GSM Europe
The European interest group of the GSM Association

GSM Europe Comments to the proposed '99 Review Telecoms Package

GSM Europe would like to congratulate the Commission on its outstanding work in producing the proposed telecoms package.

We support the overall approach in the package to roll back regulation. This move to competition law is justified now that almost all parts of the communications sector are entering a phase of effective competition like, for example, the mobile market place.
Although we support the general approach we believe that in its detailed proposals the Commission hasn't materialized its intentions to roll back regulation sufficiently to reach the objective of minimum regulation necessary.

We strongly believe that ex-ante access and interconnection regulation is not justified and is counter productive to competitive markets. We therefore fully support the European Parliaments Resolution[1]. The European Parliament ***"considers that the instruments for regulating access, including interconnection, should not be extended to the mobile communications market…"***

GSM Europe supports the Commission's view that: "*the use of ex-ante rules by national regulatory authorities should be limited to those areas where ex-post application of the remedies available under competition law cannot achieve the same results in the same time-scale.*"[2]

GSM Europe also reiterates its support for the Commission's position that ex-ante regulation should not be applied where competition has developed effectively[3]. We note, however, that certain proposals incorporated in this draft common regulatory framework directive do not reflect this sound principle.

We urge the European Parliament and the Council to amend the proposed directives accordingly in order to secure Europe's competitive advantage in mobile communications. In this document we outline the main areas of support and concern.

GSM Europe, 12 September 2000.

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[1] European Parliament. Resolution. 13 June 2000. A5-0145/2000. Para 6.
[2] Draft Directive on Access and Interconnection. Recital 4.
[3] Draft Directive on a Common Regulatory Framework. Recital 21.

Table of Content

General Comments

GSM Europe fully supports the Commissions proposal to abandon the 25% market share SMP concept which experience has shown distorts markets and disadvantages new entrants. GSM Europe also feels it is positive that the Commission has opted for an approach that is to a large extent in line with competition law.

However, GSM Europe is of the opinion that sector specific access and interconnection regulation is only justified in those markets where dominant operators have a historical fixed incumbency and are not (yet) effectively competitive. The Commission's proposals still leave room for NRAs to impose ex-ante regulation obligations, which are market distorting per se, on competitive markets. We strongly believe that ex-ante regulation is only justified to tackle persisting market failures because of fixed incumbencies. We are of the opinion that markets without such an incumbency should be regulated on the basis of ex-post competition law. We are concerned that the proposed approach will result in regulatory intervention when no abuse of any dominant position has taken place.

The mobile sector is a clear example of a nascent market that has developed successfully over the past years by embracing competition since its inception. The robust competition that has been established in this market is expected to intensify significantly, and at an even higher speed than experienced to date, with the advent of e-commerce. GSM Europe considers that the success of the new regulatory framework should be measured by the achievement of the stated objective - "no ex-ante regulation where there is effective competition". This being the case, it follows that the mobile sector should not be subject to any ex-ante conditions relating to access under the new regulatory package. This notion is consistent with the European Parliament's position which: *"...considers that the instruments for regulating access, including interconnection, should not be extended to the mobile communications market and Internet Service Providers."*[4]

GSM Europe urges Europe's regulators to safeguard Europe's only competitive advantage in the communications sector by explicitly excluding the mobile sector from ex-ante access, interconnection and retail price regulation, for the following reasons:

- For a while now almost all parts of the mobile sector are already highly competitive.
- The few less competitive areas are either prospectively competitive or can be sufficiently dealt with by competition law. Ex-post competition law is and will be sufficient to deal with possible market failures, for example via DG Competition sector inquiries.
- High-risk investment, which is typical for the mobile sector and incomparable with most other parts of the communications sector, can only be justified if operators can make access and interconnection agreements based on commercial agreements. A threat of ex-ante regulation is highly inappropriate for a sector where extremely high investments have to be made to enter the market.
- The extraordinary high 3G investments in licenses and infrastructure will put further pressure on competition between operators. The number of operators will increase to 4 to 6 competing infrastructure operators. There will be an increasing mutual interest for operators and virtual network operators to come to commercial agreements.

[4] European Parliament. Resolution. 13 June 2000. A5-0145/2000. Para 6.

Relationship between ex-ante regulation and competition law

The Commission envisages the new Framework will facilitate the transition from sector-specific regulation to competition law in particular markets, as competition becomes effective. GSM Europe notes that the proposals under this directive do not indicate how the Commission will select markets for which competition law remedies are deemed to be inadequate. Clear criteria for this selection process must be specified.

Furthermore, GSM Europe believes that if the objective for the industry to make a transition to competition law is to be realized, ex-ante regulation under the proposed framework must be:

- applied only to those markets whose characteristics require ex-ante obligations to address identified market failure; and
- consistent and proportionate with the application of competition law.

In terms of the latter, where ex-ante regulation is to be imposed (most appropriately in situations of historical incumbencies in the fixed sector) on a SMP designated operator, due consideration must be given to the actual behaviour of that operator. It seems reasonable to expect that the ex-ante obligations imposed on an operator with SMP who is not abusing its dominant position, must remain consistent and proportional (and cannot be more onerous) to the obligations imposed on a dominant operator (who is abusing its position) under competition law.

GSM Europe considers that unless the fundamental principles of consistency and proportionality with competition law is pursued and adhered to by the Commission and the NRA's, the industry will never make the transition to competition law. This cannot be the outcome the Commission is striving towards, if the Commission's objective is to only apply ex-ante regulation where competition law does not provide a sufficient and timely remedy.

SMP/dominance

Article 13 introduces one specific competition law concept - *joint dominance* - in the definition of significant market power. GSM Europe believes that there is no justification to single out only one specific competition law concept when there are other, equally important, competition law concepts embodied in case law[5]. The adopted approach under the new framework runs the risk of giving "joint dominance" a more prominent meaning than can be justified in comparison to other competition law concepts. In addition, relying on this concept more than others, and then applying it to the circumstances of the communications market through decisions by NRAs, is likely to lead to an outcome quite different from its application in other industries. The legal uncertainty and potential discriminatory outcomes affecting parties in the communications sector compared to other industry sectors will create an environment that is likely to create distortions and may hinder the investments in, and development of innovative services in the communications markets.

In order to align the proposed article as much as possible to the stated objectives of the Commission, the trigger for the application of ex-ante rules should be restricted to those instances of dominance where the market is not able to correct shortcomings in effective competition and

[5] such as for instance essential facility

where the normal ex-post application of competition rules will not provide a timely remedy. To achieve this it is proposed to make the following amendments:

- delete the words *"either individually or jointly with others"* from the text of paragraph 2 of article 13; and
- state in the policy objectives that the intention is to address only those markets where competition law is deemed to be inadequate to remedy market failure.

Policy Objectives

The comments made in this submission indicate that there are identifiable discrepancies between the objectives of the Commission outlined in the recitals on the one hand and the actual objectives under the articles of the text of the proposals on the other hand. The objectives set out in the following recitals; 21 (only ex-ante regulatory action where there is no effective competition and national and community law cannot remedy); 32 (this directive confines itself to the minimum required, etc.), should be transferred to the main text of the draft directive and incorporated under Article 7 - Policy objectives. In addition, the principle of minimum regulation as proclaimed by the Council, "...regulation should be reduced to the minimum necessary with proposals being made only where essential and well justified"[6], should be incorporated as an explicit part of the main text on principles and objectives.

[6] Council Resolution. 30 November 1999. Council 99/365.

The proposed Framework Directive

- Proposed amendments -

Article 13 and Recital 20

Article 13 Undertakings with significant market power

1. Where the Specific Measures require national regulatory authorities to determine operators have significant market power, paragraphs 2 and 3 shall apply.	1. Where the Specific Measures require national regulatory authorities to ~~determine~~ decide whether operators have significant market power, paragraphs 2 and 3 shall apply.

Justification

This amendment should make clear that deeming an operator to have significant market power involves a decision of the NRA. This way the language of the article is consistent with article 4.1 and gives market players the legal certainty that there is a right of appeal against such decisions.

2. An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.	2. An undertaking shall be deemed to have significant market power if~~, either individually or jointly with others,~~ it enjoys a persistent position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.

Justification

We believe that importing only one specific rather than all applicable and equally important competition law concepts embodied in case law (such as essential facility), creates the risk of giving joint dominance more prominence than can normally be justified. Relying on this concept, potentially out of line with the present case law of the European Court of Justice[7], and then applying it to the circumstances of the communications market through decisions by NRAs, is likely to result in an outcome quite different from its application in other industries. This is discriminatory! Giving a vague concept as joint dominance such a lot of prominence in ex-ante legislation will lead to legal uncertainty, something which is contrary to the aims of this new regulatory framework. It will create an environment that is likely to hinder the investments in, and development of innovative services, in the communications markets.

The Commission has always stressed the need for a greater reliance on "forbearance" in regulation. GSM Europe fully supports that point of view. However, the proposals from the Commission contain very few, if any, measures that force regulators to apply that important principle. GSM Europe feels it is of utmost important that when a regulators assesses a market whether it is effectively competitive or not, it takes into account the market development. Telecommunication markets are not static but extremely dynamic and market positions can

[7] Case T 86/89, March 10 1992, SIV and Fabrica Pisana, 1992 ECR II-1403; C 68/94 en 30/95 France at al. Versus Commission, 1998 Jur .I1375); C-395 396/96P, 16 March 2000, CMB (CEWAL); case T-102/96, 2 March 1999, Gencor)

change in short time frames. The market has also shown that it can find solutions to problems. Applying ex-ante regulation should therefore only be allowed when it is clear that the market is not going to provide a solution itself in the short to medium term. Any market assessment should not be a “snap shot” but be forward looking and take the dynamism of the market into consideration. A high price of today may be a stage in a downward spiral, the market share of a market player may be high but falling rapidly. The addition of the word “persistent” should guarantee the implementation of the “forbearance” principle in the determination of significant market power.

3. Where an undertaking has significant market power on a specific market, it may also be deemed to have significant market power on a closely related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the undertaking.	Delete

Justification

GSM Europe disagrees with paragraph 3 of article that companies with SMP in a specified market are also deemed to have SMP in a closely related market. In accordance with article 14 NRAs should undertake a comprehensive analysis of *each* market which is separately identified under competition law and this analysis will reveal which players have market power. To simply deem operators to have market power by virtue of their position in another market will lead to over regulation and very possibly lead to regulation in competitive markets. It leaves an undesirable possibility for regulators to impose conditions when on the basis of a market analysis this cannot be justified. There are other regulatory mechanisms that exist to address cross-market leverage such as accounting separation rules.

Recital 20

(20) There is a need for ex-ante obligations in certain circumstances in order to ensure the development of a competitive market. The definition of significant market power in the Directive 97/33/EC of the European Parliament and of the Council on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP)29 as amended by Directive 98/61/EC 30 has proved effective in the initial stages of market opening as the threshold for ex-ante obligations, but now needs to be adapted to suit more complex and dynamic markets, and for this reason is being modified to be based on the concept of dominance as defined in the case law of the Court of Justice and the Court of First Instance of the European Communities. Except in other cases mandated by international obligations of the European Community and its Member States, ex ante regulatory obligations designed to	(20) There is a need for ex-ante obligations in certain circumstances in order to ensure the development of a competitive market. The definition of significant market power in the Directive 97/33/EC of the European Parliament and of the Council on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP)29 as amended by Directive 98/61/EC 30 has proved effective in the initial stages of market opening as the threshold for ex-ante obligations, but now needs to be adapted to suit more complex and dynamic markets, and for this reason is being modified to be based on the concept of dominance as defined in the case law of the Court of Justice and the Court of First Instance of the European Communities. ~~Except in other cases mandated by international obligations of the European Community and its Member States,~~ ex-ante regulatory obligations designed to

ensure effective competition are justified only for undertakings which have financed infrastructure on the basis of special or exclusive rights in areas where there are legal, technical or economic barriers to market entry, in particular for construction of network infrastructure, or which are vertically integrated entities owning or operating network infrastructure for delivery of services to customers and also providing services over that infrastructure, to which their competitors necessarily require access.	ensure effective competition are justified only for undertakings which have financed infrastructure on the basis of special or exclusive rights in areas where there are legal, technical or economic barriers to market entry, in particular for construction of network infrastructure, or which ~~are vertically integrated entities~~ own~~ing~~ or operate~~ing~~ network infrastructure ~~for delivery of services to customers and also providing services over that infrastructure, to which their competitors necessarily require access~~ which is essential for entry to the relevant market.

Justification

GSM Europe seriously doubts the necessity of article 8(2) of the draft Directive on Access and Interconnection and therefore proposes to delete article 8(2). Article 8(2) of the draft Directive on Access and Interconnection, amongst others, refers to international obligations (i.e. the WTO agreement) as a reason for additional ex-ante obligations. However, GSM Europe is of the opinion that the framework is fully in line with all WTO obligations of the EU and its Member States and therefore sees no need for article 8(2). In order to be consistent a reference to the international obligations in recital 20 needs to be deleted.

The last part of recital 20 refers to essential facilities. However, the wording chosen by the Commission is not fully in line with case law and is fairly obscure. GSM Europe has particular problems with the reference to "vertical integration", and the vague nature of the word "necessarily" would mean that national regulatory authorities would get to big a scope for intervention. Therefore a new text is proposed that is fully in line with recent case law and gives more clarity.

Recital 21 and article 14

Recital 21

(21) It is essential that such regulatory obligations should only be imposed where there is not effective competition and where national and Community competition law remedies are not sufficient to address the problem. It is necessary therefore for the Commission to draw up guidelines at Community level for national regulatory Authorities to follow in assessing whether competition is effective in a given market and in assessing significant market power. These guidelines will also address the issue of newly emerging markets, where *de facto* the market leader is likely to have a substantial market share but should not be subjected to inappropriate obligations. National regulatory authorities will need to co-operate with each other where the relevant market is found to be trans-national.	(21) It is essential that such regulatory obligations should only be imposed where there is ~~not~~ neither effective nor prospective competition and where national and Community competition law remedies are not sufficient to address the problem. In order to give market forces a chance to develop regulatory obligations should not be imposed in markets that have a real prospect of becoming competitive in the short to medium term. It is necessary therefore for the Commission to draw up guidelines at Community level for national regulatory Authorities to follow in assessing whether competition is effective in a given market and in assessing significant market power. These guidelines will also address the issue of newly emerging markets, where *de facto* the market leader is likely to have a substantial market share but should not be subjected to inappropriate obligations. National regulatory authorities will need to co-operate with each other where the relevant market is found to be trans-national.

Article 14(1) and 14(2) – Market Analysis Procedure

1. After consultation with national regulatory authorities through the High Level Communications Group, the Commission shall issue a Decision on Relevant Product and Service Markets (hereinafter 'the Decision'), addressed to Member States. The Decision shall identify those product and service markets within the electronic communications sector, the characteristics of which may be such as to justify the imposition of regulatory obligations set out in the Specific Measures, without prejudice to markets that may be defined in specific cases under competition law. The Commission shall also publish Guidelines on market analysis and the calculation of significant market power (hereinafter 'the Guidelines').	1. After consultation with national regulatory authorities through the High Level Communications Group <u>and other interested parties</u>, the Commission shall issue a Decision on Relevant Product and Service Markets (hereinafter 'the Decision'), addressed to Member States. The Decision shall <u>provide guidance on the identification, on the basis of competition law, of those product and service markets</u> within the electronic communications sector, the characteristics of which may be such as to justify the imposition of regulatory obligations set out in the Specific Measures~~, without prejudice to markets that may be defined in specific cases under competition law~~. The Commission shall also publish Guidelines on market analysis and the calculation of significant market power (hereinafter 'the Guidelines').
2. Within two months of the date of adoption of the Decision or any updating thereof, national regulatory authorities shall carry out an analysis of the product and service markets identified in the Decision, in accordance with the Guidelines. Member States shall ensure that national competition authorities are fully associated with that analysis. The national regulatory authority's analysis of each market shall be published.	2. Within two months of the date of adoption of the Decision or any updating thereof, national regulatory authorities shall <u>identify in accordance with the Decision the product and service markets within the electronic communication sector, and carry out an analysis in accordance with the Guidelines.</u> Member States shall ensure that national competition authorities are fully associated with that analysis. The national regulatory authority's analysis of each market shall be published.

Justification

Although GSM Europe appreciates the effort to harmonise the different approaches to identify product markets in the Member States we reject the proposal to pre-define markets by a decision of the Commission because it would result in too little judicial control. In particular, operators and service providers belonging to the markets that are pre-defined by the Commission are not able to appeal against the Commission's decision although it is the undertakings that are, de facto, affected by the decision. Therefore, GSM Europe proposes the market analysis to be carried out by the NRAs applying the principles of competition law. Such a proceeding will ensure that undertakings will be able to take legal action against the market analysis and that decisions are adjusted to the specific market conditions at the point of time the decision is taken. The goal of harmonisation can be reached by harmonising the methodology which should be laid down in a Commission Decision.

Article 14(1) of the proposed Framework Directive provides that markets will be identified for regulatory purposes but will be "*without prejudice to markets that may be defined in specific cases under competition law.*" This causes some confusion and is not clarified by the Recitals to the directive. The inclusion of the market definitions in the attached Annex to the directive only causes greater confusion.

The market definition approach favoured in the draft Framework Directive will only magnify the concerns already relating to the current regulatory framework, namely that a hybrid regulatory approach to competition analysis is emerging which is confused and confusing. Relevant markets defined for regulatory purposes are distinct from those identified for competition law purposes under the current regulatory framework and it appears that the Commission is proposing to continue this approach. Such an approach goes against the grain of the proposed market analysis, which is based on an analysis of effective competition. Indeed, the current markets identified *ex ante* for regulatory purposes comprise many different products and services across which the degree of effective competition varies dramatically. This has lead to market definition analysis at a Member State level which is unnecessarily complicated and promotes legal uncertainty.

Moreover, a regulatory framework which defines markets on an artificial basis without having regard to the competitive constraints on the participants in the relevant market (unlike market definition under EU competition rules) fails to understand investment decisions in a risky environment which removes innovation from the framework's core. Failure to harness the potential of innovation will carry serious consequences for growth, employment, education and lifestyle.

3. Where national regulatory authorities are required under Articles 16, 25 or 27 of Directive [on universal service and users rights relating to electronic communications networks and services], or Articles 7 or 8 of Directive [access to and interconnection of electronic communications networks and associated facilities] to determine whether to impose, maintain or withdraw obligations on undertakings, it shall determine on the basis of its market analysis referred to in paragraph 2 whether a market identified in the Decision is effectively competitive in a specific geographic area in accordance with the Guidelines.	3. Where national regulatory authorities are required under Articles 16, 25 or 27 of Directive [on universal service and users rights relating to electronic communications networks and services], or Articles 7 or 8 of Directive [access to and interconnection of electronic communications networks and associated facilities] to ~~determine~~ <u>decide</u> whether to impose, maintain or withdraw obligations on undertakings, it shall determine on the basis of its market analysis referred to in paragraph 2 whether a market identified in the Decision is effectively competitive in a specific geographic area in accordance with the Guidelines.

Article 14(4) and 14(5)

4. Where a national regulatory authority concludes that the market is effectively competitive, it shall not impose or maintain sector specific regulatory obligations set out in the Specific Measures. In cases where sector specific regulatory obligations already exist, it shall withdraw such obligations placed on undertakings in that specific market. An appropriate period of notice shall be given to parties affected by such a withdrawal of obligations.	4.Where a national regulatory authority concludes that the market is effectively competitive<u>, or prospectively competitive</u>, it shall not impose or maintain sector specific regulatory obligations set out in the Specific Measures. In cases where sector specific regulatory obligations already exist, it shall withdraw such obligations placed on undertakings in that specific market. An appropriate period of notice shall be given to parties affected by such a withdrawal of obligations.

5. Where a national regulatory authority determines that a market identified in the Decision is not effectively competitive in a specific geographic area in accordance with the Guidelines, it shall impose sector-specific regulatory obligations set out in the Specific Measures, or maintain such obligations where they already exist.	5. Where a national regulatory authority determines that a market identified in the Decision is not effectively competitive in a specific geographic area in accordance with the Guidelines, it shall, in association with the national competition authorities, determine whether to impose measures on the basis of competition law. In case national and/or Community competition law remedies are not sufficient to address the problem, it ~~shall~~ may impose sector-specific regulatory obligations set out in the Specific Measures, or maintain such obligations where they already exist

Justification

Article 14(4) and 14(5): There is a need for greater reliance on regulatory "forbearance" in market analysis. Market forces are the best mechanism to deliver the Commission's objectives of choice, quality and value for money. Implicit within this is a recognition that market failures are generally temporary and will be overcome by the market. Accordingly "forbearance" is principle that should be laid down in the regulatory regime. Currently the proposals do not sufficiently take account of the principle of regulatory forbearance. While the proposals focus on the need to demonstrate a market failure and the inability of competition law to deal effectively with this market failure in the first instance, there is less emphasis on whether this market failure is unlikely to be removed by market action and, if not, whether the proposed intervention is proportionate to the nature of the failure. In particular, the concept of prospective competitiveness ought to be included (at least in the forthcoming Guidelines) and forbearance recommended in such cases. A failure to carve forbearance language in the proposed regulatory package would entail legal uncertainty that inevitably constrains the key driver to market forces: investment commitments in new networks and new technologies. Article 14 of the proposed Framework Directive is a case in point. GSM Europe would suggest a small addition in article 14(4) to guarantee that NRAs don't intervene if a market is prospectively competitive. In other words if a market is likely to become competitive in the short to medium term, intervention should be ruled out because it may distort the market and even thwart market forces to emerge.
According to the present draft, NRAs appear to be obliged to impose sector-specific obligations if a market "is" not effectively competitive. Thus, the draft fails to provide sufficient flexibility to enable the regulatory authorities to take account of whether the market is prospectively competitive. A proper analysis of effective competition cannot rely on a "snap-shot" of the market alone. An approach similar to the longer-term analysis of the structural effects of mergers carried out under the EC Merger Regulation would be better. Although the rules and procedures for the analysis will be laid down in forthcoming guidelines, the suggested change of wording in article 14 is meant to make an approach based on "forbearance" possible.

The European Parliament has stated that it considers the mobile market to be competitive. GSM Europe fully endorses that view and believes that therefore no ex-ante obligations should be imposed on mobile operators. However, others have voiced the belief that parts of the mobile market are not competitive at the moment. But even in case parts of the mobile market are not effectively competitive, few doubt these market segments aren't likely to be competitive in a number of years. In a recent case the British Monopolies and Merger Commission has made rulings to that effect. In order to avoid premature and unnecessary intervention that might replace market forces by a cycle of regulatory action, GSM Europe proposes to strengthen the wording with regard to prospective competition.

Article 4 – Right of Appeal

1. Member States shall ensure that a mechanism exists at national level under which a user or undertaking providing electronic communications networks and/or services has the right of appeal against a decision of a national regulatory authority to a body that is independent of government and the national regulatory authority concerned. The appeal body shall consider not only the procedure according to which the decision was reached, but also the facts of the case. Pending the outcome of any such appeal, the decision of the national regulatory authority shall stand.	1. Member States shall ensure that a mechanism exists at national level under which a user or undertaking providing electronic communications networks and/or services has the right of appeal against a decision of a national regulatory authority to a body that is independent of government and the national regulatory authority concerned. The appeal body shall consider not only the procedure according to which the decision was reached, but also the facts and the substance of the case. Pending the outcome of any such appeal, the decision of the national regulatory authority shall stand.

Justification

Several Member States only have judicial review as an appeals mechanism. Judicial reviews do not address matters relating to the substance of a decision and is largely a mechanism for dealing with procedural errors in the decision making process or mistakes by the body making a decision about the extent of its power. With article 4(1) the European Commission tries to improve the legal certainty and give market players better possibilities for appeal. However, the wording of article 4 is not effective enough to address this problem. It is still possible to argue that a judicial review can deal with the facts of the case. To make sure that in all Member States the appeals mechanism can deal with the substance of a case, a small addition to the article is necessary.

Article 6 – Consultation and transparency mechanism

2. Where a national regulatory authority intends to take measures under Article 8 or Article 14(4) and (5) of this Directive or Article 8(2) of Directive *[on access to and Interconnection of electronic communications networks and associated facilities]*, it shall communicate the draft measure to the Commission and the national regulatory authorities in other Member States, together with the reasoning on which the measure is based. National regulatory authorities may make comments to the national regulatory authority concerned within the period for consultation determined in accordance with paragraph 1.	2. Where a national regulatory authority intends to take measures under Article 8, Article 13(1), Article 14(4) and (5) of this Directive or Article 8 ~~8(2)~~ of Directive *[on access to and interconnection of electronic communications networks and associated facilities]*, it shall communicate the draft measure to the Commission and the national regulatory authorities in other Member States, together with the reasoning on which the measure is based. National regulatory authorities may make comments to the national regulatory authority concerned within the period for consultation determined in accordance with paragraph 1.

Justification

This amendment is to clarify that all draft decisions relating to deeming an operator to have SMP need to be notified to the Commission. According to the current Commission proposals it is very unclear whether NRAs must consult the Commission on application of specific ex-ante obligations once a market has been analysed (article 8.1 of the Access and Interconnection Directive) or on the decision whether an operator has significant market power (article 13(1) of the Framework Directive). The proposed amendments will ensure that the above articles are subject to the consultation and transparency mechanism.

GSM Europe wants to stress the importance of a better pan-European application of the telecommunications regulation. However, European co-ordination and harmonisation is not necessary for all NRA decisions as this would make the whole system too onerous and slow, but only for the most important and fundamental decisions. The decisions that have the most profound effect on the market and on individual undertakings are decisions which deem a party as having significant market power and which apply ex-ante obligations. Therefore, all decisions relating to the application of significant market power should be part of the consultation and transparency mechanism.

It is very important that the imposition of specific obligations is part of the consultation mechanism in order not to get 15 divergent regimes in the EU. The NRAs currently have a great deal of freedom in this respect and the consultation mechanism should give more assurances that NRAs don't apply obligations different solutions in similar circumstances, or don't apply obligations when they wouldn't be proportionate or be the right tool to solve the problem. Recital 20 indicates that NRAs should only apply ex-ante obligations in case the problems can't be dealt with under competition law. Recital 20 also states that ex ante regulatory obligations are justified only for undertakings which have financed infrastructure on the basis of special or exclusive rights in areas where there are legal, technical or economic barriers to market entry, in particular for construction of network infrastructure, or which have a so-called essential facility. There is a serious risk that application of these rules will differ widely within the European Union if there isn't an appropriate consultation mechanism in place. It is very important that the Commission and fellow NRAs can check the application.

Article 7 - Policy Objectives and Regulatory Principles

1. Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Measures, the national regulatory authorities take all reasonable measures which are aimed exclusively at achieving the objectives set out in paragraphs 2, 3 and 4. Those measures shall be proportionate to those objectives. Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Measures, in particular those designed to ensure fair competition, national regulatory authorities take the utmost account of the need for regulation to be technologically neutral; i.e. that it neither imposes nor discriminates in favour of the use of a particular type of technology.	1. Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Measures, the national regulatory authorities take all reasonable measures which are aimed exclusively at achieving the objectives set out in paragraphs 2, 3 and 4. Those measures shall be ~~proportionate~~ <u>the minimum necessary to achieve</u> those objectives. Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Measures, in particular those designed to ensure fair competition, national regulatory authorities take ~~the utmost~~ account of the need for regulation to be technologically neutral; i.e. that it neither imposes nor discriminates in favour of the use of a particular type of technology.
2. The national regulatory authorities shall promote an open and competitive market for electronic communications networks, electronic communications services and associated facilities by: (a) ensuring that users derive maximum benefit in terms of choice, price, quality and value for money;	2. The national regulatory authorities shall promote an open and competitive market for electronic communications networks, electronic communications services and associated facilities by: (a) ~~ensuring that users~~ <u>promoting the long term interests of users so they can</u> derive maximum benefit in terms of choice, price, quality and value

(b) ensuring that there is no distortion or restriction of competition in the electronic communications sector; (c) encouraging efficient investment in infrastructure; and (d) by ensuring the efficient allocation and assignment of radio spectrum.	for money; (b) ensuring that there is no distortion or restriction of competition in the electronic communications sector; (c) encouraging ~~efficient~~ investment in infrastructure and innovation; and (d) by ensuring the efficient allocation and assignment of radio spectrum. New: *"(e) limiting the use of ex-ante regulation to those market failures where ex-post application of remedies available under competition law cannot achieve the same results in the same time-scale.*

Justification

Paragraph 1 currently refers only to the principle of technology neutrality. It should also include the other regulatory principles in the EC's original communication such as minimum regulation, legal certainty and local enforcement. The European Parliament and the Council specifically endorsed those principles. GSM Europe feels that in particular principle of minimum regulation should be highlighted. The present redraft intends to re-introduce this important legislative principle.

The wording of paragraph 2a should avoid the wording *"ensuring"* as it is ultimately not under the control of the NRA to ensure maximum benefits for users that will be achieved by the activities and business risks of companies. The introduction of the words *"promote"* and *"can"* reflect this. Furthermore, a reference is made to the long-term interests of consumers (i.e. increased competition and choice) as they can be very different to short-term interests (i.e. short-term price reductions).

Paragraph 2 c introduces the word *"innovation"* as an additional goal. Innovation is one of the most important consumer benefits and any regulatory regime should stimulate innovation and investment.

The new article 7.2.e states that NRAs intend to address only those markets where competition law is deemed to be inadequate to remedy market failure. This is in line with recital 21 which states that ex-ante regulatory obligations should only be imposed where there is not effective competition and where national and Community competition law remedies are not sufficient to address the problem.

Article 8 – Management of radio spectrum

4. Member States may make provision for undertakings to trade rights to use radio spectrum with other undertakings only where such rights to use radio spectrum have been assigned by national regulatory authorities by auction. Decisions to make provision for trading of such rights of use in specific frequency bands shall be subject to the procedure set out in Article 6. 5. Member States shall ensure that an	4. Member States may make provision for undertakings to trade rights to use radio spectrum with other undertakings ~~only~~ where ~~such rights to use radio spectrum have been assigned by national regulatory authorities by auction~~ this does not result is a distortion of competition. Decisions to make provision for trading of such rights of use in specific frequency bands shall be subject to the procedure set out in Article 6. 5. Member States shall ensure that an undertaking's intention to trade rights to use radio

undertaking's intention to trade rights to use radio spectrum is notified to the national regulatory authority responsible for spectrum assignment and that any sales transaction takes place under the supervision and with the consent of that authority. National regulatory authorities shall ensure that interested parties are aware of an intended sale of rights to use radio spectrum in order that they have the opportunity to make an offer for such rights of use. National regulatory authorities shall ensure that competition is not distorted as a result of any such transaction. Where radio spectrum use has been harmonised through the European Parliament and Council Decision [*on a regulatory framework for radio spectrum policy in the Community]* or other Community measures, any such trading shall not result in change of use of that radio spectrum.	spectrum is notified to the national regulatory authority responsible for spectrum assignment and that any sales transaction takes place under the supervision and with the consent of that authority. ~~National regulatory authorities shall ensure that interested parties are aware of an intended sale of rights to use radio spectrum in order that they have the opportunity to make an offer for such rights of use~~. National regulatory authorities shall ensure that competition is not distorted as a result of any such transaction. ~~Where radio spectrum use has been harmonised through the European Parliament and Council Decision [*on a regulatory framework for radio spectrum policy in the Community]* or other Community measures, any such trading shall not result in change of use of that radio spectrum.~~

Justification

It is discriminatory to limit secondary spectrum trading to auctioned spectrum only. The Commission is deliberately restraining downstream market entry by constraining secondary spectrum trading. This is particularly in light of the policy of the Commission to encourage greater market entry, of which we are witnessing more and more through such services as unbranded wholesale services and new UMTS entrants. Greater flexibility in secondary trading is positive, as a means to ever more competitive market structures. The objective must be to ensure that spectrum is used in the most efficient and effective manner. Spectrum trading can only help to ensure that this happens and past decisions of NRAs to allocate spectrum through auctions or other means is irrelevant.

The Commission wants to limit spectrum trading to spectrum that was auctioned so as to avoid companies making windfall profits with the sale of cheaply acquired spectrum. However, GSM Europe feels that as long as a transaction doesn't distort competition and the regulator can ensure this, spectrum trading should be allowed irrespective of how a company acquired the spectrum.

Spectrum trading should result primarily from commercial negotiations between operators. There is no reason why NRAs should notify all interested parties of an intended sale of rights to use radio spectrum. For spectrum planning reasons and in the interests of licensing transparency this may be desirable, after the event. Therefore, we suggest the deletion of sentences in paragraph 5.

Annex - List of markets to be included in the initial Commission Decision on Product and Service Markets (Article 14)

1. Markets referred to in Directive […] on universal service and users' rights relating to electronic communications networks and services Article 16 - (Retail tariff regulation) and Article 25 (2) – (carrier selection) – the provision of connection to and use of the public telephone network at fixed locations Article 27 (Leased lines)	Delete

– the provision of leased lines to end users […]	

Justification

The Annex to the proposed Framework Directive should not be part in any event of the proposed regulatory package because it pre-empts the debate on the Commission Decision on Relevant Product and Service Markets. In addition, the markets defined in the Annex are not based on an analysis of competition rules. For example, the Commission determined in its *BiB* Decision that there was a market for the provision of local access infrastructure, which was comprised of many different local access technologies. The markets proposed in the Annex are more do to with access technologies/methodologies rather than the substitutability principles found under EU competition law (which are focused on product's or service's price, characteristics and intended use). Moreover, the proposed markets fail to take account of the subtleties of market convergence.

New market definitions on the basis of competition law should be applied as from the entry into force of the new regulatory framework.

The proposed Access and Interconnect Directive

- Proposed amendments -

Article 2 – Definitions

2. Furthermore, for the purposes of this Directive: (a) 'access' means the making available of facilities and/or services, to another undertaking, under defined conditions, on either an exclusive or non-exclusive basis, for the purpose of providing electronic communications services. It covers *inter alia*: access to network elements and associated facilities and services, which may involve the connection of equipment, by wire or wireless means; access to physical infrastructure including buildings, ducts and masts; access to software systems including operational support systems; access to number translation or systems offering equivalent functionality; access to mobile networks, in particular for roaming; access to conditional access systems for digital television services. Interconnection is a specific type of access implemented between public network operators. Access in this Directive does not refer to access by end-users.	2. Furthermore, for the purposes of this Directive: (a) 'access' means the making available of facilities and/or services, to another undertaking, under defined conditions, on either an exclusive or non-exclusive basis, for the purpose of providing electronic communications services. ~~It covers *inter alia*: access to network elements and associated facilities and services, which may involve the connection of equipment, by wire or wireless means; access to physical infrastructure including buildings, ducts and masts; access to software systems including operational support systems; access to number translation or systems offering equivalent functionality; access to mobile networks, in particular for roaming; access to conditional access systems for digital television services. Interconnection is a specific type of access implemented between public network operators.~~ Access in this Directive does not refer to access by end-users.

Justification

The definition for access is too long and need to be shortened for the sake of clarity and legal certainty. We suggest that only the first sentence remains. GSM Europe would like to reiterate its firm position that roaming is a form of access for an end user and not between undertakings and should therefore not be part of this Directive (see Art. 2.2 Access in this Directive does not refer to access by end-users).

Recital 4

In markets where there continues 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 of ex-ante rules to ensure that the market functions effectively. National regulatory authorities should have the power to secure, where commercial negotiation fails, adequate access and interconnection and interoperability of services in the interest of end-users; this would be the case for example if network operators were to unreasonably restrict end-user choice for access to	In markets where there continues 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 of ex-ante rules 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 (delete the rest…..).

Internet portals and services.	

Justification

Access to Internet portals should not be included within the scope of the Directive and can be dealt with adequately by competition rules.

Article 5 – Powers and responsibilities of NRAs

2. Member States shall ensure that national regulatory authorities are empowered to impose the obligations identified in Articles 6 to 13 of this Directive on operators that have been designated as having significant market power in a relevant market. In the absence of agreement between undertakings on access and interconnection arrangements, Member States shall ensure that the national regulatory authority is empowered to intervene at the request of either of the parties involved or at its own initiative, taking account of the policy objectives and procedures included in Articles 6, 7, 13, 14, 15, 16, 17, 18 of Directive [on a common regulatory framework for electronic communications networks and services].	2. Member States shall ensure that national regulatory authorities are empowered to impose the obligations identified in Articles 6 to 13 of this Directive on operators that have been designated as having significant market power in a relevant market. In the absence of agreement between undertakings on access and interconnection arrangements, Member States shall ensure that the national regulatory authority is empowered to intervene at the request of either of the parties involved in case the party on which obligations shall be imposed is an operator who is designated as having significant market power ,~~or at its own initiative~~, taking account of the policy objectives and procedures included in Articles 6, 7, 13, 14, 15, 16, 17, 18 of Directive [on a common regulatory framework for electronic communications networks and services].

Justification

The wording: "[…] Member States shall ensure that the NRA is empowered to intervene at the request of either of the parties involved or at its own initiative […]" creates uncertainty and may lead to different outcomes in different Member States. GSM Europe would therefore urge the Parliament to delete the possibility for NRAs to intervene at their own initiative. The present wording in this article is in contradiction with the objectives of regulation in this sector as they are stated in the Explanatory Memorandum.

On page 3 in the explanatory memorandum (under the item "Approach", the first paragraph) the Commission states: "*At Community level it is also important to ensure that Member States do not implement different patterns of regulation which lead to market variation, increasing cost to end-users and a fragmentation of the single market*".

Article 5.2 states that NRAs will have the power to intervene where parties fail to enter into an access or interconnection agreement. GSM Europe fears that this would simply lead to over-regulation. In contrast to the first sentence of Article 5.2 the second sentence does not explicitly refer to SMP-operators. Therefore an obligation of entering into an access or interconnection agreement might be imposed on operators who do not have SMP whereas pursuant to the current Interconnection Directive only operators having SMP are obliged to enter into an agreement. In order to avoid additional regulation the power of intervention and imposition of regulatory obligations should be restricted to cases in which an operator having SMP refuses to offer access or interconnection.

Article 7.1 – Review of former obligations

Member States shall maintain all obligations on undertakings providing publicly available electronic communications networks concerning access and interconnection that were in force prior to the date of entry into force of this Directive under Articles 4, 6, 7, 8, 11, 12, and 14 of Directive 97/33/EC, Article 16 of Directive 98/10/EC, Articles 7, 8 of Directive 92/44/EC and Article 3 of Regulation [on unbundled access to the local loop], until such time as these obligations have been reviewed and a determination made in accordance with para 3.	Member States shall maintain all obligations on SMP undertakings providing publicly available electronic communications networks concerning access and interconnection that were in force prior to the date of entry into force of this Directive under Articles 4, 6, 7, 8, 11, 12, and 14 of Directive 97/33/EC, Article 16 of Directive 98/10/EC, Articles 7, 8 of Directive 92/44/EC and Article 3 of Regulation [on unbundled access to the local loop], until such time as these obligations have been reviewed and a determination made in accordance with para 3.

Justification

For reasons of clarity and legal certainty it should be specified that the (dis)application of both "old" regulatory obligations defined in Directives 97/33/EC, 98/10/EC and 92/44/EC and "new" obligations defined here should apply only to undertakings with SMP.

Article 7.3

Member States shall ensure that, on entry into force of this Directive, and periodically thereafter, national regulatory authorities undertake a market analysis, in accordance with the procedure in Article 14 of Directive [on a common regulatory framework for electronic communications networks and services] to determine whether to maintain, amend or withdraw these obligations. An appropriate period of notice shall be given to parties affected by such amendment or withdrawal of obligations.	Member States shall ensure that~~, on entry into force of this Directive, and periodically thereafter national~~ regulatory authorities periodically undertake a market analysis, in accordance with the procedure in Article 14 of Directive [on a common regulatory framework for electronic communications networks and services] to determine whether to maintain, amend or withdraw these obligations. The first market analysis must take place 3 months before the transposition date mentioned in Article 18 to ensure that the existing regulatory obligations will lapse as soon as the new regulatory framework takes effect. An appropriate period of notice shall be given to parties affected by such amendment or withdrawal of obligations.

Justification

GSM Europe is concerned that the proposed transitional procedure from the old regime to the new lacks the necessary legal certainty. Although there is a need for safeguards during the transition from the current to the new regulatory framework, we believe that the proposed transitional procedure will be too cumbersome and will lead to an uncertain dual regulatory framework. This will be to the detriment of a move to a single market and of undertakings having SMP under the old regime.

GSM Europe suggests therefore that these obligations be automatically withdrawn following the first market analysis (which would include an assessment of those operators which are deemed to have SMP under the criteria set out in the Framework Directive), with only the possibility of applying obligations under the new regulatory framework. As a result a patchwork of regulatory models and associated obligations can be avoided. The market analysis should therefore take place during the pre-implementation phase so that existing regulatory obligations would lapse as soon as the new regime takes effect.

GSM Europe urges the Commission to put into effect its deregulatory intentions immediately and not wait until the new framework is implemented. The Commission should make it clear (or issue a notice) to ensure that mobile operators are not designated as having SMP under the current regime and before the new regime comes into place. As GSM Europe has stated before, SMP obligations (in the interconnection market) for mobile operators effectively set a price ceiling in the market, having a negative effect on especially new entrants in the mobile market.

Article 8.1- Imposition, amendment or withdrawal of obligations

…..national regulatory authorities shall impose one or more of the obligations set out in Articles 9 to 13 of this directive as appropriate, in order to avoid distortions of competition. The specific obligation(s) imposed shall be based on the nature of problem identified.	…..national regulatory authorities ~~shall~~ <u>may</u> impose one or more of the obligations set out in Articles 9 to 13 of this directive as appropriate, in order to avoid distortions of competition. The specific obligation(s) imposed shall be based on the nature of problem identified<u>, justified on the basis of the policy objectives, and - in accordance with the principle of minimum regulation.”</u>

Justification

Replace the term <u>“shall”</u> with <u>“may”</u>. Within the context of minimum regulation this amendment provides the opportunity to resort to forbearance.

GSM Europe supports the proposal for NRA’s to choose from a menu of obligations which allows a flexible response to an identified market failure. The obligations to be imposed should be fully justified in the light of the policy objectives. Care should be taken that the principle of minimum regulation is respected when obligations are imposed. A timeframe should be attached to each obligation.
Art 6 of the Framework Directive on Consultation and transparency should refer to art 8.1 in order to harmonise conditions across Europe in similar markets and market conditions.

Article 8.2

National regulatory authorities may, without prejudice to the provisions of Article 6 of this Directive: a) impose on undertakings, including undertakings other than those with significant market power, the obligations set out in Article 9-13 of this Directive in relation to interconnection, in order to comply with international commitments, and exceptionally, with the prior agreement of the Commission, b) impose on operators with significant market power obligations for access or interconnection that go beyond those set out in Articles 9 to 13 of this Directive, provided that all such obligations are justified in the light of the objectives laid down in Article 1 of this Directive and in Article 7 of Directive [on a common regulatory framework for electronic communications networks and services], and are proportionate to the aim pursued.	Delete

Justification

GSM Europe is very concerned that the principle of forbearance, as set out in the previous text has been removed (i.e. the intention to lay down in regulation that obligations have to be withdrawn where an undertaking no longer has SMP or where the obligation is no longer necessary because competition will deliver the required result). Regulation must only be imposed on non-transient market failures or there will be a danger of over regulation and distortion of competition.

[8.2a] NRAs should not have power to impose any of the new obligations on undertakings which do not enjoy SMP.

[8.2b] For legal certainty and to prevent fragmentation of the European market NRAs should not have to possibility to impose regulatory obligations that go beyond those set out in Articles 9 to 13 of the Directive.

GSM Europe would like to urge the Parliament to delete Article 8.2 in its entirety as it will lead to fragmentation of the single market, create legal uncertainty for new market entrants and will be pushing up the cost of capital. This would clearly be in contradiction with the spirit of the '1999 Review' of simplification and deregulation.

Article 12.1- Obligations of access to, and use of, specific network facilities

12.1 A national regulatory authority shall, in accordance with the provisions of Article 8 of this Directive, be able to impose obligations on operators to grant access to, and use of, specific facilities and/or associated services, *inter alia* in situations where the national regulatory authority considers that denial of access would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest. Operators may be required *inter alia*: f) obligations to provide specified services needed to ensure interoperability of end-to-end services to users, including facilities for intelligent network services or roaming on mobile networks;	12.1 Delete and replace by: A national regulatory authority shall be able to impose obligations on operators to grant access in order to prevent a non-transient distortion of competition. Operators may be required *inter alia*: f) obligations to provide specified services needed to ensure interoperability of end-to-end services to users, including facilities for intelligent network services ~~or roaming on mobile networks;~~

Justification

This new obligation taken together with the 'access' definition would allow NRAs to potentially unbundle every part of a network. The extent of unbundling is of paramount importance to investors of infrastructure. The degree and scope of unbundling should be clearly defined and not left open ended as this results in an unacceptable level of uncertainty for investors and is counter to principles of minimal regulation and legal certainty. It is not clear how 'specific facilities and /or associated services' in para 1 is defined. Therefore GSM Europe proposes to wording mentioned above.

Article 13.1 – Price control and cost accounting obligations

A national regulatory authority shall, in accordance with the provisions of Article 8 of this	A national regulatory authority shall, in accordance with the provisions of Article 8 of this

Directive, be able to impose price controls, including obligation for cost orientation of prices and obligation concerning cost accounting systems, for the provision of specific types of interconnection and/or network access, in situations where a market analysis indicates that a potential lack of effective competition means that the operator concerned might be capable of sustaining prices at an excessively high level, or applying a price squeeze, to the detriment of end users. National regulatory authorities shall take into account the investment made by the operator and the risks involved.	Directive, be able to impose price controls, including obligation for cost orientation of prices and obligation concerning cost accounting systems, for the provision of specific types of interconnection and/or network access, in situations where a market analysis indicates that a potential lack of effective competition means that the operator concerned might be capable of sustaining prices at an excessively high level, or applying a price squeeze, <u>for a non-transitory period</u> to the detriment of end users. National regulatory authorities shall take into account the investment made by the operator and the risks involved.

Justification

Article 13 would permit NRAs to impose price controls for the provision of specific types of interconnection services on operators deemed to have SMP on a specific market, following the market analysis in accordance with Article 14 of the Framework Directive.

Regulation by NRAs of termination rates should in the case of mobile operators be permitted only where an operator has SMP in the national market for interconnection as is foreseen in the current Interconnection Directive (97/13/EC). There is no justification for increasing the scope of regulation in this area, especially not in a sector which is deemed to be 'prospectively competitive'. GSM Europe believes that such measures would not be proportionate to the objectives. These regulatory obligations would only serve to increase regulatory uncertainty, pushing up the cost of capital which is contrary both to the stated objective of reducing regulation and the previously stated views of the Commission regarding the scope of the Interconnection Directive (OJ No C84 19.3.1998 p3 refers).

The Commission must specify that it is only where excessive prices can be sustained for <u>a non-transitory period</u> that intervention may be justified and that the length of that period will depend on the market (or MS) in question.

Explanatory Memorandum (page 3-4), The proposed new regulatory framework for access and interconnection

…In a competitive market, interconnection of and access to networks should in principle be agreed on the basis of commercial negotiation between the companies concerned. However, a number of factors constrain the competitiveness of the market at present. One is the existence of former monopolists that still provide the majority of connections, giving them a degree of bargaining power significantly greater than that of their competitors; another is the existence of bottleneck resources controlled by one or a few operators, such as the local access network in the telecommunications environment and conditional access systems in the digital television environment; and yet another is the existence of legal barriers to market entry that exist in the	…In a competitive market, interconnection of and access to networks should in principle be agreed on the basis of commercial negotiation between the companies concerned. However, a number of factors constrain the competitiveness of the market at present. One is the existence of former monopolists that still provide the majority of connections, giving them a degree of bargaining power significantly greater than that of their competitors; another is the existence of bottleneck resources controlled by one or a few operators, such as the local access network in the telecommunications environment and conditional access systems in the digital television environment (delete the rest<u>…..</u>).

mobile sector, where currently the availability of spectrum means that the number of players is limited to four or five, which has not been enough to ensure competitive pricing in all segments of the mobile market, in particular for call termination services.	

Justification

Paragraph 3 states that the number of players in the mobile sector has not been enough to ensure competitive pricing in all segments of the mobile market, in particular for call termination services.

It is not appropriate prior to national regulators undertaking detailed market analysis to state that particular market failures exist. Indeed the MMC (now referred to as a the competition commission) in the UK undertook a 9-month investigation into the pricing for fixed to mobile calls. It concluded that the market was prospectively competitive due to the potential for call back opportunities and other ways of calling customers such as fixed lines to provide competition.

Ex-ante regulation for call termination in the fixed market was originally developed to deal with ‘historic incumbencies’. There is therefore no obvious justification for singling out mobile termination over fixed termination as a failed market.

GSM Europe proposes that the reference to the lack of competitive pricing in the mobile sector is deleted.

The proposed authorisation of electric communications networks and services Directive

-Proposed amendments-

Article 3 – General authorisation

1. Member States shall not prevent an undertaking from providing electronic communications services or networks expect where this is necessary to protect public security, safety or health interests.	1. Member States shall not prevent an undertaking from providing electronic communications services or networks except where this is necessary to protect public security~~,~~ ~~safety or health interests~~ <u>or where scientific evidence has proved that the provision of electronic communications services or networks causes health damages</u>.

Justification

GSM Europe notes that the reasons allowing Member States to prevent undertakings from providing communication services have been extended by the Commission. According to the Commission's new approach not only public security but also safety and health interests may justify the exclusion of an undertaking from providing communication services or operating a communications network. GSM Europe rejects the proposed amendment of Art. 3 par. 1 as it may lead to over-regulation. In particular, GSM Europe considers the wording "health interests" to be too broad and too vague. GSM Europe is of the opinion that legislation on public health issues connected with electronic communications services should be based on published guidelines and expert opinion of independent, domicile and international electromagnetic radiation bodies (e.g. WHO, ICNIRP, NRPB [UK]) and other expert substantiated scientific evidence. Therefore, only in cases where, based on such scientific evidence, specific health damages may be expected from providing communications services an undertaking should not be authorised to provide such services or to operate a communications network.

Article 5 par. 2/Art. 13/Art. 8 par. 3 of the framework directive

GSM Europe welcomes the proposal that procedures for granting the right to use frequencies shall be open, non-discriminatory and transparent. However, the operators of GSM Europe are concerned to note that the draft directive does not discourage spectrum auctions which we believe might raise licence fees above economic value and may lead to higher consumer tariffs[8]. Moreover, Member States are free to decide whether to assign spectrum by auction or by beauty contest. Experiences with respect to the assignment procedures of UMTS-frequencies have shown that this room to manoeuvre will lead to different economic conditions for operators in different Member States which can be detrimental to the goal of harmonisation of market conditions within the European Union. In this context GSM Europe doubts that Art. 16 is sufficient to deal with the above mentioned risks for the functioning of the internal market.

[8] *Some regulators and operators who are members of GSM Europe do not subscribe to this view*

Article 7 – Procedure for restricted granting of rights to use radio frequencies

	add: *5.Member States shall ensure that undertakings affected by a decision to limit the granting of rights to use radio frequencies may appeal against this decision.*

Justification

National decisions to limit the granting of rights to use radio spectrum can have substantial effects on the business of mobile operators. Taking this fact into account the Commission has already provided in Art. 7 par. 1 that Member States have to publish their decisions as well as the reasons for limiting rights of using radio frequencies. However, GSM Europe is concerned that there is a lack of legal control with regard to the decisions taken by Member States. We are of the opinion that there should be a possibility to appeal against the decision of limiting the granting of rights to use radio frequencies. Therefore, GSM Europe proposes to amend Art. 7 by a new paragraph or at least to clarify that those operators are entitled to take legal action against decisions of Member States according to Art. 4 of the framework directive.

Article 11. 1 (d) – Information required under the general authorisation…

d. publication of comparative overviews of quality and price of services for the benefit of consumers;	~~d. Publication of comparative overviews of quality and price of services for the benefit of consumers;~~
The information referred to in (a), (b), (d), (e) and (f) may not be required prior to or as a condition for market access.	The information referred to in (a), (b)~~, (d)~~, (e) and (f) may not be required prior to or as a condition for market access.

Justification

GSM Europe is still disappointed to see in Art. 11 of the draft directive that Member States will be allowed to require information for the purposes of publication of comparative overviews of quality and price of services. GSM Europe is concerned that these requirements will give rise to de facto regulatory standards. However, the quality of service is one of the main parameters of competition in the communications sector. Creating such regulatory standards will distort competition in this area. In order to avoid the described negative effects on competition GSM Europe recommends to delete Art. 11 par. 1 (d).

Article 12 – Administrative charges

GSM Europe welcomes the Commission's proposal that administrative charges must be justified by administrative costs. However, due to national experiences GSM Europe would like to express its concerns that Member States will try to charge other than administrative fees (e.g. hidden charges under the cover of taxation) that are not justified by administrative costs. Therefore, GSM Europe urges the Commission to monitor administrative pricing (e.g. by a periodic best practice exercise) in the Member States and to take all measures to avoid that administrative charges will create market entry barriers. In this respect GSM Europe fully supports the Commission's proposals in Art. 16 under which the Commission is entitled to adopt measures to harmonise administrative charges within the European Union.

Article 14 – Amendment of rights and obligations

Member States may amend the rights, conditions, procedures, charges and fees concerning general authorisations and rights of use or rights of way in objectively justified cases and in a proportionate manner. Member States shall give appropriate notice of their intention to make such amendments and allow interested parties, including users and consumers, a sufficient period of no less than four weeks to express their views on the proposed amendments.	Member States may amend the rights, conditions, procedures, charges and fees concerning general authorisations and rights of use or rights of way in objectively justified cases and in a proportionate manner and only after a consultation with interested parties. Member States shall give ~~appropriate notice of~~ their intention to make such amendments and set out their purpose for the changes and how it is justified in accordance with EC law to interested parties and take account of their views. Member States should have particular regard to the need to maintain stability and regulatory certainty and to take into account investments and/or licence fees committed by undertakings prior to the proposed change. ~~Allow interested parties, including users and consumers, a sufficient period of no less than four weeks to express their views on the proposed amendments.~~ Parties concerned by a decision of Member States may appeal against decisions in accordance with the appeals procedure set out in the common framework directive.

Justification

The current drafting gives Member States complete discretion to alter, the rights, conclusions, procedures and fees associated with general authorisations and rights of way. There needs to be a specific reference to a transparent consultation procedure prior to any amendment being imposed and a specific reference to Art. 4 of the common framework directive on the rights of appeal. These changes are needed to ensure that there are appropriate checks and controls on decisions of Member States by industry players.

Annex B (1)

Designation of service for which the frequency shall be used, including conditions in relation to the content to be provided.	1. Designation of ~~service~~ standard for which the frequency shall be used. ~~, including conditions in relation to the content to be provided.~~

Justification

NRAs should not be in a position to specify what content operators can offer over allocations of spectrum frequencies as content services are intended to be outside the scope of this review. Regulating the content of services is far too restrictive and goes far beyond current practices.

The proposed Universal Service and Users Rights relating electronic communications networks and services Directive

-Proposed amendments-

General comments

GSM Europe supports the principle of minimum regulation. We are also of the opinion that competitive markets provide users with value for money. The policy objective "ensuring that users derive maximum benefit in terms of choice, price, quality and value for money"[9] is best achieved by competitive supply. It will always be difficult for Regulators to define what is in the best interest of users.

User rights should be protected by horizontal regulation. Sector specific protection of user rights should be confined to either:

- consumer protection issues that are specific to the communications sector and cannot be dealt with under horizontal law; or
- elements of the communications sector that are still in the process of transition towards competitive supply.

The policy objectives in both the Framework and the Universal services and user rights draft directives are presented in a manner that appears to ignore existing horizontal regulation as well as the consumer empowerment which competition brings to the market. This is contrary to the principle of minimum regulation that constitutes the basis of the present proposal.

GSM Europe fully supports the decision not to extend the scope of USO beyond basic fixed telephony services.

We also support the proposal that cost recovery of USO can be via general taxation and that if a USO fund is used that contributions come from a wide base as possible. Although we do have doubts over how NRAs will be able to ensure service providers or manufacturers contribute.

Article 7 -

1. Member States shall, where appropriate, take specific measures to ensure equivalent access to and affordability of publicly available telephone services, including access to Emergency and directory services, for disabled users and users with special social needs. 2. Member States may take specific measures, in the light of national conditions, to ensure that disabled users and users with special needs can also take advantage of the choice of undertakings	1. Member States shall, where appropriate, take specific measures to ensure equivalent access to and affordability of publicly available <u>fixed</u> telephone services, including access to Emergency and directory services, for disabled users and users with special social needs. 2. Member States may take specific measures, in the light of national conditions, to ensure that disabled users and users with special needs can also take advantage of the choice of <u>fixed</u>

[9] Draft Framework Directive, art 7.2.a.

and service providers available to the majority of users.	undertakings and service providers available to the majority of users.

Justification

As currently drafted section 7 extends the current scope of Universal Services to apply to all providers of public communication services i.e. mobile, ISP as well as fixed providers.
There is a real danger of over regulation, which will distort competition and discourage further developments.

Article 12 – Costing of Universal Service

1. (b) ...... such as public tendering or auction.	1. (b)...... such as public tendering ~~or auction.~~

Justification

In our opinion public tendering includes an auction. Therefore delete the term "or auction".

Article 16 – Retail tariff regulation

1. Member States shall maintain all obligations on retail tariffs for the provision of access to and use of the public telephone network at fixed locations that were in force prior to the date of entry into force of this Directive under Article 17 of Directive 98/10/EC, until a review has been carried out and a determination made in accordance with paragraph 2 of this Article. 3. Where as a result of a market analysis carried out in accordance with Article 14(3) of the Directive *[on a common regulatory framework for electronic communications networks and service*s], national regulatory authorities determine that a market is not effectively competitive, they shall ensure that undertakings with significant market power in that market orient their tariffs towards costs, so as not to charge excessive prices or inhibit market entry, or restrict competition by setting predatory prices, showing undue preference to specific users or unreasonably bundling services. National regulatory authorities may apply appropriate retail price cap measures to such undertakings in order to protect user and consumer interests whilst promoting effective competition.	1. Member States shall maintain all obligations on retail tariffs for the provision of access to and use of the <u>fixed</u> public telephone network at fixed locations that were in force prior to the date of entry into force of this Directive under Article 17 of Directive 98/10/EC, until a review has been carried out and a determination made in accordance with paragraph 2 of this Article. 3. Where as a result of a market analysis carried out in accordance with Article 14<u>(2)</u> of the Directive *[on a common regulatory framework for electronic communications networks and service*s], national regulatory authorities determine that a market is not effectively competitive, they shall ensure that undertakings with significant market power in that market orient their tariffs towards costs, so as not to charge excessive prices or inhibit market entry, or restrict competition by setting predatory prices, showing undue preference to specific users or unreasonably bundling services. National regulatory authorities may apply appropriate retail price cap measures to such undertakings in order to protect user and consumer interests whilst promoting effective competition.

Justification

We understood from the Commission's explanation at the public hearing that the obligations for retail price regulations are not meant for operators outside fixed telephony.

Retail price regulation would distort the competitive mobile market and could only be justified for incumbent fixed operators.

Article 19 – Quality of Service

1. Member States shall ensure that national regulatory authorities are able to require undertakings that provide publicly available electronic communications services to publish comparable, adequate and up-to-date information for consumers on the quality of their services. The published information shall also be supplied to the national regulatory authority.	1. Member States shall ensure that in non competitive markets national regulatory authorities are able to require organisations that provide publicly available electronic communications services to publish comparable, adequate and up-to-date information for consumers on the quality of their services. The published information shall also be supplied to the national regulatory authority. The methodology used should not unduly favour or disadvantage any provider.

Justification

We want to emphasize that for GSM Europe the quality of service is an important tool in the competitive market, especially in the mobile market. Only competition forces operators to make their prices transparent and guarantees that those operators who provide good quality retain customers. GSM Europe is of the opinion that the market will select different levels of quality and price/performance. NRA's should not attempt to pre-empt the market in this respect.

Article 21 – Operator assistance and directory enquiry services

2. Member States shall ensure that all direct public telephone service providers which assign telephone numbers to subscribers meet all reasonable requests to make Available, for the purposes of the provision of directory services, the relevant information in an agreed format on terms which are fair, cost-oriented and non-discriminatory.	2. Member States shall ensure that all direct public telephone service providers which assign telephone numbers to subscribers meet all reasonable requests to make available, for the purposes of the provision of directory services, the relevant information in an agreed format on terms which are fair, ~~cost-oriented~~ reasonable and non-discriminatory.

Justification

We are not supporting article 21(2) where the obligation, to make available, for the purposes of the provision of directory services, the relevant information on terms which are fair, cost-oriented and non-discriminatory, is imposed on the operators.
Even an analysis of a cost-oriented price could be a great burden for smaller operators. In our opinion this request cannot be regarded as appropriate.

Article 22 – European emergency number

Member States shall ensure that undertakings which operate public telephone networks make caller location information available to authorities handling emergencies, where technically feasible, for all calls to the European emergency number '112'.	Member States shall ensure that undertakings which operate public telephone networks make caller location information available to authorities handling emergencies, where technically feasible and commercially viable for all calls to the European emergency number "112"

Justification

There exist a number of techniques to provide caller location data including GPS, Time Difference of Arrival, cell ID. These methods bring about different accuracy, cost implications and timescales for deployment.

There are various reasons why a mobile operator provides the caller location data via GPS or Cell ID such as less reliability in rural areas, missing function indoors and in dense areas or simply sound business reasons.

We think that it should be the decision of the mobile operators to examine the merits of each technique for its own business. The operators should be free to decide whether to invest in technology or not. If they only invest in a technology to observe a regulatory decision this leads to the problem on whom additional investment costs should be imposed.

Mandating caller location for emergency services may result in operators delaying commercial launch until they are certain of the standard required so they can take sound business decisions.

Annex I

1 (b) Selective call barring for outgoing calls, free of charge i.e. the facility whereby the subscriber can, on request to the telephone service provider, bar outgoing calls of defined types or to defined types of numbers free of charge.	1 (b) Selective call barring for outgoing calls, free of charge i.e. the facility whereby the subscriber can, on request to the telephone service provider, bar outgoing calls of defined types ~~or to defined types~~ of numbers free of charge.

Justification

We suggest to delete "or to defined types" because only a specific number of defined types makes good economic sense.

Explanatory Memorandum - Users and Consumers Interests (p.5)

NRAs will have powers to impose specific measures, including per call tariff information, in accordance with the policy objectives of the overall legislative package, including consumer interests.	NRAs will have powers to impose specific measures, including per call tariff information, in accordance with the policy objectives of the overall legislative package, including consumer interests, if technically possible and cost effective.

Justification

The sentence should be changed, otherwise the NRA would have the power to prescribe real time per call advice of charge (AoC) for all our services which could be technically impossible

Recital 26 (p.14)

All operators should be obliged to complete calls that use not only the European regional code '3883' but also any other regional codes that may be used in Europe.	All operators should be obliged to complete calls that use not only the European regional code '3883' ~~but also any other regional codes that may be used in Europe.~~

Justification

It is not clear what is meant by “any other regional codes”, therefore we suggest to restrict the proposal only to the European regional code ‘3883’.

The proposed personal data and the protection of privacy in the electronic communications sector Directive

-Proposed amendments-

Data protection is currently regulated by the general Data Protection Directive (95/46/EC) and the Telecommunications Data Protection Directive (97/66(EC). The latter is the only Directive, which regulates a specific industry sector. The general Data Protection Directive is set to be revised in 2001, while the Telecommunications Data Protection Directive, which is the subject of this position paper, is part of the 99 Communications Review, aimed to adapt the level-playing field for the communications market.

The Commission's policy to propose an update of the sector-specific data protection measures under the new regulatory framework for the communications industry is incongruous and confusing. It would be better to undertake the review of the telecoms directive at the same time as the general directive, which is due next year. This would give all interested parties more time to learn how the existing regulatory framework functions in the new communications environment, and would benefit the development of a consistent and practical approach combining legislative solutions with industry self-regulation and technological measures.

GSM Europe shares the view that, data protection rules should be technology- and sector neutral. The mobile sector already offers services which meet the highest standards of data protection (e.g. prepaid cards for anonymous usage of mobile services, itemised billing or IP based information services) (IP needs clarification) the GSM operators do not see any need for additional specific regulation in this area. A data protection directive should only provide a general framework of principles, which are applicable irrespective of the type of technology. Within this framework, flexible self-regulatory approaches should prevail and greater trust should be placed on market solutions instead of introducing restrictive regulation, which could hamper the development of innovative communications services in Europe.

Because of this and to capture with the overall aim of the 1999 Review (withdrawal of sector specific regulation wherever possible) and having a general data protection legislation already guaranteeing all necessary safeguards, the need for any telecommunications specific data protection regulation has to be questioned.

The proposed directive still specifies sector specific rules for electronic communications services and does not formulate more general rules. Despite the fact that GSM Europe thinks that such a sector specific data protection regulation is not necessary and should therefore be withdrawn, it wishes to propose amendments in respect of the proposed Directive.

Article 6.3

For the purpose of marketing its own electronic communications services or for the provision of value added services to the subscriber, the provider of a publicly available electronic communications service may process the data referred to in paragraph 1 to the extent and for the duration necessary for	For the purpose of marketing its own electronic communications services or customer care services or for the provision of value added services to the subscriber, the provider of a publicly available electronic communications service may process the data referred to in

such services, if the subscriber has given his consent.	paragraph 1 to the extent and for the duration necessary for such services, ~~if the subscriber has given his consent.~~ unless the subscriber has expressed its wish for the data not to be processed.

Justification

A great variety of innovative value added services have already been introduced, based on traffic information. New services are currently being developed. Traffic information typically allows offerings of services specifically tailored to customer needs. For instance customers ask often for an overview of their usage and whether they might be better suited to an alternative tariff package. Section 6 would preclude customers from benefiting from such retrospective review. The framework should therefore be kept open for such services to reach rapidly the greatest number of subscribers.

Also, a requirement to obtain consent in each individual case would seem to impose an undue burden on operators particularly in the mobile pre-pay market where operators do not collect customer details.

The opt-out approach is flexible, clear and simple to implement. It is furthermore the approach provided for in the Electronic Commerce Directive(200/31/EC). It is important to keep approaches in both Directives consistent with each other.

Finally, it should be recalled that the General Data Protection Directive (95/46/EC) already provide with a general regulatory framework with which service providers have to comply.

Article 6.4

The service provider must inform the subscriber of the types of traffic data which are processed for the purposes mentioned in paragraphs 2 and 3 and of the duration of such processing.	Delete.

Justification

The overall purpose of this paragraph is unclear.

This obligation of information is not necessary for the subscriber:

1) it seems irrelevant for a subscriber to know for instance that traffic data is kept for interconnection purposes (paragraph 2), as it concerns traffic settlement between two service providers, that is only large amount of traffic, not individual communications;
2) in relation to purposes mentioned in paragraph 3, the subscriber will have had the possibility to react and, if he/she wishes so, to block the data processing; and
3) in relation to the provision of value added services (paragraph 3), the subscriber will have in most cases actively asked for the delivery of the services him/herself, so he/she is aware of the processing; in the worst cases, it could lead to a situation where the subscriber has asked for a service, but blocks the processing of data needed to deliver such a service.

If any such information must be provided, it should be sent to the subscriber in such a way that the service provider does not need to contact each individual subscriber. As it is currently common practice, the information should be provided to the subscriber either:

- in the general conditions of his/her contract
- in the general rules of the company regarding data, which can be provided to the customer upon request

Otherwise, fulfilling such an obligation would be very difficult and costly for service providers.

Therefore it seems that this obligation of information imposes a heavy burden on the service provider while the benefit expected, if any, are very limited.

Article 8.5

The provisions of paragraph 1 shall also apply with regard to calls to third countries originating in the Community. The provisions of paragraphs 2, 3 and 4 shall also apply to incoming calls originating in third countries.	The provisions of paragraph 1 shall also apply, if technically feasible, with regard to calls to third countries originating in the Community. The provisions of paragraphs 2, 3 and 4 shall also apply, if technically feasible, to incoming calls originating in third countries.

Justification

The application of the provision of paragraph 1 to cross-boarder situation can be problematic. Mobile operators are unlikely to be able to comply with this obligation due to technical restraints. For example, the extension of the mechanism allowing for the calling user to have the possibility to eliminate the presentation of the calling-line identification on a per-call basis to calls to third countries originating in the Community may not necessarily be possible on mobile networks. This is because signalling systems need to work across borders and the home operator is not in a position to influence the seamlessness of such systems.

Article 9.1

Where electronic communications networks are capable of processing location data other than traffic data, relating to users or subscribers of their services, these data may only be processed when they are made anonymous, or with the consent of the users or subscribers to the extent and for the duration necessary for the provision of a value added service. The service provider must inform the users or subscribers, prior to obtaining their consent, of the type of location data which will be processed, of the purposes and duration of the processing and whether the data will be transmitted to a third party for the purpose of providing the value added service.	Where electronic communications networks are capable of processing location data other than traffic data, relating to users or subscribers of their services, these data may only be processed when they are made anonymous, or ~~with the consent of the users or subscribers to the extent and for the duration necessary for the provision of a value added service. The service provider must inform the users or subscribers, prior to obtaining their consent, of the type of location data which will be processed, of the purposes and duration of the processing and whether the data will be transmitted to a third party for the purpose of providing the value added service.~~ as long as the users or subscribers has not express its wish for the data not to be processed.

Justification

The obligations suggested are extremely constraining for service providers and would surely contribute to hamper the development of the value added service market for which users demand is growing. A great variety of innovative value added services based on location information are currently being developed. The framework should therefore be kept open for such services to reach rapidly the greatest number of subscribers.

Location services are an important service for 3G/UMTS, but will require high investments of deploying accurate location technologies. Therefore, for operators to recoup their substantial fixed costs, these services must have the ability to reach a large number of subscribers.

The opt-out approach is flexible, clear and simple to implement. It is furthermore the approach provided for in the Electronic Commerce Directive(200/31/EC). It is important to keep approaches in both Directives consistent with each other.

It should also be recalled that the General Data Protection Directive (95/46/EC) already provide with a general regulatory framework with which service providers have to comply.

The obligation of information is not necessary for the subscriber:

1. the subscriber will have had the possibility to react and, if he/she wishes so, to block the data processing; and
2. the subscriber will have in most cases actively asked for the delivery of the services him/herself, so he/she is aware of the processing; in the worst cases, it could lead to a situation where the subscriber has asked for a service, but blocks the processing of data needed to deliver such a service.

If any, the information should be sent to the subscriber in such a way that the service provider does not need to contact each individual subscriber. Information regarding the involvement of a third party should also be provided to the subscriber by the means described below. As it is currently common practice, the information should be provided to the subscriber either:

- in the general conditions of his/her contract

- in the general rules of the company regarding data, which can be provided to the customer upon request

Otherwise, fulfilling such an obligation would be very difficult and costly for service providers. Therefore it seems that this obligation of information imposes a heavy burden on the service provider while the benefit expected, if any, are very limited.

Article 9.2

Where consent of the users or subscribers has been obtained for the processing of location data other than traffic data, the user or subscriber must continue to have the possibility, using a simple means and free of charge, of temporarily refusing the processing of such data for each connection to the network or for each transmission of a communication.	Where ~~consent of the users or subscribers has been obtained~~ the users or subscribers have not opted out for the processing of location data other than traffic data, the user or subscriber ~~must continue to~~ can have the possibility, using a simple means and free of charge, of temporarily refusing the processing of such data for each connection to the network or for each transmission of a communication. if technically feasible.

Justification

As explained above, the opt-out approach is flexible, clear and simple. It is furthermore the approach provided for in the Electronic Commerce Directive (200/31/EC). It is important to keep approaches in both Directives consistent with each other's.

More important, it is very unlikely that barring the provision of location information on a case-by-case basis is technically possible. It would require highly advanced signalling tools which are not currently available.

Taking into account the time, which has been necessary to make CLIP/CLIR also available to cross-boarder traffic cases, it can be anticipated that the provision of location information, which is a much more complex and dense type of information, will not be available in the near future.

Article 13.1

The use of automated calling systems without human intervention (automatic calling machines), facsimile machines (fax) or electronic mail for the purposes of direct marketing may only be allowed in respect of subscribers who have given their prior consent.	The use of automated calling systems without human intervention (automatic calling machines), facsimile machines (fax) or electronic mail for the purposes of direct marketing may only be allowed in respect of subscribers who have ~~given their prior consent.~~ not opted-out.

Justification

The opt-out approach is flexible, clear and simple to implement. It is furthermore the approach provided for in the Electronic Commerce Directive(200/31/EC). It is important to keep approaches in both Directives consistent with each other.

It should also be recalled that the General Data Protection Directive (95/46/EC) already provide with a general regulatory framework with which service providers have to comply.

Article 13.2

Member States shall take appropriate measures to ensure that, free of charge, unsolicited communications for purposes of direct marketing, by means other than those referred to in paragraph 1, are not allowed either without the consent of the subscribers concerned or in respect of subscribers who do not wish to receive these communications, the choice between these options to be determined by national legislation.	Member States shall take appropriate measures to ensure that, free of charge, unsolicited communications for purposes of direct marketing, by means other than those referred to in paragraph 1, are not allowed ~~either without the consent of the subscribers concerned or in respect of subscribers who do not wish to receive these communications, the choice between these options to be determined by national legislation.~~ in respect of subscribers who do not wish to receive these communications.

Justification

The opt-out approach is flexible, clear and simple to implement. It is furthermore the approach provided for in the Electronic Commerce Directive (200/31/EC). It is important to keep approaches in both Directives consistent with each other.

It should also be recalled that the General Data Protection Directive (95/46/EC) already provide with a general regulatory framework with which service providers have to comply.

Add Article 13.3

	Any measures taken by Member States to implement this provision should place obligations placed on the originators of the communications concerned rather than network operators carrying the communications.

Justification

The obligation to stop unsolicited communications should rest with the originators of the communications, as they are best able to gain the consent of the subscribers. It is not practical for network operators to check where communications, such as individual e-mails, originate from or whether they are unsolicited.

Add Article 15.2

	Member States shall ensure that costs incurred in meeting such obligations are re-imbursed either by the organisation requesting the information or by the Member State itself.

Justification

Provision of caller location information for purposes other than 112 call, that is for example by law enforcement agencies, for surveillance, cases of fraud or other police investigations requires significant resources from operators. It is therefore reasonable that operators should be able to recover their full costs.

Furthermore, the provision of customer information to the emergency services should not impact upon the normal day-to-day running of an operator's business. Operators are under increasing pressure from emergency authorities to obtain information from network functions that operate on a real time basis such as billing platforms. Operators need to ensure that collecting information for emergency authorities does not have a detrimental impact on the quality of service they offer customers.