has been retained in both paragraphs 2 and 4 of the Article as these provisions have different functions and the recommendation is relevant for both.
22. No further changes are made to the rest of the article, which remains largely unchanged from the current framework.

Authorisation and Conditions (Article 46 - 48 and Recitals 112-119)

23. One minor amendment has been made to remove unnecessary text in **Article 46(2)**.
24. The implementing decision in **Article 47(3)** has been deleted. **Recitals 116bis and 117** have been deleted accordingly.
25. No further changes have been made to these Articles or Recitals.

Duration of Rights (Article 49)

26. The inclusion of a fixed mandatory minimum duration of rights has been removed from **Article 49** and the text has been further amended to clarify the scope and allow for the possibility of temporary adjustment (both extension and reduction) of the duration of rights for the purpose of simultaneous expiry of rights.
27. **Member States will be invited to indicate whether there are any other approaches to licence duration which could help to further the objectives set out in the 5G declaration, particularly in creating a positive framework for investment.**

Renewal of Rights (Article 50 and Recitals 120-122)

28. The considerations regarding renewal of rights in **Article 50(1)** have been changed from mandatory to voluntary in order to retain some of the flexibility under the current framework. Following this change, the text previously deleted in **Article 50(3)** has now been reinserted.

Transfer or Lease of Rights (Article 51 and Recital 123)

29. No further changes have been made to this Article or Recital. This retains the implementing decision in **Article 51(4)** as previously amended.

Coordinated Timing (Article 53 and Recital 125)

30. As signalled in ST11067/17, the Presidency has proposed a revised **Article 53** that removes the implementing decision and instead seeks to achieve the objective of increasing investment certainty while ensuring Member States retain the necessary flexibility. In order to achieve a more coordinated outcome without an implementing act, delegations are asked to consider a standardised 2-year period from the point of adoption of harmonised technical conditions to the point at which Member States should ensure that general authorisation of spectrum rights is adopted or individual rights can be issued.
31. This proposal contains two additional flexibilities. First, a decision on harmonised technical conditions would be able to specify a different period, if this was necessary. Second, Member States have the possibility of extension on general interest grounds and in case of other justifying conditions set out in **Article 53(3)**.
32. To reflect the provisional nature of this new text, it is exceptionally placed in square brackets.
33. **Member States will be invited to provide views as to whether this approach would help meet the objectives of the 5G declaration and ensure Member States retain sufficient flexibility.**

Procedure for Limiting Rights of Use (Article 54 and Recital 126)

34. **Article 54(2)(b)** has been slightly amended to improve clarity.

Local Area Networks (Article 55 and Recitals 127)

35. The clarity of **Article 55(1)** has been improved by specifying more precisely where end-users are not liable for third party use of internet access.

Small-Area Wireless Access Points (Article 56 and Recitals 128)

36. An addition has been made to **Article 56(1)** making clear that it does not prejudice Member State competence regarding protection of the environment and human health.
37. The scope of **Article 56(3)** has been clarified so that it relates only to fees and charges applied by authorities and not to commercial agreements, for example for the use of property. This is reflected in **Recital 128**.

NRA Powers (Article 59(3) and Recital 142)

38. **Article 59(3)** has been substantially redrafted to emphasise the intention of this provision, namely to ensure that regulators are able, insofar as they make provision for doing so when issuing rights of use, to impose specific, geographically limited, sharing obligations on operators where those operators, in order to address a failure to comply with conditions of the rights of use.
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SPECTRUM TEXTRECITALS

ANNEX

↓ 2009/140/EC recital 28 (adapted)
⇒ new

- (30) ~~Although spectrum management remains within the competence of the Member States,~~ Strategic planning, coordination and, where appropriate, harmonisation at ~~Community~~ ~~EU~~ ~~Union~~ ~~level~~ can help ensure that spectrum users derive the full benefits of the internal market and that ~~EU~~ ~~Union~~ ~~interests~~ can be effectively defended globally. For these purposes, where appropriate, legislative multiannual radio spectrum policy programmes ~~should~~ ~~may~~ ~~be established~~ ~~adopted~~ ~~⇒~~, with the first one defined by Decision No 243/2012/EU of the European Parliament and of the Council¹, ~~⇒~~ ~~setting~~ ~~to set~~ ~~out~~ the policy orientations and objectives for the strategic planning and harmonisation of the use of radio spectrum in the ~~Community~~ ~~Union~~. These policy orientations and objectives may refer to the availability and efficient use of radio spectrum necessary for the establishment and functioning of the internal market ~~⇒~~, in accordance with this Directive ~~⇒~~ ~~and may also refer, in appropriate cases, to the harmonisation of procedures for the granting of general authorisations or individual rights of use for radio frequencies where necessary to overcome barriers to the internal market. These policy orientations and objectives should be in accordance with this Directive and the Specific Directives.~~

↓ 2009/140/EC recital 32 (adapted)
⇒ new

- (31) ~~The current spectrum management and distribution system is generally based on administrative decisions that are insufficiently flexible to cope with technological and economic evolution, in particular with the rapid development of wireless technology and the increasing demand for bandwidth.~~ ~~⇒~~ National borders are increasingly irrelevant in determining optimal radio spectrum use. ~~⇒~~ ~~The~~ ~~undue~~ fragmentation amongst national policies ~~⇒~~ regarding the management of radio spectrum, including unjustified different conditions for access to, and use of, radio spectrum according to the type of operator, ~~may~~ ~~⇒~~ results in increased costs and lost market opportunities for spectrum users, ~~and~~ ~~⇒~~ It may ~~⇒~~ slows down innovation, ~~⇒~~ limit investment, reduce economies of scale for manufacturers and operators as well as create tensions between rights holders and discrepancies in the cost of access to spectrum. This fragmentation may overall result in a distortion of the functioning ~~⇒~~ to the detriment of the internal market, ~~⇒~~ and prejudice to ~~⇒~~ consumers and the economy as a whole. ~~Moreover, the conditions for access to, and use of, radio frequencies may vary according to the type of operator, while electronic services provided by these operators increasingly overlap, thereby creating tensions between rights holders, discrepancies in the cost of access to spectrum, and potential distortions in the functioning of the internal market.~~

¹ OJ L 81, 21.3.2012, p. 7.

↓ 2009/140/EC recital 33 (adapted)

~~National borders are increasingly irrelevant in determining optimal radio spectrum use. Fragmentation of the management of access to spectrum rights limits investment and innovation and does not allow operators and equipment manufacturers to realise economies of scale, thereby hindering the development of an internal market for electronic communications networks and services using radio spectrum.~~

↓ 2009/140/EC recital 30 (adapted)

- (32) The spectrum management provisions of this Directive should be consistent with the work of international and regional organisations dealing with radio spectrum management, such as the International Telecommunications Union (ITU) and the European Conference of Postal and Telecommunications Administrations (CEPT), so as to ensure the efficient management of and harmonisation of the use of spectrum across the ~~Community~~ ☒ Union ☒ and between the Member States and other members of the ITU.
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↓ 2002/20/EC recital 33

⇒ new

- (53) Member States may need to amend rights, conditions, procedures, charges and fees relating to general authorisations and rights of use where this is objectively justified. Such changes should be duly notified to all interested parties in good time, giving them adequate opportunity to express their views on any such amendments. ⇒ Taking into account the need to ensure legal certainty and to promote regulatory predictability, any restriction or withdrawal of existing rights of use for radio spectrum or to install facilities should be subject to predictable and transparent procedures; hence stricter requirements or a notification mechanism could be imposed where rights of use have been assigned pursuant to competitive or comparative procedures. Unnecessary procedures should be avoided in case of minor amendments to existing rights to install facilities or to use spectrum when such amendments do not impact on third parties' interests. The change in the use of spectrum as a result of the application of technology and service neutrality principles should not be considered a sufficient justification for a withdrawal of rights since it does not constitute the granting of a new right. ⇐

↓ 2002/20/EC recital 34

~~The objective of transparency requires that service providers, consumers and other interested parties have easy access to any information regarding rights, conditions, procedures, charges, fees and decisions concerning the provision of electronic communications services, rights of use of radio frequencies and numbers, rights to install facilities, national frequency usage plans and national numbering plans. The national regulatory authorities have an important task in providing such information and keeping it up to date. Where such rights are administered by other levels of government the national regulatory authorities should endeavour to create a user-friendly instrument for access to information regarding such rights.~~

↓ 2002/20/EC recital 35

~~The proper functioning of the single market on the basis of the national authorisation regimes under this Directive should be monitored by the Commission.~~

↓ 2002/20/EC recital 36

~~In order to arrive at a single date of application of all elements of the new regulatory framework for the electronic communications sector, it is important that the process of national transposition of this Directive and of alignment of the existing licences with the new rules take place in parallel. However, in specific cases where the replacement of authorisations existing on the date of entry into force of this Directive by the general authorisation and the individual rights of use in accordance with this Directive would lead to an increase in the obligations for service providers operating under an existing authorisation or to a reduction of their rights, Member States may avail themselves of an additional nine months after the date of application of this Directive for alignment of such licences, unless this would have a negative effect on the rights and obligations of other undertakings.~~

↓ 2002/20/EC recital 37

~~There may be circumstances under which the abolition of an authorisation condition regarding access to electronic communications networks would create serious hardship for one or more undertakings that have benefited from the condition. In such cases further transitional arrangements may be granted by the Commission, upon request by a Member State.~~

↓ 2002/20/EC recital 38

~~Since the objectives of the proposed action, namely the harmonisation and simplification of electronic communications rules and conditions for the authorisation of networks and services cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary for those objectives,~~

↓ 2009/140/EC recital 70

(54) Minor amendments to rights and obligations are those amendments which are mainly administrative, do not change the substantial nature of the general authorisations and the individual rights of use and thus cannot cause any comparative advantage to the other undertakings.

↓ new

(67) Lack of coordination between Member States when organising the use of spectrum in their territory can, **if not solved through bilateral Member States negotiations**, create large-scale interference issues severely impacting the development of the Digital Single Market. Member States should take all necessary measures to avoid cross-border and harmful interference and cooperate with each other to that end. ~~Upon request of one or more Member States or of the Commission, the~~ **The** Radio Spectrum Policy Group should be tasked with supporting the necessary cross-border coordination. ~~[Building on RSPG's proposed solution, an implementing measure may be required in some circumstances to definitively resolve cross-border interferences or to enforce under Union law a coordinated solution agreed by two or several Member States in bilateral negotiations.]~~

(68) The Radio Spectrum Policy Group (RSPG) is a Commission high-level advisory group which was created by Commission Decision 2002/622/EC² to contribute to the development of the internal market and to support the development of a Union-level radio spectrum policy, taking into account economic, political, cultural, strategic, health and social considerations, as well as technical parameters. It should be composed of the heads of the bodies that have overall political responsibility for strategic spectrum policy. It should advise the Commission in developing strategic objectives, priorities and roadmaps for spectrum policy. This should further increase the visibility of spectrum policy in the various EU policy areas and help to ensure cross-sectorial coherence at national and Union level. It should also provide advice to the European Parliament and the Council upon their request. Moreover, the RSPG should also be the forum for the coordination of implementation by Member States of their obligations related to radio spectrum under this Directive and should play a central role in fields essential for the internal market **and spectrum policy**. ~~such as cross-border coordination or standardisation. Technical or expert working~~ **Working** groups could also be created to assist plenary meetings, at which strategic policy is framed through senior-level representatives of the Member States and the Commission.

↓ 2009/140/EC recital 72 (adapted)
⇒ new

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

² Commission Decision 2002/622/EC of 26 July 2002 establishing a Radio Spectrum Policy Group (OJ L 198 , 27/07/2002, p. 49).

↓ 2002/20/EC recital 15 (adapted)

- (71) The conditions, which may be attached to ~~the general authorisation~~ authorisations and ~~to the specific~~ individual rights of use, should be limited to what is strictly necessary to ensure compliance with requirements and obligations under ~~Community law~~ and national law ~~in accordance with Community~~ and Union law.
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↓ new

(84) By virtue of their overall economic expertise and market knowledge, and of the objective and technical character of their assessments, and in order to ensure coherence with their other tasks of market regulation, national regulatory authorities should determine the elements of selection procedures and the conditions attached to the rights of use for spectrum which have the greatest impact on market conditions and the competitive situation, including conditions for entry and expansion. That includes for example the parameters for economic valuation of spectrum in compliance with this Directive, the specification of the regulatory and market-shaping measures such as the use of spectrum caps or reservation of spectrum or the imposition of wholesale access obligations, or the means to define the coverage conditions attached to rights of use. ~~[A more convergent use and definition of such elements would be favoured by a coordination mechanism whereby~~ **the RSPG, BEREC, the Commission and the national regulatory competent** authorities of the other Member States would review draft measures in advance of the granting of rights of use by a given Member State ~~in parallel to the national public consultation~~. The measure determined by the national regulatory authority can only be a subset of a wider national measure, which may more broadly consist of the granting, trade and lease, duration, renewal or the amendment of rights of use for radio spectrum as well as of the selection procedure or the conditions attached to the rights of use. Therefore, when notifying a draft measure, **national regulatory competent** authorities may provide information on other draft national measures related to the relevant selection procedure for limiting rights of use for radio spectrum which are not covered by the peer review mechanism.]

↓ 2002/20/EC recital 24 (adapted)

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

↓ new

(86) Member States ~~should be encouraged to~~ **may** consider joint authorisations as an option when issuing rights of use where the expected usage covers cross-border situations. **When doing so, there are some criteria which Member States should consider. Jointly agreed scheduling of the individual national authorisation processes should be initiated and implemented by the competent authorities according to a jointly agreed schedule. The process should provide, where appropriate, for common conditions and procedures for the selection and granting of individual rights among the Member States concerned. Where appropriate, common or comparable conditions, should be able to be attached to the individual rights of use among the Member States concerned, thereby allowing users to be assigned similar radio spectrum blocks. Other Member States should be enabled to join the process.**

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

↓ 2002/20/EC recital 32

⇒ new

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

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

- (95) In line with their role of ensuring optimal use of radio spectrum, fees linked to rights of use for radio spectrum can influence decisions about whether to seek such rights and put into use radio spectrum resources. ~~When setting reserve prices as a means to determine the minimum valuation ensuring optimal use,~~ Member States should therefore ensure that **reserve prices are set in a way that leads to the efficient assignment of the rights** such prices, irrespective of the type of selection procedure used, ~~also reflect the additional costs associated with the fulfilment of authorisation conditions imposed to further policy objectives that would not reasonably be expected to be met pursuant to normal commercial standards, such as territorial coverage conditions.~~ In doing so, regard should also be had to the competitive situation of the market concerned **including the possible alternative uses of the resources.**
- (96) Optimal use of radio spectrum resources depends on the availability of appropriate networks and associated facilities. In that regard, fees for rights of use for radio spectrum and for rights to install facilities should take into consideration the need to facilitate continuous infrastructure development with a view to achieving the most efficient use of the resources. ~~Member States should therefore provide for modalities for payment of the fees for rights of use for radio spectrum linked with the actual availability of the resource in a manner that facilitates the investments necessary to promote such development. The modalities should be specified in an objective, transparent, proportionate and non-discriminatory manner before opening procedures for the granting of rights of use for spectrum.~~ **When imposing fees for rights of use for spectrum, competent authorities should take into account other fees or administrative charges linked to the general authorisation or the rights of use in order not to create undue financial burden to undertakings providing electronic communications services and networks and to incentivise optimal use of the allocated resources.**

↓ 2002/21/EC recital 19 (adapted)
⇒ new

- (101) ~~Radio frequencies~~ ⇒ Radio spectrum is a scarce public resource with an important public and market value. ⇐ ⊗ It is ⊗ an essential input for radio-based electronic communications ⊗ networks and ⊗ services and, in so far as ⊗ it relates ⊗ ~~they relate~~ to such ⊗ networks and ⊗ services, should therefore be ⇒ efficiently ⇐ allocated and assigned by national regulatory authorities according to ~~a set of~~ harmonised objectives and principles governing their action as well as to objective, transparent and non-discriminatory criteria, taking into account the democratic, social, linguistic and cultural interests related to the use of ~~frequency~~ ⊗ frequencies ⊗. ~~It is important that the allocation and assignment of radio frequencies is managed as efficiently as possible. Transfer of radio frequencies spectrum can be an effective means of increasing efficient use of spectrum, as long as there are sufficient safeguards in place to protect the public interest, in particular the need to ensure transparency and regulatory supervision of such transfers.~~ Decision No 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision)³ establishes a framework for harmonisation of radio frequencies ⇒ spectrum ⇐, ~~and action taken under this Directive should seek to facilitate the work under that Decision.~~

↓ 2009/140/EC recital 25 (adapted)
⇒ new

- (102) Radio spectrum policy activities in the ~~Community~~ ⊗ Union ⊗ should be without prejudice to measures taken, at ~~Community~~ ⊗ Union ⊗ or national level, in accordance with ~~Community~~ ⊗ Union ⊗ **or national** law, to pursue general interest objectives, in particular with regard to content regulation and audiovisual and media policies, and the right of Member States to organise and use their radio spectrum for ~~the purposes of~~ public order, public security and defence. ⇒ ~~As use of spectrum for military and other national public security purposes impacts on the availability of spectrum for the internal market, radio spectrum policy should take into account all sectors and aspects of Union policies and balance their respective needs, while respecting Member States' rights.~~ ⇐

³ Decision No 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision) (OJ L 108, 24.4.2002).

- (103) Ensuring ubiquitous connectivity in each Member State is essential for economic and social development, participation in public life and social and territorial cohesion. As connectivity becomes an integral element to European society and welfare, EU-wide coverage should be achieved by relying on imposition by Member States of appropriate coverage requirements, which should be adapted to each area served and limited to proportionate burdens in order not to hinder deployment by service providers. Coverage of the territory as well as connectivity across Member States should be maximised and reliable, with a view to promote in-border and cross-border services and applications such as connected cars and e-health. ~~Therefore, in order to increase regulatory certainty and predictability of investment needs and to guarantee proportionate and equitable connectivity for all citizens, application by competent authorities of coverage obligations should be coordinated at Union level. Considering national specificities, such coordination should be limited to general criteria to be used to define and measure coverage obligations, such as population density or topographical and topological features.~~
- (104) The need to ensure that citizens are not exposed to electromagnetic fields at a level harmful to public health should be approached in a consistent way across the Union, having particular regard to the precautionary approach taken in Council Recommendation No 1999/519/EC⁴, in order to ensure consistent deployment conditions.
- (105) Spectrum harmonisation and coordination and equipment regulation supported by standardisation are complementary need to be coordinated closely to meet their joint objectives effectively, with the support of the RSPG. Coordination between the content and timing of mandates to CEPT under the Radio Spectrum Decision and standardisation requests to standardisation bodies, such as the European Telecommunications Standards Institute, including with regard to radio receivers parameters, should facilitate the introduction of future systems, support spectrum sharing opportunities and ensure efficient spectrum management.
- (106) The demand for harmonised radio spectrum is not uniform in all parts of the Union. In cases where there is lack of demand for a harmonised band at regional or national level, Member States ~~could~~ **may** ~~exceptionally be able to~~ allow an alternative use of the band as long as such lack of demand persists and provided that the alternative use does not prejudice the harmonised use of the said band by other Member States ~~and that it ceases when demand for the harmonised use materialises.~~

⁴ Council Recommendation 1999/519/EC of 12 July 1999 on the limitation of exposure of the general public to electromagnetic fields (0 Hz to 300 GHz), OJ L 199, 30.7.1999, p. 59–70.

↓ 2009/140/EC recital 34 (adapted)

- (107) Flexibility in spectrum management and access to spectrum ~~⊗~~ has been established ~~⊗~~ ~~should be increased~~ through technology and service-neutral authorisations to allow spectrum users to choose the best technologies and services to apply in frequency bands declared available for electronic communications services in the relevant national frequency allocation plans in accordance with ~~⊗~~ Union ~~⊗~~ ~~Community~~ law (the ‘principles of technology and service neutrality’). The administrative determination of technologies and services should apply ~~⊗~~ only ~~⊗~~ when general interest objectives are at stake and should be clearly justified and subject to regular periodic review.
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↓ 2009/140/EC recital 35 (adapted)

- (108) Restrictions on the principle of technology neutrality should be appropriate and justified by the need to avoid harmful interference, for example by imposing emission masks and power levels, to ensure the protection of public health by limiting public exposure to electromagnetic fields, to ensure the proper functioning of services through an adequate level of technical quality of service, while not necessarily precluding the possibility of using more than one service in the same frequency band, to ensure proper sharing of spectrum, in particular where its use is only subject to general authorisations, to safeguard efficient use of spectrum, or to fulfil a general interest objective in conformity with ~~Community~~ ~~⊗~~ Union ~~⊗~~ law.
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↓ 2009/140/EC recitals 36 and 37
(adapted)

- (109) Spectrum users should also be able to freely choose the services they wish to offer over the spectrum ~~subject to transitional measures to deal with previously acquired rights~~. On the other hand, measures should be allowed which require the provision of a specific service to meet clearly defined general interest objectives such as safety of life, the need to promote social, regional and territorial cohesion, or the avoidance of the inefficient use of spectrum to be permitted where necessary and proportionate. Those objectives should include the promotion of cultural and linguistic diversity and media pluralism as defined by Member States in conformity with ~~Community~~ ~~⊗~~ Union ~~⊗~~ law. Except where necessary to protect safety of life or, exceptionally, to fulfil other general interest objectives as defined by Member States in accordance with ~~Community~~ ~~⊗~~ Union ~~⊗~~ law, exceptions should not result in certain services having exclusive use, but should rather grant them priority so that, in so far as possible, other services or technologies may coexist in the same band. It lies within the competence of the Member States to define the scope and nature of any exception regarding the promotion of cultural and linguistic diversity and media pluralism.

↓ 2009/140/EC recital 38

- (110) As the allocation of spectrum to specific technologies or services is an exception to the principles of technology and service neutrality and reduces the freedom to choose the service provided or technology used, any proposal for such allocation should be transparent and subject to public consultation.
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↓ new

- (111) In exceptional cases where Member States decide to limit the freedom to provide electronic communications networks and services based on grounds of public policy, public security or public health, Member States should explain the reasons for such limitation.
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↓ 2009/140/EC recital 31

⇒ new

- (112) Radio ~~frequencies~~ ⇒ spectrum ⇐ should be managed so as to ensure that harmful interference is avoided. This basic concept of harmful interference should therefore be properly defined to ensure that regulatory intervention is limited to the extent necessary to prevent such interference, ⇒ having regard also to the need ~~for network equipment and end-user devices to incorporate resilient receiver technology~~ **to take into consideration advanced methods for protection against harmful interference, with the aim to apply these technologies and spectrum management paradigms in order to avoid, to the best extent possible the application of the non-interference, non-protection principle.** Transport has a strong cross-border element and its digitalisation brings challenges. Vehicles (metro, bus, cars, trucks, trains, etc) are becoming more and more autonomous and connected. In an EU single market, vehicles travel beyond national borders more easily. Reliable communications, and avoiding harmful interferences, are critical for the safe and good operation of vehicles and their on-board communications systems. ⇐

- (113) With growing spectrum demand and new varying applications and technologies which necessitate more flexible access and use of spectrum, Member States should promote the shared use of spectrum by determining the most appropriate authorisation regimes for each scenario and by defining appropriate and transparent rules and conditions therefor. Shared use of spectrum increasingly ensures its effective and efficient use by allowing several independent users or devices to access the same frequency band under various types of legal regimes so as to make additional spectrum resources available, raise usage efficiency and facilitate spectrum access for new users. Shared use can be based on general authorisations or licence-exempt use allowing, under specific sharing conditions, several users to access and use the same spectrum in different geographic areas or at different moments in time. It can also be based on individual rights of use under arrangements such as licenced shared access where all users (with an existing user and new users) agree on the terms and conditions for shared access, under the supervision of the competent authorities, in such a way as to ensure a minimum guaranteed radio transmission quality. When allowing shared use under different authorisation regimes, Member States should not set widely diverging durations for such use under different authorisation regimes.
- (114) In order to ensure predictability and preserve legal certainty and investment stability, Member States should define in advance appropriate criteria to determine compliance with the objective of efficient use of spectrum by right holders when implementing the conditions attached to individual rights of use and general authorisations. Interested parties should be involved in the definition of such conditions and informed in a transparent manner about how the fulfilment of their obligations will be assessed.
- (115) Considering the importance of technical innovation, Member States should be able to provide for rights to use spectrum for experimental purposes, subject to specific restrictions and conditions strictly justified by the experimental nature of such rights.
- (116) Network infrastructure sharing, and in some instances spectrum sharing, can allow for a more efficient and effective use of radio spectrum and ensure the rapid deployment of networks, especially in less densely populated areas. When defining the conditions to be attached to rights of use for radio spectrum, competent authorities should also consider authorising forms of sharing or coordination between undertakings with a view to ensure effective and efficient use of spectrum or compliance with coverage obligations, in compliance with competition law principles.

~~[(116bis) Due to its limited propagation characteristics, radio spectrum in very high bands is unlikely to be used to provide territorial broadband coverage and is likely to be used in very densely populated areas as a priority. A national license could result in spectrum being unused in major part of the territory, in effect sterilising its use. There is also an expected decrease in use from very densely populated cities to inner suburbia on to outer suburbia. This is a problem that all Member States would face individually or together. As diverging solutions could fragment the internal market in equipment, delaying rollout of 5G systems, a common solution should be found, acknowledging any technical harmonisation measures in force. This solution should provide a toolbox for Member States in identifying the appropriate authorisation regime to be applied to a band, or part of a band, depending on a general categorisation of population density. Such a solution need also provide safeguards for relevant incumbent uses, where applicable.]~~

~~(117) [Market conditions as well as the relevance and number of players can differ amongst Member States. While the need and opportunity to attach conditions to rights of use for radio spectrum can be subject to national specificities which should be duly accommodated, the modalities of the application of such obligations should be coordinated at EU level through Commission implementing measures to ensure a consistent approach in addressing similar challenges across the EU.]~~

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

- (119) Member States should only impose, prior to the granting of right, the verification of elements that can reasonably be demonstrated by an applicant exercising ordinary care, taking due account of the important public and market value of radio spectrum as a scarce public resource. This is without prejudice to the possibility for subsequent verification of the fulfilment of eligibility criteria, for example through milestones, where criteria could not reasonably be met initially. To preserve effective and efficient use of radio spectrum, Member States should not grant rights where their review indicates applicants' inability to comply with the conditions, without prejudice to the possibility of facilitating time-limited experimental use. Sufficiently long duration of authorisations for the use of spectrum should increase investment predictability to contribute to faster network roll-out and better services, as well as stability to support spectrum trading and leasing. Unless use of spectrum is authorised for an unlimited period of time, such duration should both take account of the objectives pursued and be sufficient to facilitate recoupment of the investments made. While a longer duration can ensure investment predictability, measures to ensure effective and efficient use of radio spectrum, such as the power of the competent authority to amend or withdraw the right in case of non-compliance with the conditions attached to the rights of use, or the facilitation of radio spectrum tradability and leasing, will serve to prevent inappropriate accumulation of radio spectrum and support greater flexibility in distributing spectrum resources. Greater recourse to annualised fees is also a means to ensure a continuous assessment of the use of the spectrum by the holder of the right.
- (120) In deciding whether to renew already granted rights of use for radio spectrum, competent authorities should take into account the extent to which renewal would further the objectives of the regulatory framework and other objectives under national and Union law. Any such decision should be subject to an open, non-discriminatory and transparent procedure and based on a review of how the conditions attached to the rights concerned have been fulfilled. **This should normally be completed at least 3 years before the expiry of such rights.** When assessing the need to renew rights of use, Member States should weigh the competitive impact of extending already assigned rights against the promotion of more efficient exploitation or of innovative new uses that might result if the band were opened to new users. Competent authorities may make their determination in this regard by allowing for only a limited extension in order to prevent severe disruption of established use. While decisions on whether to extend rights assigned prior to the applicability of this Directive should respect any rules already applicable, Member States should equally ensure that they do not prejudice the objectives of this Directive.
- (121) When renewing existing rights of use, Member States should, together with the assessment of the need to renew the right, review the fees attached thereto with a view to ensuring that those fees continue to promote optimal use, taking account amongst other things, of the stage of market and technological evolution. For reasons of legal certainty, it is appropriate for any adjustments to the existing fees to be based on the same principles as those applicable to the award of new usage rights.

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

↓ 2009/140/EC recital 39 (adapted)
⇒ new

(123) ⇒ Transfer of spectrum usage rights can be an effective means of increasing the efficient use of spectrum. ~~↔ In the interests~~ ⊗ For the sake ⊗ of flexibility and efficiency, ⇒ and to allow valuation of spectrum by the market, ~~↔ national regulatory authorities may~~ ⇒ Member States should ~~by default~~ ~~↔~~ allow spectrum users ~~freely~~ to transfer or lease their spectrum ~~↔~~ usage rights to third parties ⇒ following a simple procedure and subject to the conditions attached to such rights and to competition rules, under the supervision of the national regulatory authorities responsible ~~↔~~ . ~~This would allow spectrum valuation by the market. In view of their power to ensure effective use of spectrum~~ ⇒ In order to facilitate such transfers or leases, as long as harmonisation measures adopted under the Radio Spectrum Decision are respected ~~↔~~ , ~~national regulatory authorities~~ ⇒ Member States ~~↔~~ should ⊗ also ⊗ ~~take action so as to ensure that trading does not lead to a distortion of competition where spectrum is left unused~~ ⇒ consider requests to have spectrum rights partitioned or disaggregated and conditions for use reviewed ~~↔~~ .

↓ new

(124) Measures taken specifically to promote competition when granting or renewing rights of use for radio spectrum should be decided by national regulatory authorities, which have the necessary economic, technical and market knowledge. Spectrum assignment conditions can influence the competitive situation in electronic communications markets and conditions for entry. Limited access to spectrum, in particular when spectrum is scarce, can create a barrier to entry or hamper investment, network roll-out, the provision of new services or applications, innovation and competition. New rights of use, including those acquired through transfer or leasing, and the introduction of new flexible criteria for spectrum use can also influence existing competition. Where unduly applied, certain conditions used to promote competition, can have other effects; for example, spectrum caps and reservations can create artificial scarcity, wholesale access obligations can unduly constrain business models in the absence of market power, and limits on transfers can impede the development of secondary markets. Therefore, a consistent and objective competition test for the imposition of such conditions is necessary and should be applied consistently. The use of such measures should therefore be based on a thorough and objective assessment, by national regulatory authorities, of the market and the competitive conditions thereof.

(125) Building on opinions from the RSPG, the adoption of a common deadline for allowing the use of a band which has been harmonised under the Radio Spectrum Decision, **in particular the bands harmonised for wireless broadband electronic communications such as the 3.4-3.8 GHz and the 24.25-27.5 GHz bands as well as the 31.8-33.4 GHz and 40.5-43.5 GHz bands**, can be necessary to avoid cross-border interferences and beneficial to ensure release of the full benefits of the related technical harmonisation measures for equipment markets and for the deployment of very high capacity electronic communications networks and services. In order to significantly contribute to the objectives of this framework and facilitate coordination, the establishment of such common deadlines should be subject to Commission implementing acts. **To comply with and adapt to such common deadlines, Member States would consequently have to consider the adoption of transitional measures to extend or reduce the duration of existing rights or authorisations.**

↓ 2002/20/EC recitals 21 and 22
(adapted)
⇒ new

(126) Where the demand for ~~a radio frequencies in a specific~~ spectrum ~~range~~ band exceeds their availability and, as a result, a Member State concludes that the rights of use for radio spectrum must be limited, appropriate and transparent procedures should be followed apply for the assignment granting of such frequencies rights in order to avoid any discrimination and optimise the use of those the scarce resources. Such limitation should be justified, proportionate and based on a thorough assessment of market conditions, giving due weight to the overall benefits for users and to national and internal market objectives. The objectives governing any limitation procedure should be clearly defined in advance. When considering the most appropriate selection procedure, and in compliance with coordination measures taken at Union level, Member States should timely and transparently consult all interested parties on the justification, objectives and conditions of the procedure. Member States may use, *inter alia*, competitive or comparative selection procedures for the assignment of radio frequencies spectrum as well as or for numbers with exceptional economic value. In administering such schemes, national regulatory authorities should take into account the provisions of Article 8 objectives of this Directive. If a Member State finds that further rights can be made available in a band, it should start the process therefor.

↓ 2002/20/EC recital 23

~~National regulatory authorities should ensure, in establishing criteria for competitive or comparative selection procedures, that the objectives of Article 8 of Directive 2002/21/EC (Framework Directive) are met. It would therefore not be contrary to this Directive if the application of objective, non-discriminatory and proportionate selection criteria to promote the development of competition would have the effect of excluding certain undertakings from a competitive or comparative selection procedure for a particular radio frequency. A Member State may find that further rights can be made available in a band. In this case it should start the process of making such rights available.~~

(127) Massive growth in radio spectrum demand, and in end-user demand for wireless broadband capacity, calls for solutions allowing alternative, complementary, spectrally efficient access solutions, including low-power wireless access systems with a small-area operating range such as radio local area networks (RLAN) and networks of low-power small-size cellular access points. Such complementary wireless access systems, in particular publicly accessible RLAN access points, increase access to the internet for end-users and mobile traffic off-loading for mobile operators. RLANs use harmonised radio spectrum without requiring an individual authorisation or spectrum usage right. Most RLAN access points are so far used by private users as local wireless extension of their fixed broadband connection. End-users, within the limits of their own internet subscription, should not be prevented from sharing access to their RLAN with others, so as to increase the number of available access points, particularly in densely populated areas, maximise wireless data capacity through radio spectrum re-use and create a cost-effective complementary wireless broadband infrastructure accessible to other end-users. Therefore, unnecessary restrictions to the deployment and interlinkage of RLAN access points should also be removed. Public authorities or public service providers, who use RLANs in their premises for their personnel, visitors or clients, for example to facilitate access to e-Government services or for information on public transport or road traffic management, could also provide access to such access points for general use by citizens as an ancillary service to services they offer to the public on such premises, to the extent allowed by competition and public procurement rules. Moreover, the provider of such local access to electronic communications networks within or around a private property or a limited public area on a non-commercial basis or as an ancillary service to another activity that is not dependant on such access (such as RLAN hotspots made available to customers of other commercial activities or to the general public in that area) can be subject to compliance with general authorisations for rights of use for radio spectrum but should not be subject to any conditions or requirements attached to general authorisations applicable to providers of public communications networks or services or to obligations regarding end-users or interconnection **considering that such conditions or requirements shall apply upon the providers of access to the network from such RLAN**. However, such provider should remain subject to the liability rules of Article 12 of Directive 2000/31/EC on electronic commerce⁵. Further technologies such as LiFi are emerging that will complement current radio spectrum capabilities of RLANs and wireless access point to include optical visible light-based access points and lead to hybrid local area networks allowing optical wireless communication.

⁵ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), (OJ L 178, 17.7.2000, p.1).

- (128) Since low power small-area wireless access points are very small and make use of unobtrusive equipment similar to that of domestic RLAN routers and considering their positive impact on the use of spectrum and on the development of wireless communications, their technical characteristics - such as power output- should be specified at Union level in a proportionate way for local deployment and their use should be subject to general authorisations only – to the exception of RLAN which should not be subject to any authorisation requirement beyond what is necessary for the use of radio spectrum - and any additional restrictions under individual planning or other permits should be limited to the greatest extent possible. **As a result, in order to facilitate the deployment and operation of small area wireless access points, and without prejudice to any applicable requirement related to spectrum management, Member States should subject such devices to general rules only and not impose the granting of any individual authorisations, such as individual town planning approval, for the installation and/or operation of every small cell device. Properly justified exceptions could be however envisaged for the protection of specific sites of high military, architectural, historical or natural value defined in advance and the permit should be granted within a short deadline.**
- (132) In markets where there continue to be large differences in negotiating power between undertakings, and where some undertakings rely on infrastructure provided by others for delivery of their services, it is appropriate to establish a framework to ensure that the market functions effectively. National regulatory authorities should have the power to secure, where commercial negotiation fails, adequate access and interconnection and interoperability of services in the interest of end-users. In particular, they ~~may~~ can ensure end-to-end connectivity by imposing proportionate obligations on undertakings that are subject to the general authorisation and that control access to end-users. Control of means of access may entail ownership or control of the physical link to the end-user (either fixed or mobile), and/or the ability to change or withdraw the national number or numbers needed to access an end-user's network termination point. This would be the case for example if network operators were to restrict unreasonably end-user choice for access to Internet portals and services.

new

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

↓ 2002/19/EC recital 7

- (134) National legal or administrative measures that link the terms and conditions for access or interconnection to the activities of the party seeking interconnection, and specifically to the degree of its investment in network infrastructure, and not to the interconnection or access services provided, may cause market distortion and may therefore not be compatible with competition rules.
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↓ 2002/19/EC recital 8
⇒ new

- (135) Network operators who control access to their own customers do so on the basis of unique numbers or addresses from a published numbering or addressing range. Other network operators need to be able to deliver traffic to those customers, and so need to be able to interconnect directly or indirectly to each other. ~~The existing~~ ⇒ It is therefore appropriate to lay down ⇐ 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 fully digital electronic communications networks used for the distribution of television services and open to the public 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.~~
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↓ 2002/19/EC recital 9

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

- (137) Currently both end-to-end connectivity and access to emergency services depend on end-users adopting number-based interpersonal communications services. Future technological developments or an increased use of number-independent interpersonal communications services could entail a lack of sufficient interoperability between communications services. As a consequence significant barriers to market entry and obstacles to further onward innovation could emerge and appreciably threaten both effective end-to-end connectivity between end-users and effective access to emergency services.
- (138) In case such interoperability issues arise, the Commission may request a BEREC report which should provide a factual assessment of the market situation at the Union and Member States level. On the basis of the BEREC report and other available evidence and taking into account the effects on the internal market, the Commission should decide whether there is a need for regulatory intervention by national regulatory authorities. If the Commission considers that such regulatory intervention should be considered by National Regulatory Authorities, it may adopt implementing measures specifying the nature and scope of possible regulatory interventions by NRAs, including in particular measures to impose the mandatory use of standards or specifications on all or specific providers. The terms 'European standards' and 'international standards' are defined in Article 2 of Regulation (EU) No 1025/2012.⁶ National regulatory authorities should assess, in the light of the specific national circumstances, whether any intervention is necessary and justified to ensure end-to-end-connectivity or access to emergency services, and if so, impose proportionate obligations in accordance with the Commission implementing measures.
- (139) In situations where undertakings are deprived of access to viable alternatives to non-replicable assets up to the first distribution point, national regulatory authorities should be empowered to impose access obligations to all operators, without prejudice to their respective market power. In this regard, national regulatory authorities should take into consideration all technical and economic barriers to future replication of networks. The mere fact that more than one such infrastructure already exists should not necessarily be interpreted as showing that its assets are replicable. The first distribution point should be identified by reference to objective criteria.

⁶ Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council [OJ L 364 of 14.11.2012, p.12]

- (140) It could be justified to extend access obligations to wiring and cables beyond the first concentration point in areas with lower population density, while confining such obligations to points as close as possible to end-users, where it is demonstrated that replication would also be impossible beyond that first concentration point
- (141) In such cases, in order to comply with the principle of proportionality, it can be appropriate for national regulatory authorities to exclude certain categories of owners or undertakings, or both, from obligations going beyond the first distribution point, on the grounds that an access obligation not based on significant market power would risk compromising their business case for recently deployed network elements. Structurally separated undertakings should not be subject to such access obligations if they offer an effective alternative access on a commercial basis to a very high capacity network.
- (142) [Sharing of passive or active infrastructure used in the provision of wireless electronic communications services, or the joint roll-out of such infrastructures, in compliance with competition law principles can be particularly useful to maximise very high capacity connectivity throughout the Union, especially in less dense areas where replication is impracticable and end-users risk being deprived of such connectivity. National regulatory authorities should, exceptionally, be enabled to impose such sharing or joint roll-out, or localised roaming access, in compliance with Union law, if they demonstrate the benefits of such sharing or access in terms of overcoming very significant barriers to replication and of addressing otherwise severe restrictions on end-user choice or quality of service, or both, or on territorial coverage, and taking into account several elements, including in particular the need to maintain infrastructure roll-out incentives.]

↓ 2009/140/EC recital 65 (adapted)

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

Article ~~8~~4

Strategic planning and coordination of radio spectrum policy

1. Member States shall cooperate with each other and with the Commission, **including through the Radio Spectrum Policy Group, established by Commission Decision 2002/622/EC** in the strategic planning, coordination and harmonisation of the use of radio spectrum in the ~~European Community~~ Union **in line with EU policies for the establishment and functioning of the internal market in electronic communications.** To this end, they shall take into consideration, inter alia, the economic, safety, health, public interest, ~~⇒ public security and defence ←~~, freedom of expression, cultural, scientific, social and technical aspects of EU policies as well as the various interests of radio spectrum user communities with the aim of optimising the use of radio spectrum and avoiding harmful interference.

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

*3. Member States shall cooperate through the Radio Spectrum Policy Group, established by Commission Decision 2002/622/EC, with each other and with the Commission, and upon their request with the European Parliament and the Council, in support of the strategic planning and coordination of radio spectrum policy approaches in the Union. **In the context of this legislation the tasks of the RSPG shall include:***

a) developing and disseminating among its members best practices on spectrum related matters, including on the strategic planning and coordination of radio spectrum policy approaches between Member States and in the Union as well as any other matter which affects the use of radio spectrum in Member States in relation not only to the internal market but also to public order, public security, civil protection and defence policies as the use of radio spectrum for such policies may influence the organisation of radio spectrum as a whole;

b) on request, providing assistance to its members on spectrum related matters.

The RSPG shall be composed of one high level representative per Member State as well as of a high-level representative from the Commission.

~~34.~~ The Commission, taking utmost account of the opinion of the Radio Spectrum Policy Group (RSPG), ~~established by Commission Decision 2002/622/EC of 26 July 2002 establishing a Radio Spectrum Policy Group⁷,~~ may submit legislative proposals to the European Parliament and the Council for establishing multiannual radio spectrum policy programmes. Such programmes shall set out the policy orientations and objectives for the strategic planning and harmonisation of the use of radio spectrum in accordance with the provisions of this Directive ~~and the Specific Directives.~~

~~4. Where necessary to ensure the effective coordination of the interests of the European Community in international organisations competent in radio spectrum matters, the Commission, taking utmost account of the opinion of the RSPG, may propose common policy objectives to the European Parliament and the Council.~~

↓ 2009/140/EC Art. 3.8 (adapted)
⇒ new

Article 19

⊗ Restriction or withdrawal of rights ⊗

~~21.~~ **Without prejudice to Article 30 paragraph 5,** Member States shall not restrict or withdraw rights to install facilities or rights of use for radio frequencies ⊗ spectrum ⊗ ⇒ or numbers ⇐ before expiry of the period for which they were granted except where justified ⊗ ~~pursuant to paragraph 2~~ ⊗ and where applicable in conformity with the Annex ⊗ I ⊗ and relevant national provisions regarding compensation for withdrawal of rights.

⁷ ~~OJ L 198, 27.7.2002, p. 49.~~

2. In line with the need to ensure the effective and efficient use of radio spectrum or the implementation of harmonised conditions adopted under Decision No 676/2002/EC, Member States may allow withdrawal of rights **of use for radio spectrum**, including those **rights granted pursuant to Article 49** with a ~~25 year minimum duration~~, based on **pre-established** procedures ~~laid down in advance~~, in compliance with the principles of proportionality and non-discrimination.

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

4. ~~Any intention to restrict or withdraw authorisations or individual rights of use for radio spectrum or numbers shall be subject to a public consultation in accordance with Article 23.~~

*Article 28***Radio Spectrum Coordination among Member States**

1. Member States ~~and their competent authorities~~ shall ensure that the use of radio spectrum is organised on their territory in a way that no other Member State is impeded, in particular due to cross-border harmful interference between Member States, from allowing on its territory the use of harmonised radio spectrum in accordance with Union legislation.

They shall take all necessary measures to this effect without prejudice to their obligations under international law and relevant international agreements such as the ITU Radio Regulations.

2. Member States shall cooperate with each other, **and** through the Radio Spectrum Policy Group **where appropriate**, in the cross-border coordination of the use of radio spectrum in order to:

- (a) ensure compliance with paragraph 1;
- (b) solve any problem or dispute in relation to cross-border coordination or cross-border harmful interference.

3. **In order to ensure compliance with paragraph 1, any** ~~Any~~ Member State concerned as well as ~~the Commission~~ may request the Radio Spectrum Policy Group to use its good offices **to address any problem or dispute in relation to cross-border coordination or cross border harmful interference. Where appropriate, the RSPG may** ~~and, where appropriate, to propose a coordinated solution~~ **in an opinion a coordinated solution regarding any such problem or dispute in relation to cross-border coordination or cross border harmful interference,** in order ~~to assist Member States in complying with paragraphs 1 and 2.~~

4. Where no solution has been reached following the mechanisms set out in paragraphs 2 and 3 and at the request of a Member State concerned or in light of information provided by such a Member State upon its own initiative, the Commission may, taking utmost account of the opinion of the Radio Spectrum Policy Group **recommending a coordinated solution pursuant to paragraph 3, adopt ~~implementing measures~~ **decisions** to resolve cross-border harmful interferences between two or several Member States which prevent them from using the harmonised radio spectrum in their territory. Those ~~implementing acts~~ **decisions** shall be adopted in accordance with the examination procedure referred to in Article 110(4) **and shall be addressed to those Member States concerned by the unresolved harmful interference.****

5. The ~~Commission~~ Union shall, upon request of an affected Member State, provide legal, political and technical support to resolve spectrum coordination issues with countries neighbouring the Union, including candidate and acceding countries, in such a way that the Member States concerned can observe their obligations under Union law.

↓ 2002/20/EC Art.10

Article ~~10~~30

Compliance with the conditions of the general authorisation or of rights of use for radio spectrum and for numbers and compliance with specific obligations

↓ 2009/140/EC Art. 3.6(a) (adapted)
⇒ new

1. ⇒ Member States shall ensure that their ~~national regulatory and other~~ competent authorities ⇐ ~~National regulatory authorities shall~~ monitor and supervise compliance with the conditions of the general authorisation or of rights of use ⇐ for radio spectrum and for numbers ⇐, ~~and~~ with the specific obligations referred to in Article ~~613(2), in accordance with Article 11~~ ⇐ and with the obligation to use radio spectrum effectively and efficiently in accordance with Articles 4, 45(1) and 47 paragraphs 1 and 2. ⇐

~~National regulatory~~ ⇐ ~~and other~~ ⇐ Competent ⇐ authorities shall have the power to require undertakings ~~providing electronic communications networks or services~~ covered by the general authorisation or enjoying rights of use for radio ⇐ spectrum ⇐ ⇐ frequencies or numbers to provide all information necessary to verify compliance with the conditions of the general authorisation or of rights of use **for radio spectrum and for numbers** or with the specific obligations referred to in Article ~~613(2)~~ ⇐ or Article 47(1) and (2) ⇐, in accordance with Article ~~11~~21.

2. Where a national ~~regulatory~~ ⇒ competent ⇐ authority finds that an undertaking does not comply with one or more of the conditions of the general authorisation or of rights of use **for radio spectrum and for numbers**, or with the specific obligations referred to in Article ~~6~~13(2), it shall notify the undertaking of those findings and give the undertaking the opportunity to state its views, within a reasonable time limit.

3. The ~~relevant~~ **competent** authority shall have the power to require the cessation of the breach referred to in paragraph 2 either immediately or within a reasonable time limit and shall take appropriate and proportionate measures aimed at ensuring compliance.

In this regard, Member States shall empower the ~~relevant~~ **competent** authorities to impose:

(a) dissuasive financial penalties where appropriate, which may include periodic penalties having retroactive effect; and

(b) orders to cease or delay provision of a service or bundle of services which, if continued, would result in significant harm to competition, pending compliance with access obligations imposed following a market analysis carried out in accordance with Article ~~16~~65 ~~2002/21/EC (Framework Directive)~~.

The measures and the reasons on which they are based shall be communicated to the undertaking concerned without delay and shall stipulate a reasonable period for the undertaking to comply with the measure.

↓ 2009/140/EC Art. 3.6(b) (adapted)
⇒ new

4. Notwithstanding ~~the provisions of~~ paragraphs 2 and 3, Member States shall empower the ~~relevant~~ **competent** authority to impose financial penalties where appropriate on undertakings for failure to provide information in accordance with the obligations imposed under Article ~~11~~21(1)(a) or (b) ~~of this Directive~~ and Article ~~9~~67 ~~of Directive 2002/19/EC (Access Directive)~~ within a reasonable period stipulated by the national ~~regulatory~~ ⇒ competent ⇐ authority.

↓ 2009/140/EC Art. 3.6(c) (adapted)

5. In cases of serious ~~⊗~~ breach ~~⊗~~ or repeated breaches of the conditions of the general authorisation or of the rights of use **for radio spectrum and for numbers**, or specific obligations referred to in Article ~~613~~(2) ~~⊗~~ or Article 47 (1) or (2) ~~⊗~~, where measures aimed at ensuring compliance as referred to in paragraph 3 of this Article have failed, ~~⊗~~ Member States shall ensure that ~~⊗~~ national regulatory ~~⊗~~ and other competent ~~⊗~~ authorities may prevent an undertaking from continuing to provide electronic communications networks or services or suspend or withdraw rights of use. ~~⊗~~ Member States shall empower the ~~relevant~~ **competent** authority to impose ~~⊗~~ ~~Sanctions~~ and penalties which are effective, proportionate and dissuasive. ~~⊗~~ Such sanctions and penalties ~~⊗~~ may be applied to cover the period of any breach, even if the breach has subsequently been rectified.

↓ 2009/140/EC Art. 3.6(d) (adapted)

6. Irrespective of the provisions of paragraphs 2, 3 and 5, where the ~~relevant~~ **competent** authority has evidence of a breach of the conditions of the general authorisation ~~⊗~~ or of the ~~⊗~~ rights of use **for radio spectrum and for numbers** or of the specific obligations referred to in Article ~~613~~(2) ~~⊗~~ or Article 47(1) and (2) ~~⊗~~ that represents an immediate and serious threat to public safety, public security or public health or will create serious economic or operational problems for other providers or users of electronic communications networks or services or other users of the radio spectrum, it may take urgent interim measures to remedy the situation in advance of reaching a final decision. The undertaking concerned shall thereafter be given a reasonable opportunity to state its views and propose any remedies. Where appropriate, the ~~relevant~~ **competent** authority may confirm the interim measures, which shall be valid for a maximum of 3 months, but which may, in circumstances where enforcement procedures have not been completed, be extended for a further period of up to three months.

↓ 2002/20/EC (adapted)

7. Undertakings shall have the right to appeal against measures taken under this Article in accordance with the procedure referred to in Article 4 31 of ~~⊗~~ this ~~⊗~~ Directive ~~2002/21/EC~~ ~~(Framework Directive)~~.

↓ new

CHAPTER II

CONSISTENT SPECTRUM ASSIGNMENT

Article 35

Peer review process

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

- (a) in case of individual rights of use for radio spectrum, the selection process, in relation to Article 54;
- (b) the criteria regarding the eligibility of the bidder, where appropriate, in relation to Article 48 (4);
- (c) the parameters of spectrum economic valuation measures, such as the reserve price, in relation to Article 42;
- (d) the duration of the rights of use and the conditions for renewal in line with Articles 49 and Article 50;
- (e) any measures to promote competition pursuant to Article 52, when necessary;
- (f) the conditions related to the assignment, transfer, including trade and lease of rights of use for radio spectrum in relation to Article 51, sharing of spectrum or wireless infrastructure in relation to Article 59 paragraph 3 or the accumulation of rights of use in relation to Article 52 paragraph 2 (c) and (e); and

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

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

2. Where **the RSPG has been informed of a draft** ~~a national regulatory authority intends~~ **Member State has decided to assign rights of use for harmonised radio spectrum for electronic communications services or networks by way of a procedure limiting the number of rights of use pursuant to Article 54, and the [national regulatory authority] subsequently intends to take a national measure which falls within the scope of the selection procedure in Article 54 paragraph 2 ~~paragraph 1 (a) to (g), for bands for which the harmonised technical conditions have been set in order to enable use for wireless broadband, [the national regulatory authority]~~ it shall make the draft measure accessible, ~~together with the reasoning on which the measure is based,~~ to **its members, BEREC, and** the Commission ~~and [national regulatory competent authorities]~~ in other Member States, at the same time. **Where necessary, the RSPG may request the responsible competent authority provide further reasoning or background information on which the measure is based.****

3. ~~Within one month, or a longer period, up to three months if the [national regulatory authority] agrees to extend the deadline, BEREC shall issue a reasoned opinion on the draft measure, which shall analyse whether that measure would be~~ **The RSPG may invite the competent authority concerned for an exchange of views together with other members with a view to assess whether the measure is, as regards the matters referred to in paragraph 1,** the most appropriate in order to:

- (a) promote the development of the internal market as well as competition and maximise the benefits for the consumer, and overall achieve the objectives and principles set in Articles 3 and 45(2),
- (b) ensure effective and efficient use of radio spectrum; and

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

~~The reasoned opinion shall state if the draft measure should be amended or withdrawn. Where appropriate, **The competent authority may request the RSPG to defer such an exchange of views until a later preparatory stage in its national assignment procedure. Following such an exchange the RSPG** ~~BEREC~~ shall, where it deems appropriate, issue a reasoned opinion on any aspect of the draft measure relating to the matters referred to in paragraph 1 which may include ~~provide~~ specific recommendations. **Such an opinion shall be provided within one month, or up to three months if the competent authority agrees to extend the deadline, as to whether the draft measure should be amended or withdrawn** to that end. ~~[National regulatory~~ **Competent** authorities] and the ~~Commission~~ may also make comments on the draft decision to the ~~[national regulatory competent authority]~~ concerned.~~

4. When carrying out their tasks pursuant to this Article, **the RSPG**, BEREC and ~~national regulatory competent~~ authorities] shall have regard in particular to:

- (a) the objectives and principles provided in this Directive; as well as to any relevant Commission implementing decision adopted in accordance with this Directive as well as Decisions 676/2002/EC and 243/2012/EC;
- (b) any specific national objectives established by the Member State consistent with Union law;
- (c) the need to avoid that competition is distorted when adopting such measures;
- (d) the results of the most recent geographical survey of networks pursuant to Article 22; **and**
- (e) the need to ensure coherence with recent and pending assignment procedures in other Member States, and possible effects on trade between Member States.; ~~and~~
- (f) ~~any relevant opinion of the Radio Spectrum Policy Group.~~

5. The ~~national regulatory competent~~ authority] concerned shall ~~take utmost account of the opinion of BEREC and of comments made by the Commission and other national regulatory authorities in regard to any of the elements listed in paragraph 1 (a) to (g) before adopting its final decision. It shall~~ communicate the final decision adopted, **together with a reasoned justification**, to **the RSPG**, BEREC and the Commission.

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

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

6. When preparing their draft measure pursuant to this Article, ~~national regulatory competent~~ authorities] may seek support from **the Commission**, BEREC and **the RSPG**.

7. **The RSPG**, BEREC, the Commission and the ~~[national regulatory competent authority]~~ concerned shall cooperate closely to identify the most appropriate and effective solution in the light of the regulatory objectives and principles laid down in this Directive whilst taking due account of the views of market participants and the need to ensure the development of consistent regulatory practice.

~~8. The final decision adopted by the [national regulatory competent authority] shall be published.]~~

↓ 2002/20/EC (adapted)

Article ~~836~~

Harmonised assignment of radio spectrum frequencies

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

*Article 37***Joint authorisation process to grant individual rights of use for radio spectrum**

1. Two or several Member States may cooperate with each other and with the ~~Commission, RSPG and where appropriate BEREC to meet their obligations under Articles 13, 46 and 54,~~ by jointly establishing the common aspects of an authorisation process and, **where appropriate**, also jointly conducting the selection process to grant individual rights of use for radio spectrum, ~~in line, where applicable with any common timetable established in accordance with Article 53.~~ The joint authorisation process shall meet **When doing so, Member States may consider** the following criteria:

- (a) **jointly agreed scheduling of** the individual national authorisation processes shall be initiated and implemented ~~by the competent authorities~~ according to a jointly agreed schedule;
- (b) it shall provide where appropriate for ~~common conditions and procedures for the selection and granting of individual rights among the Member States concerned,~~ **where appropriate;**
- (c) it shall provide where appropriate for common or comparable conditions to be attached to the individual rights of use among the Member States concerned, **where appropriate**, inter alia allowing users to be assigned similar radio spectrum blocks;
- (d) it shall be ~~how and when~~ open **other Member States may join the process** at any time until the authorisation process has been conducted to other Member States.

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

⊠ PART II. NETWORKS ⊠

⊠ TITLE I: MARKET ENTRY AND DEPLOYMENT ⊠

Article ~~13~~ 42

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

1. Member States may allow the ~~relevant~~ ⊠ competent ⊠ authority to impose fees for the rights of use for radio ~~frequencies~~ ⇒ spectrum ⊠ ~~or numbers~~ or rights to install facilities on, over or under public or private property, ⇒ that are used for the provision of electronic communications services or networks and associated facilities ⊠ which ~~reflect the need to~~ ensure the optimal use of these resources. Member States shall ensure that such fees shall be objectively justified, transparent, non-discriminatory and proportionate in relation to their intended purpose and shall take into account the objectives in Articles ~~3, 4 and 45(2), (4) and (5), 8 of Directive 2002/21/EC (Framework Directive)~~ ⊠, as well as: ⊠

↓ new

- (a) ~~being service and technology neutral, subject only to limitations in line with Article 45(4) and (5), while promoting the effective and efficient use of spectrum and maximising social and economic utility of spectrum;~~
- (b) ~~taking into account the need to foster the development of innovative services; and~~
- (c) ~~taking into account possible alternative uses of the resources.~~

2. Member States shall ~~seek to ensure that reserve prices established as minimum fees for rights of use for radio spectrum are set at a level that ensures the efficient assignment of rights of use for spectrum, taking into account the possible alternative uses of the resources.~~ reflect the additional costs entailed by conditions attached to these rights in pursuit of the objectives under Articles 3, 4 and 45(2), such as coverage obligations that would fall outside normal commercial standards, in accordance with paragraph 1.

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

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

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

CHAPTER II

ACCESS TO RADIO SPECTRUM

SECTION 1 AUTHORISATIONS

↓ 2009/140/EC Art. 1.10 (adapted)
⇒ new

Article ~~94~~5

Management of radio ~~and~~ spectrum ~~and~~ frequencies ~~for electronic communications services~~

1. Taking due account of the fact that radio frequencies are ⇒ spectrum is ⇐ a public good that has an important social, cultural and economic value, Member States shall ensure the effective management of radio frequencies ⇒ spectrum ⇐ for electronic communications services ⇒ and networks ⇐ in their territory in accordance with Articles ~~83~~ and ~~48a~~. They shall ensure that ⇒ radio ⇐ spectrum allocation used for electronic communications services ⇒ and networks ⇐ and issuing general authorisations or individual rights of use of ⇐ for ⇐ such radio frequencies ⇒ spectrum ⇐ by competent national authorities are based on objective, transparent, non-discriminatory and proportionate criteria.

In applying this Article, Member States shall respect relevant international agreements, including the ITU Radio Regulations ⇒ and other agreements adopted in the framework of the ITU **applicable to radio spectrum, such as the agreement reached at the Regional Radiocommunications Conference of 2006** ⇐, and may take public policy considerations into account.

2. Member States shall promote the harmonisation of use of radio frequencies ⇒ spectrum ⇐ **for use by electronic communications services** across the Community ⇐ Union ⇐, consistent with the need to ensure effective and efficient use thereof and in pursuit of benefits for the consumer such as economies of scale and interoperability of services ⇐ and networks ⇐. In so doing, they shall act in accordance with Article ~~8a~~ 4 and with the Decision ~~No~~ 676/2002/EC (~~Radio Spectrum Decision~~) ⇒ by inter alia ⇐.

- (a) **ensuring pursuing wireless broadband** coverage of their national territory and/or population at high quality and speed, ~~both indoors and outdoors~~, including along major transport paths, including the trans-European transport network;
- (b) ~~ensuring that areas with similar characteristics, in particular in terms of network deployment or population density, are subject to consistent coverage conditions;~~
- (c) facilitating the rapid development in the Union of new wireless communications technologies and applications, including, where appropriate, in a cross-sectorial approach;
- (d) ensuring the prevention of cross-border or national harmful interference ~~in accordance with Articles 28 and 46 respectively, and taking appropriate pre-emptive and remedial measures to that end;~~
- (e) promoting the shared use of radio spectrum between similar and/or different uses of spectrum ~~through appropriate established sharing rules and conditions, including the protection of existing rights of use,~~ in accordance with ~~Union~~ **competition** law;
- (f) applying the most appropriate and least onerous authorisation system possible ~~in accordance with Article 46~~ in such a way as to maximise flexibility, ~~sharing~~ and efficiency in the use of radio spectrum;
- (g) ~~ensuring that~~ **applying** rules for the granting, transfer, renewal, modification and withdrawal of rights to use radio spectrum **that** are clearly and transparently defined and applied in order to guarantee regulatory certainty, consistency and predictability;
- (h) ~~ensuring~~ **pursuing** consistency and predictability throughout the Union regarding the way the use of radio spectrum is authorised in protecting public health **taking into account the Council Recommendation of 12 July 1999 on Exposure of the General Public to Electromagnetic Fields,** ~~against electromagnetic fields.~~

~~[When **In parallel to** adopting technical harmonisation measures under Decision No 676/2002/EC on harmonised conditions for the availability and efficient use of radio spectrum, the Commission may, following a request to the Radio Spectrum Policy Group and taking utmost account of the **resulting** opinion of Radio Spectrum Policy Group, adopt an implementing measure **a decision** setting out whether, pursuant to Article 46 of this Directive, **the most appropriate authorisation regime(s) for the rights in the harmonised band or parts thereof** shall be subject to a general authorisation or to individual rights of use. Those implementing measures **decisions** shall be adopted in accordance with the examination procedure referred to in Article 110(4).]~~

~~Where the Commission is considering acting to provide for **adopting** measures in accordance with Article 39 (1), (4), (5) and (6), it may seek the advice **opinion** of the Radio Spectrum Policy Group with regard to the implications of any such standard or specification for the coordination, harmonisation and availability of radio spectrum. The Commission shall take utmost account of the advice **opinion** of the Radio Spectrum Policy Group in taking any subsequent steps.~~

3. In case of a national or regional lack of market demand for the use of a harmonised band, and subject to the harmonisation measure adopted under Decision No 676/2002/EC, Member States may allow an alternative use of all or part of that band, including the existing use, in accordance with paragraphs 4 and 5, provided that:

- (a) the finding of a lack of market demand for the use of the harmonised band is based on a public consultation in line with Article 23;
- (b) such alternative use does not prevent or hinder the availability or the use of the harmonised band in other Member States; and
- (c) the Member State concerned takes due account of the long-term availability or use of the harmonised band in the Union and the economies of scale for equipment resulting from using the harmonised radio spectrum in the Union

The alternative use ~~shall only be allowed on an exceptional basis~~. It shall be subject to a **regular** review ~~every three years~~, or upon a **duly justified** request to the competent authority for use of the band in accordance with the harmonisation measure by a prospective user. The Member State shall inform the Commission and the other Member States of the decision taken as well as of the outcome of any review, together with its reasoning.

~~34.~~ Unless otherwise provided in the second subparagraph, Member States shall ensure that all types of technology used for **the provision of** electronic communications services ⇒ or networks ⇐ may be used in the radio ~~frequency bands~~ ⇒ spectrum ⇐, declared available for electronic communications services in their National Frequency Allocation Plan in accordance with ~~Community~~ ⊗ Union ⊗ law.

Member States may, however, provide for proportionate and non-discriminatory restrictions to the types of radio network or wireless access technology used for electronic communications services where this is necessary to:

- (a) avoid harmful interference;
- (b) protect public health against electromagnetic fields ⊗, taking utmost account of Council Recommendation No 1999/519/EC⁸; ⊗
- (c) ensure technical quality of service;
- (d) ensure maximisation of ~~radio frequency sharing~~ **radio spectrum sharing** ⇒ shared use of radio spectrum resources, in accordance with Union law; ⇐
- (e) safeguard efficient use of ⇒ radio ⇐ spectrum; or
- (f) ensure the fulfilment of a general interest objective in accordance with paragraph ~~54.~~

~~45.~~ Unless otherwise provided in the second subparagraph, Member States shall ensure that all types of electronic communications services may be provided in the radio ~~frequency bands~~ ⇒ spectrum ⇐, declared available for electronic communications services in their National Frequency Allocation Plan in accordance with ~~Community~~ ⊗ Union ⊗ law. Member States may, however, provide for proportionate and non-discriminatory restrictions to the types of electronic communications services to be provided, including, where necessary, to fulfil a requirement under the ITU Radio Regulations.

⁸ Recommendation 1999/519/EC of the Council of 12 July 1999 on the limitation of exposure of the general public to electromagnetic fields (0 Hz to 300 GHz) (OJ L 1999, 30.7.1999, p. 59).

Measures that require an electronic communications service to be provided in a specific band available for electronic communications services shall be justified in order to ensure the fulfilment of a general interest objective as defined by Member States in conformity with ~~Community~~

Union law, such as, and not limited to:

- (a) safety of life;
- (b) the promotion of social, regional or territorial cohesion;
- (c) the avoidance of inefficient use of radio ~~frequencies~~ spectrum ; or
- (d) the promotion of cultural and linguistic diversity and media pluralism, for example by the provision of radio and television broadcasting services.

A measure which prohibits the provision of any other electronic communications service in a specific band may only be provided for where justified by the need to protect safety of life services. Member States may, exceptionally, also extend such a measure in order to fulfil other general interest objectives as defined by Member States in accordance with ~~Community~~ Union law.

~~65.~~ Member States shall regularly review the necessity of the restrictions referred to in paragraphs ~~34~~ and ~~45~~, and shall make the results of these reviews public.

↓ new

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

↓ 2009/140/EC Art. 1.10

~~6. Paragraphs 3 and 4 shall apply to spectrum allocated to be used for electronic communications services, general authorisations issued and individual rights of use of radio frequencies granted after 25 May 2011.~~

~~Spectrum allocations, general authorisations and individual rights of use which existed by 25 May 2011 shall be subject to Article 9a.~~

~~7. Without prejudice to the provisions of the Specific Directives and taking into account the relevant national circumstances, Member States may lay down rules in order to prevent spectrum hoarding, in particular by setting out strict deadlines for the effective exploitation of the rights of use by the holder of the rights and by applying penalties, including financial penalties or the withdrawal of the rights of use in case of non-compliance with the deadlines. These rules shall be established and applied in a proportionate, non-discriminatory and transparent manner.~~

↓ 2009/140/EC Art. 3.3 (adapted)
⇒ new

Article ~~5~~ 46

~~Rights of use for radio frequencies and numbers~~ ☒ **Authorisation of the use of radio spectrum** ☒

1. Member States shall facilitate the use of radio ⇒ spectrum, including shared use, ⇐ frequencies under general authorisations ⇒ and limit the granting of individual rights or use for radio spectrum to situations where such rights are necessary to maximise efficient use in the light of demand and, taking into account the criteria set out in the second subparagraph ⇐ . ⇒ In all other cases, they shall set out the conditions for the use of radio spectrum in a general authorisation. ⇐

⇒ To this end, Member States shall decide on the most appropriate regime for authorising the use of radio spectrum, taking account of ⇐ ~~Where necessary, Member States may grant individual rights of use in order to:~~

↓ new

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

↓ 2009/140/EC Art. 3.3
⇒ new

(b) ⇒ the need to protect against ~~avoid~~ harmful interference;

↓ new

(c) the requirements for **development** of a reliable sharing ~~arrangement~~ **conditions**, where appropriate;

↓ 2009/140/EC Art. 3.3 (adapted)
⇒ new

(d) ⇒ the **need** ~~appropriate level of receiver resilience~~ to ensure technical quality of communications or ~~service~~;

~~safeguard efficient use of spectrum, or~~

(e) ~~fulfil other~~ objectives of general interest as defined by Member States in conformity with ~~Community~~ Union law.

↓ new

When applying a general authorisation or individual rights taking in account measures adopted under Decision No 676/2002/EC where the radio spectrum band concerned has been harmonised, Member States shall seek to minimise problems of harmful interference, including in cases of shared use of radio spectrum on the basis of a combination of general authorisation and individual rights of use. ~~In so doing, they shall have regard to the need:~~

~~to maintain incentives for incorporation of resilient receiver technologies in devices;~~

~~to prevent impediments caused by alternative users;~~

~~to avoid to the best extent possible the application of the non-interference, non-protection principle to general authorisation regimes; and~~

~~where that principle still applies, to protect against out-of-band interference.~~

2. When taking a decision pursuant to paragraph 1 with a view to facilitating the shared use of radio spectrum, the competent authorities shall ensure that the ~~rules and~~ conditions for the shared use of radio spectrum are clearly set out ~~and concretely specified~~ in the acts of authorisation.

3. ~~The Commission may, taking utmost account of the opinion of the Radio Spectrum Policy Group, adopt implementing measures on the modalities of application of the criteria, rules and conditions referred to in paragraphs 1 and 2 with regard to harmonised radio spectrum. It shall adopt these measures in accordance with the examination procedure referred to in Article 110(4).~~

Article 47

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

1. Competent authorities shall attach conditions to individual rights ~~and general authorisations to~~ use **for** radio spectrum in accordance with Article 13(1) in such a way as to ensure the most effective and efficient use of radio spectrum ~~by the beneficiaries of the general authorisation or the holders of individual rights or by any third party to which an individual right or part thereof has been traded or leased~~. They shall clearly define any such conditions including ~~the~~ **any** level of use required and the possibility to trade and lease in relation to this obligation in order to ensure the implementation of those conditions in line with Article 30. Conditions attached to renewals of right of use for radio spectrum may not provide undue advantages to existing holders of those rights.

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

- a. ~~the possibility to combine complementary bands in a single assignment process; and~~
- b. ~~the relevance of the size of radio spectrum blocks or of the possibility to combine such blocks in relation to the possible uses thereof, considering in particular the needs of new emerging communications systems.~~

Competent authorities shall timely consult and inform interested parties regarding conditions attached to individual usage rights ~~and general authorisations~~ in advance of their imposition. They shall determine in advance and inform interested parties in a transparent manner of the criteria for the assessment of the fulfilment of these conditions.

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

~~[3. The Commission, **taking utmost account of the opinion of the Radio Spectrum Policy Group**, may adopt implementing measures **decisions regarding the criteria for defining** in order to specify the modalities of applying the conditions that Member States may attach to authorisations to use harmonised radio spectrum in accordance with paragraphs 1 and 2, with the exception of fees **imposed** pursuant to Article 42.~~

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

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

⊗ SECTION 2 RIGHTS OF USE ⊗

Article 48

⊗ Granting of individual rights of use for radio spectrum ⊗

1. Where it is necessary to grant individual rights of use for radio ~~frequencies and numbers~~
⇒ spectrum ⇐, Member States shall grant such rights, upon request, to any undertaking for the provision of networks or services under the general authorisation referred to in Article 312, subject to the provisions of Articles 613, 754 and 1121(1)(c) of this Directive and any other rules ensuring the efficient use of those resources in accordance with ⊗ this ⊗ Directive ~~2002/21/EC~~ (~~Framework Directive~~).

2. Without prejudice to specific criteria and procedures adopted by Member States to grant rights of use of ⊗ for ⊗ radio ~~frequencies~~ ⇒ spectrum ⇐ to providers of radio or television broadcast content services with a view to pursuing general interest objectives in conformity with ~~Community~~ ⊗ Union ⊗ law, the rights of use for radio ~~frequencies and numbers~~ ⇒ spectrum ⇐ shall be granted through open, objective, transparent, non-discriminatory and proportionate procedures, and, in the case of radio frequencies, in accordance with the provisions of Article 945 of Directive ~~2002/21/EC~~ (~~Framework Directive~~).

3. An exception to the requirement of open procedures may apply in cases where the granting of individual rights of use of ⊗ for ⊗ radio ~~frequencies~~ ⇒ spectrum ⇐ to the providers of radio or television broadcast content services is necessary to achieve a general interest objective as defined by Member States in conformity with ~~Community~~ ⊗ Union ⊗ law.

↓ new

4. Competent authorities shall consider applications for individual rights of use for radio spectrum in the context of selection procedures pursuant to objective, transparent, proportionate and non-discriminatory eligibility criteria that are set out in advance and reflect the conditions to be attached to such rights. They shall be able to request all necessary information from applicants to assess, on the basis of said criteria, applicants' ability to comply with the conditions. Where on the basis of the assessment, the authority concludes that an applicant does not possess the required ability, it shall provide a duly reasoned decision to that effect.

↓ 2009/140/EC Art. 3.3 (adapted)
⇒ new

5. When granting rights of use, Member States shall specify whether those rights can be transferred ⇒ or leased ⇐ by the holder of the rights, and under which conditions. In the case of radio frequencies ⇒ spectrum ⇐, such provision shall be in accordance with Articles ~~9~~45 and ~~9b~~ 51 of this Directive ~~2002/21/EC (Framework Directive)~~.

~~Where Member States grant rights of use for a limited period of time, the duration shall be appropriate for the service concerned in view of the objective pursued taking due account of the need to allow for an appropriate period for investment amortisation.~~

~~Where individual rights to use radio frequencies are granted for 10 years or more and such rights may not be transferred or leased between undertakings pursuant to Article 9b of Directive 2002/21/EC (Framework Directive) the competent national authority shall ensure that the criteria to grant individual rights of use apply and are complied with for the duration of the licence, in particular upon a justified request of the holder of the right. If those criteria are no longer applicable, the individual right of use shall be changed into a general authorisation for the use of radio frequencies, subject to prior notice and after a reasonable period, or shall be made transferable or leaseable between undertakings in accordance with Article 9b of Directive 2002/21/EC (Framework Directive).~~

36. Decisions on the granting of rights of use shall be taken, communicated and made public as soon as possible after receipt of the complete application by the ~~[national regulatory competent authority]~~, ~~within three weeks in the case of numbers that have been allocated for specific purposes within the national numbering plan and~~ within six weeks in the case of radio ~~⇨ spectrum ⇩~~ ~~frequencies~~ ⇨ declared available for ⇩ ~~that have been allocated to be used by~~ electronic communications services ~~within the~~ ~~⇩~~ in their ~~⇩~~ national frequency allocation plan. ~~The latter~~ ~~⇩~~ This ~~⇩~~ time limit shall be without prejudice to **Article 54(8) and to** any applicable international agreements relating to the use of radio ~~frequencies~~ ⇨ spectrum ⇩ or of orbital positions.

↓ 2009/140/EC Art. 3.3 (adapted)
⇨ new

Article 49

⇩ Duration of rights ⇩

1. Where Member States ⇨ authorise the use of **harmonized** radio spectrum **for electronic communications services or networks** through individual ⇩ ~~grant~~ rights of use for a limited period of time, **in particular for bands for which technical conditions have been set in order to enable the use for wireless broadband**, ⇨ they shall ensure that the authorisation is granted for a period that is ⇩ ~~the duration shall be~~ appropriate ~~for the service concerned~~ in view of the objective pursued taking due account of the need to ⇨ ensure effective and efficient use and promote efficient investments, including ⇩ ~~allow~~ ⇩ by allowing ⇩ for an appropriate period for investment amortisation **and communicate these considerations in a timely, transparent and predictable manner. This subparagraph does not apply**

~~[2. Where Member States grant rights of use for harmonised radio spectrum for electronic communications services or networks for a limited period of time, in particular in bands for which technical conditions have been set in order to enable use of wireless broadband, those rights of use for harmonised radio spectrum shall be valid for a duration of at least [25] years, except in the case of temporary rights, temporary extension adjustment of rights pursuant to paragraph 3 and rights for secondary use in such harmonised bands.~~

~~Member States may amend rights of use in accordance with Article 18, in particular to ensure that the conditions continue to reflect efficient and effective use of the spectrum.~~

~~Member States may also withdraw rights of use, in accordance with Article 30 (5) in case of serious breach or repeated breaches of the conditions attached to a right, including that regarding a required level of use where imposed, or, in accordance with Article 19 if efficient and effective use of the spectrum cannot otherwise be ensured.]~~

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

Article 50

Renewal of rights

1. Competent authorities ~~shall~~ **may** take a decision on the renewal of individual rights of use for harmonised radio spectrum **in a timely manner** ~~at least 3 years before the expiry of those rights.~~ They ~~shall~~ **may** consider such renewal, whether at their own initiative or upon request by the right holder, in the latter case not earlier than 5 years prior to expiry of the rights concerned. This shall be without prejudice to renewal clauses applicable to existing rights.

2. In taking a decision pursuant to paragraph 1, competent authorities shall ~~have regard to the following considerations~~ **consider, inter alia:**

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

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

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

(d) the need to promote, or avoid any distortion of, competition in line with Article 52;

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

(f) the need to avoid severe service disruption.

3. When considering possible renewal of individual rights of use for **harmonised** radio spectrum for which the number of rights of use is limited **pursuant to paragraph 2**, competent authorities shall conduct an open, transparent and non-discriminatory procedure ~~to examine the criteria in paragraph 2~~, and shall, ~~in particular~~, **inter alia**:

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

(b) clearly state the reasons for such possible renewal.

If as a result of the consultation pursuant to the first subparagraph, there is evidence of market demand from undertakings other than those holding rights of use for spectrum in the band concerned, the competent authority shall **decide whether to renew** ~~grant~~ **the rights or to organise a new selection procedure in order to grant the rights of use** pursuant to Article 54.

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

~~Article 9a~~

~~Review of restrictions on existing rights~~

~~1. For a period of five years starting from 25 May 2011, Member States may allow holders of rights to use radio frequencies which were granted before that date and which will remain valid for a period of not less than five years after that date, to submit an application to the competent national authority for a reassessment of the restrictions on their rights in accordance with Article 9(3) and (4):~~

~~Before adopting its decision, the competent national authority shall notify the right holder of its reassessment of the restrictions, indicating the extent of the right after reassessment, and shall allow him a reasonable time limit to withdraw his application.~~

~~If the right holder withdraws his application, the right shall remain unchanged until its expiry or until the end of the five-year period, whichever is the earlier date.~~

~~2. After the five-year period referred to in paragraph 1, Member States shall take all appropriate measures to ensure that Article 9(3) and (4) apply to all remaining general authorisations or individual rights of use and spectrum allocations used for electronic communications services which existed on 25 May 2011.~~

~~3. In applying this Article, Member States shall take appropriate measures to promote fair competition.~~

~~4. Measures adopted in applying this Article do not constitute the granting of new rights of use and therefore are not subject to the relevant provisions of Article 5(2) of Directive 2002/20/EC (Authorisation Directive).~~

↓ 2002/20/EC (adapted)

Article 17

Existing authorisations

↓ 2009/140/EC Art. 3.10 (adapted)

~~1. Without prejudice to Article 9a of Directive 2002/21/EC (Framework Directive), Member States shall bring general authorisations and individual rights of use already in existence on 31 December 2009 into conformity with Articles 5, 6, 7, and the Annex of this Directive 19 December 2011 at the latest.~~

~~2. Where application of paragraph 1 results in a reduction of the rights or an extension of the general authorisations and individual rights of use already in existence, Member States may extend the validity of those authorisations and rights until 30 September 2012 at the latest, provided that the rights of other undertakings under Community law are not affected thereby. Member States shall notify such extensions to the Commission and state the reasons therefor.~~

↓ 2002/20/EC (adapted)

~~3. Where the Member State concerned can prove that the abolition of an authorisation condition regarding access to electronic communications networks, which was in force before the date of entry into force of this Directive, creates excessive difficulties for undertakings that have benefited from mandated access to another network, and where it is not possible for these undertakings to negotiate new agreements on reasonable commercial terms before the date of application referred to in Article 18(1), second subparagraph, Member States may request a temporary prolongation of the relevant condition(s). Such requests shall be submitted by the date of application referred to in Article 18(1), second subparagraph, at the latest, and shall specify the condition(s) and period for which the temporary prolongation is requested.~~

~~The Member State shall inform the Commission of the reasons for requesting a prolongation. The Commission shall consider such a request, taking into account the particular situation in that Member State and of the undertaking(s) concerned, and the need to ensure a coherent regulatory environment at a Community level. It shall take a decision on whether to grant or reject the request, and where it decides to grant the request, on the scope and duration of the prolongation to be granted. The Commission shall communicate its decision to the Member State concerned within six months after receipt of the application for a prolongation. Such decisions shall be published in the Official Journal of the European Communities.~~

↓ 2009/140/EC Art. 1.11 (adapted)
⇒ new

Article ~~9b~~51

**Transfer or lease of individual rights ~~to~~ of use for radio frequencies
spectrum**

1. Member States shall ensure that undertakings may transfer or lease to other undertakings in accordance with conditions attached to the rights of use of for radio frequencies
⇒ spectrum ⇐ and in accordance with national procedures individual rights ~~to~~ of use of for radio frequencies ⇐ spectrum ⇐ in the bands for which this is provided **in Union law or** in the implementing measures adopted pursuant to paragraph ~~3~~ 4 ⇒ or by any other Union measure such as the a radio spectrum policy programme adopted pursuant to Article 4(4) ⇐.

In other bands, Member States may also make provision for undertakings to transfer or lease individual rights ~~to~~ of use of for radio frequencies to other undertakings in accordance with national procedures.

Without prejudice to paragraph 3, ~~the~~ conditions attached to individual rights ~~to~~ of use for radio frequencies ⇐ spectrum ⇐ shall continue to apply after the transfer or lease, unless otherwise specified by the competent ~~national~~ authority.

Member States may also determine that the provisions of this paragraph shall not apply where the undertaking's individual right to use radio frequencies was initially obtained free of charge.

2. Member States shall ensure that an undertaking's intention to transfer rights ~~to~~ of use for radio frequencies \Rightarrow spectrum \Leftarrow , as well as the effective transfer thereof is notified in accordance with national procedures to the \Rightarrow national regulatory authority and to the \Leftarrow competent national authority responsible for granting individual rights of use if different and is made public.

Where the use of radio frequency use \Rightarrow spectrum \Leftarrow has been harmonised through the application of the Decision No 676/2002/EC (Radio Spectrum Decision) or other Community Union measures, any such transfer shall comply with such harmonised use.

↓ new

3. Where undertakings notify their intention to transfer or lease rights of use for radio spectrum in accordance with paragraph 2 Member States shall allow ~~the such~~ transfer or lease of rights of use for radio spectrum where the original conditions attached to the rights of use are maintained. Without prejudice to the need to ensure the absence of a distortion of competition, in particular in accordance with Article 52 of this Directive, Member States shall:

- (a) submit trading and leasing to the least onerous procedure possible;
- (b) following notification by the lessor, not refuse the lease of rights of use for radio spectrum unless the lessor does not undertake to remain liable for meeting the original conditions attached to the rights of use;
- (c) following a request by the parties, approve the transfer of rights of use for radio spectrum unless the new holder is unable to meet the original conditions for the right of use.

Points (a) to (c) are without prejudice to the Member States' competence to enforce compliance with the conditions attached to the rights of use at any time both with regard to the lessor and the lessee, in accordance with their national law.

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

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

3a. Notwithstanding paragraphs 2 and 3, Member States may take appropriate measures to protect public security and the safe functioning of vital national infrastructure and services in accordance with Union law

↓ 2009/140/EC (adapted)
⇒ new

~~142.~~ The Commission may adopt appropriate **technical** implementing ~~measures~~ **decisions** to identify the bands for which rights ~~to~~ of use for radio frequencies may be transferred or leased between undertakings. These measures shall not cover frequencies which are used for broadcasting.

These technical implementing **decisions** ~~measures, designed to amend non-essential elements of this Directive by supplementing it,~~ shall be adopted in accordance with the **regulatory** ⇒ examination ⇐ procedure ~~with scrutiny~~ referred to in Article 110(4) ~~22(3).~~

*Article 52***Competition**

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

2. When Member States grant, amend or renew rights of use for radio spectrum, their ~~¶~~national regulatory authorities may take appropriate measures such as:

- (a) limiting the amount of radio spectrum for which rights of use are granted to any undertaking, or attaching conditions to such rights of use, such as the provision of wholesale access, national or regional roaming, in certain bands or in certain groups of bands with similar characteristics;
- (b) reserving, if appropriate in regard to an exceptional situation in the national market, a certain part of a frequency band or group of bands for assignment to new entrants;
- (c) refusing to grant new rights of use for radio spectrum or to allow new radio spectrum uses in certain bands, or attaching conditions to the grant of new rights of use for radio spectrum or to the authorisation of new radio spectrum uses, in order to avoid the distortion of competition by any assignment, transfer or accumulation of rights of use;
- (d) prohibiting or imposing conditions on transfers of rights of use for radio spectrum, not subject to national or Union merger control, where such transfers are likely to result in significant harm to competition;
- (e) amending the existing rights in accordance with this Directive where this is necessary to remedy ex post a distortion of competition by any transfer or accumulation of rights of use for radio spectrum.

~~[National regulatory authorities]~~ shall, taking into account market conditions and available benchmarks, base their decision on an objective and forward-looking assessment of ~~the market competitive conditions and~~ of whether such measures are necessary to maintain or achieve effective competition and of the likely effects of such measures on existing and future investments by market operators in particular for network roll-out.

3. When applying paragraph 2, national regulatory authorities shall act in accordance with the procedures provided in Articles 18, 19, 23 ~~[and 35]~~ of this Directive.

SECTION 3 PROCEDURES

Article 53

[Coordinated timing of assignments]

1. Member States shall cooperate in ~~In~~ order to coordinate the use of harmonised radio spectrum, in particular in bands for which the technical conditions have been harmonised in order to enable their use for wireless broadband, in the Union ~~and~~ taking due account of the different national market situations., ~~the Commission may, after requesting an opinion from the RSPG regarding a recommended date or timeframe and taking utmost account of the resulting opinion,~~ by way of an implementing measure ~~decision~~. **This may include identifying**

~~(a) establish one, or, where appropriate, several common maximum dates by which the use of specific harmonised radio spectrum bands shall be authorised.;~~ **subject to market demand. Any lack of market demand shall be properly substantiated and kept under constant review by the Member State which invokes it.**

~~(b) where necessary to ensure the effectiveness of coordination, adopt any transitional measure regarding the duration of rights pursuant to Article 49, such as an extension or a reduction of their duration, in order to adapt existing rights or authorisations to such harmonised date.~~

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

[2. In bands for which the technical conditions have been harmonised in order to enable their use for wireless broadband, Member States shall allow the use of radio spectrum, and, if necessary, adopt any general authorisation or grant individual rights as soon as possible and at the latest two years from the adoption of harmonised technical conditions pursuant to Article 4 of Decision N°676/2002/EC, unless the relevant decision specifies otherwise.

3. A Member State may however delay the two year deadline provided for in paragraph 2 for a specific band:

(a) to the extent justified by a restriction to the usage of that band imposed on general interest grounds as allowed under Article 45(5)(a) or (d), and

(b) to the extent necessary and for up to another two years in case of

- lack of market demand, without prejudice to Article 45(3);

- unresolved cross-border coordination issues resulting in harmful interference;

- financial costs of transition exceeding the expected revenue generated by award procedure;

- needs for national security and defense;

- force majeure.]

↓ 2002/20/EC (adapted)

Article ~~7~~ 54

⊗ Procedure for limiting the number of rights of use to be granted for radio spectrum ⊗

↓ 2009/140/EC Art. 3.5(a) (adapted)
⇒ new

1. ⊗ Without prejudice to ~~any implementing act adopted pursuant to Article 53,~~ ⊗ ~~where~~ a Member State ⇒ concludes that a right to use radio spectrum cannot be granted pursuant to ~~Article 46~~ **under a general authorisation** ⊗ and where it considers ⊗ ~~is considering~~ whether to limit

the number of rights of use to be granted for radio ~~⇒ spectrum ⇐ frequencies or whether to extend~~
~~the duration of existing rights other than in accordance with the terms specified in such rights~~, it
shall inter alia:

↓ 2002/20/EC (adapted)
⇒ new

(a) ⇒ clearly state the reasons for limiting the rights of use, in particular ⇐ by giving ~~give~~ due weight to the need to maximise benefits for users and to facilitate the development of competition ⇒ , and review the limitation at regular intervals or at the reasonable request of affected undertakings ⇐ ;

(b) give all interested parties, including users and consumers, the opportunity to express their views on any limitation through a public consultation in accordance with Article 236 of ~~Directive 2002/21/EC (Framework Directive)~~ ⇒ . In the case of harmonised radio spectrum, this public consultation shall start within ~~six~~ **twelve** months of the adoption of the implementing measure under Decision No 676/2002/EC unless ~~technical~~ **objective** reasons ~~therein~~ require a longer deadline ⇐ ;

↓ new

2. When a Member State concludes that the number of rights of use has to be limited, it shall clearly define and justify the objectives pursued with the selection procedure, and where possible quantify them, giving due weight to the need to fulfil national and internal market objectives. The objectives that the Member State may set out with a view to design the specific selection procedure shall, **in addition to promoting competition**, be limited to ~~one or more of~~ the following:

(a) promoting coverage;

(b) **ensuring the** required quality of service;

(c) promoting ~~competition~~ **efficient use of spectrum; and**

(d) promoting innovation and business development; ~~and.~~

(e) ~~ensuring that fees promote optimal use of radio spectrum in accordance with Article 42;~~

The ~~national regulatory authority~~ shall clearly define and justify the choice of the selection procedure, including any preliminary phase to access the selection procedure. ~~It shall also clearly state the outcome of any related assessment of the competitive, technical and economic situation of the market and provide reasons for the possible use and choice of measures pursuant to Article 35.~~

↓ 2009/140/EC Art. 3.5(a) (adapted)
⇒ new

3. ~~(e)~~ Member States shall publish any decision on the selection procedure chosen and the related **elements conditions** ~~to limit the granting of rights of use or the renewal of rights of use,~~ clearly stating the reasons therefor ~~and how it has taken into account the measure adopted by the national regulatory authority in accordance with Article 35.~~ It shall also publish the conditions that will be attached to the rights of use.

↓ 2002/20/EC (adapted)
⇒ new

~~4. (d)~~ After having determined the procedure, ☒ the Member State shall ☒ invite applications for rights of use; ~~and~~

~~(e) review the limitation at reasonable intervals or at the reasonable request of affected undertakings.~~

~~52.~~ Where a Member State concludes that further rights of use for radio ⇒ spectrum ⇐ frequencies ⇒ or a combination of different types of rights ⇐ can be granted, ⇒ taking into consideration advanced methods for protection against harmful interference, ⇐ it shall publish that conclusion and ⇒ initiate the process of granting ⇐ invite applications for such rights.

↓ 2009/140/EC Art. 3.5(b) (adapted)
⇒ new

~~63.~~ Where the granting of rights of use for radio ⇒ spectrum ⇐ frequencies needs to be limited, Member States shall grant such rights on the basis of selection criteria ⇒ and a procedure determined by their national regulatory authorities pursuant to Article 35, ⇐ which must be objective, transparent, non-discriminatory and proportionate. Any such selection criteria must give due weight to the achievement of the objectives of Article 8 of Directive 2002/21/EC (Framework Directive) and of the requirements of Articles 3, 4, 28 and 459 of that Directive.

↓ new

~~[7. The Commission may adopt implementing measures setting criteria in order to coordinate the implementation of the obligations under paragraphs 1 to 3 by Member States. The implementing measures shall be adopted in accordance with the procedure referred to in Article 110(4) and taking utmost account of the opinion of the Radio Spectrum Policy Group.]~~

↓ 2002/20/EC → ₁ 2009/140/EC Art. 3.5(c) ⇒ new

84. Where competitive or comparative selection procedures are to be used, Member States may extend the maximum period of six weeks referred to in Article 48(6) ~~5(3)~~ for as long as necessary to ensure that such procedures are fair, reasonable, open and transparent to all interested parties, but by no longer than eight months ~~⇒, subject to any specific timetable established pursuant to Article 53~~ ~~←~~.

Those time limits shall be without prejudice to any applicable international agreements relating to the use of radio ~~⇒ spectrum~~ ~~← frequencies~~ and satellite coordination.

95. This Article is without prejudice to the transfer of rights of use for radio ~~⇒ spectrum~~ ~~← frequencies~~ in accordance with ~~→~~₁ Article 51~~9b~~ ~~←~~ of this Directive ~~2002/21/EC (Framework Directive)~~.

↓ new

CHAPTER III

DEPLOYMENT AND USE OF WIRELESS NETWORK EQUIPMENT

Article 55

Access to radio local area networks

1. Competent authorities shall allow the provision of access through radio local area networks to a public communications network as well as the use of the harmonised radio spectrum for that provision, subject only to applicable general authorisation conditions **relating to radio spectrum use**.

Where that provision is not ~~commercial in character~~ **part of an economic activity** or is ancillary to another ~~commercial~~ **economic** activity or public service which is not dependent on the conveyance of signals on those networks, any undertaking, public authority or end-user providing such access shall not be subject to any general authorisation for the provision of electronic communications networks or services pursuant to Article 12, to obligations regarding end-users rights pursuant to Title III of Part III of this Directive nor to obligations to interconnect their networks pursuant to Article 59 (1).

Without prejudice to Article 12 of Directive 2002/22/EC, end-users allowing third party access to their internet access service on a non-commercial basis to third parties as set out under this article otherwise than as part of their economic activity shall not, by virtue of providing such access, be liable for any use of that access nor for information transmitted by such parties over that access.

2. Competent authorities shall not prevent providers of public communications networks or publicly available electronic communications services from allowing access to their networks to the public, through radio local area networks, which may be located at an end-user's premises, subject to compliance with the applicable general authorisation conditions and the prior informed agreement of the end-user.

3. ~~In line in particular with Article 3(1) of Regulation 2015/2120 of the European Parliament and of the Council,~~⁹ ~~competent~~ **Competent** authorities shall ensure that providers of public communications networks or publicly available electronic communications services do not unilaterally ~~restrict~~ **prevent end-users from:**

- a) ~~the right of end-users to accede to~~ **accessing** radio local area networks of their choice provided by third parties; **or**
- b) ~~the right of end-users to allow~~ **allowing** reciprocally or more generally ~~accessing to~~ the networks of such providers by other end-users through radio local area networks, including on the basis of third-party initiatives which aggregate and make publicly accessible the radio local area networks of different end-users.

⁹ ~~Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union, OJ L 310, 26.11.2015, p. 1~~

~~To that end, providers of public communications networks or publicly available electronic communications services shall make available and actively offer, clearly and transparently, products or specific offers allowing its end-users to provide access to third parties through a radio local area network.~~

4. Competent authorities shall not ~~restrict~~ **prevent** ~~the right of end-users from allowing to allow~~ reciprocally or more generally access to their radio local area networks by other end-users, including on the basis of third-party initiatives which aggregate and make the radio local area networks of different end-users publicly accessible.

5. Competent authorities shall not restrict the provision of access to radio local area networks to the public:

- (a) by public ~~authorities~~ **sector bodies** ~~on or in the immediate~~ **public spaces close** to vicinity of premises occupied by such public ~~authorities~~ **sector bodies**, when that provision is ancillary to the public services provided on those premises;
- (b) by initiatives of non-governmental organisations or public ~~authorities~~ **sector bodies** to aggregate and make reciprocally or more generally accessible the radio local area networks of different end-users, including, where applicable, the radio local area networks to which public access is provided in accordance with point (a).

Article 56

Deployment and operation of small-area wireless access points

1. Without prejudice to the application of the essential requirements of Directive 2014/53/EU¹⁰, to the competence of Member States to establish binding rules regarding the protection of the environment and human health against electromagnetic fields, and to the authorisation regime applicable for the use of the relevant radio spectrum, competent authorities may only subject shall allow the deployment, connection and operation of unobtrusive small-area wireless access points under the to a general authorisation, which shall include all relevant requirements and conditions thereof, unless individual authorisation is properly justified in exceptional cases defined in advance, in which case such individual authorisation shall be granted within four months from receipt of the request. regime and shall not unduly restrict that deployment, connection or operation through individual town planning permits or in any other way, whenever such use is in compliance with implementing measures adopted pursuant to paragraph 2. The small area wireless access points shall not be subject to any fees or charges going beyond the administrative charge that may be associated to the general authorisation in accordance with Article 16.

~~This paragraph is without prejudice to the authorisation regime for the radio spectrum employed to operate small area wireless access points.~~

¹⁰ Directive 2014/53/EU of the European Parliament and of the Council of 16 April 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment and repealing Directive 1999/5/EC

2. In order to ensure the uniform implementation of the general authorisation regime for the deployment, connection and operation of small area wireless access points, the Commission may, by means of an implementing act, specify technical characteristics for the design, deployment and operation of small area wireless access points, which Member States shall define in advance any applicable restrictions in terms of size, power, visual impact and electromagnetic characteristics, for small area wireless access points. Technical characteristics for the design, deployment and operation of small-area wireless access points shall at a minimum comply with the requirements of Directive 2013/35/EU¹¹ and take account of the thresholds defined in Council Recommendation No 1999/519/EC.¹² The Commission shall specify those technical characteristics by reference to the maximum size, power and electromagnetic characteristics, as well as the visual impact, of the deployed small area wireless access points. Compliance with the specified characteristics shall ensure that small area wireless access points are unobtrusive when in use in different local contexts. Any imposition of a more stringent threshold shall be duly justified in advance.

The technical characteristics specified in order for the deployment, connection and operation of small area wireless access point to benefit from paragraph 1 shall be without prejudice to the essential requirements of Directive 2014/53/EU.¹³

¹¹ Directive 2013/35/EU of the European Parliament and of the Council of 26 June 2013 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (electromagnetic fields) (20th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) and repealing Directive 2004/40/EC (OJ L 179, 29.6.2013, p. 1).

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

¹³ Directive 2014/53/EU of the European Parliament and of the Council of 16 April 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment and repealing Directive 1999/5/EC (OJ L 153, 22.5.2014, p.62)

~~Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 110(4).~~

3. Without prejudice to any commercial agreements, the The small-area wireless access points shall not be subject to any fees or charges going beyond the administrative charge that may be associated to the general authorisation in accordance with Article 16.

CHAPTER II

ACCESS AND INTERCONNECTION

Article ~~559~~

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

↓ 2009/140/EC Art. 2.3(a)
⇒ new

1. National regulatory authorities shall, acting in pursuit of the objectives set out in Article ~~3~~ ~~8~~ of ~~Directive 2002/21/EC (Framework Directive)~~, encourage and where appropriate ensure, in accordance with the provisions of this Directive, adequate access and interconnection, and the interoperability of services, exercising their responsibility in a way that promotes efficiency, sustainable competition, ⇒ the deployment of very high capacity networks ⇐, efficient investment and innovation, and gives the maximum benefit to end-users. ⇒ They shall provide guidance and make publicly available the procedures applicable to gain access and interconnection to ensure that small and medium-sized enterprises and operators with a limited geographical reach can benefit from the obligations imposed. ⇐

↓ 2002/19/EC (adapted)
⇒ new

In particular, without prejudice to measures that may be taken regarding undertakings with significant market power in accordance with Article ~~866~~, national regulatory authorities shall be able to impose:

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

↓ 2009/140/EC Art. 2.3(a) amended by
Corrigendum, OJ L 241, 10.9.2013, p. 8
⇒ new

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

↓ new

(c) in justified cases, obligations on providers of number-independent interpersonal
communications services to make their services interoperable, namely where access to
emergency services or end-to-end connectivity between end-users is endangered due to a
lack of interoperability between interpersonal communications services.

↓ 2002/19/EC

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

↓ new

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

(i) to the extent necessary to ensure interoperability of interpersonal communications
services and may include obligations relating to the use and implementation of standards or
specifications listed in Article 39(1) or of any other relevant European or international
standards; and

(ii) where the Commission, on the basis of a report that it had requested from BEREC, has
found an appreciable threat to effective access to emergency services or to end-to-end
connectivity between end-users within one or several Member States or throughout the
European Union and has adopted implementing measures specifying the nature and scope
of any obligations that may be imposed, in accordance with the examination procedure
referred to in Article 110(4).

2. National regulatory authorities shall impose obligations upon reasonable request to grant access to wiring and cables inside buildings or up to the first concentration or distribution point where that point is located outside the building, on the owners of such wiring and cable or on undertakings that have the right to use such wiring and cables, where this is justified on the grounds that replication of such network elements would be economically inefficient or physically impracticable. The access conditions imposed may include specific rules on access, transparency and non-discrimination and for apportioning the costs of access, which, where appropriate, are adjusted to take into account risk factors.

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

National regulatory authorities shall not impose obligations in accordance with the second subparagraph where:

(a) a viable and similar alternative means of access to end-users is made available to any undertaking, provided that the access is offered on fair and reasonable terms and conditions to a very high capacity network by an undertaking meeting the criteria listed in Article 77 paragraphs (a) and (b); and

(b) in the case of recently deployed network elements, in particular by smaller local projects, the granting of that access would compromise the economic or financial viability of their deployment.

3. Without prejudice to Article 30, Member States shall ensure that [national regulatory authorities] have the power to impose on undertakings providing or authorised to provide electronic communications services or networks, in case of duly demonstrated failure of such an undertaking to comply with any of the conditions attached to individual rights of use for radio spectrum, obligations in relation to the sharing of passive or active infrastructure which rely on the use of radio spectrum, to or the sharing of radio spectrum in a specific area, or , obligations to conclude localised roaming access, provided that this possibility has been clearly set out when granting the rights of use for radio spectrum and is agreements, or the joint roll-out of infrastructures directly necessary for the local provision of services which rely on the use of spectrum, in compliance with Union law., where it is justified on the grounds that,

[National regulatory authorities] may only impose such obligations in case of duly demonstrated failure by undertakings to comply with any of the conditions attached to their rights of use for radio spectrum and after the national regulatory authorities have been consulted with regard to the need to avoid distortion of competition.

Any obligation imposed on undertakings pursuant to the first subparagraph shall be limited to specific geographical areas where provided that this possibility has been clearly defined when granting the rights of use for radio spectrum and only where justified on the grounds that, in the area subject to such obligations, the market-driven deployment of infrastructure for the provision of services or networks which rely on the use of radio spectrum is subject to very significant economic or physical obstacles, and the available connectivity is therefore severely deficient or inexistent-absent.

~~(a) the replication of such infrastructure would be economically inefficient or physically impracticable, and~~

~~(b) the connectivity in that area, including along its main transport paths, would be severely deficient, or the local population would be subjected to severe restrictions on choice or quality of service, or on both.~~

National regulatory authorities shall have regard to:

(a) the need to maximise connectivity throughout the Union and in particular territorial areas;

(b) the efficient use of radio spectrum;

(c) the technical feasibility of sharing and associated conditions;

(d) the state of infrastructure-based as well as service-based competition;

(e) the possibility to significantly increase choice and higher quality of service for end-users;

(f) technological innovation;

(g) the overriding need to support the incentive of the host to roll out the infrastructure in the first place.

Such sharing, access or coordination obligations shall be subject to agreements concluded on the basis of fair and reasonable terms and conditions. In the event of dispute resolution, national regulatory authorities may inter alia impose on the beneficiary of the sharing or access obligation, the obligation to share its spectrum with the infrastructure host in the relevant area.]

↓ 2009/140/EC Art. 2.3(b) (adapted)
⇒ new

~~42.~~ Obligations and conditions imposed in accordance with paragraph 1 ⇒ ,2 and 3 ⇐ shall be objective, transparent, proportionate and non-discriminatory, ⊗ they ⊗ and shall be implemented in accordance with the procedures referred to in Articles ~~236, 732 and 7a33 of Directive 2002/21/EC (Framework Directive)~~ ⇒ . National regulatory authorities shall assess the results of such obligations and conditions within five years from the adoption of the previous measure adopted in relation to the same operators and whether it would be appropriate to withdraw or amend them in the light of evolving conditions. National regulatory authorities shall notify the outcome of their assessment in accordance with the same procedures ⇐ .

↓ 2009/140/EC Art. 2.3(d) (adapted)

~~53.~~ With regard to access and interconnection referred to in paragraph 1, Member States shall ensure that the national regulatory authority is empowered to intervene at its own initiative where justified in order to secure the policy objectives of Article ~~3 8 of Directive 2002/21/EC (Framework Directive)~~, in accordance with the provisions of this Directive and the procedures referred to in Articles ~~236 and 327, 2620 and 21 27 of Directive 2002/21/EC (Framework Directive)~~.

↓ new

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