

TRANSITIONAL MEASURES PURSUANT TO ARTICLE 27 OF DIRECTIVE 2002/21/EC

COMMISSION REPORT TO ERG

25 NOVEMBER 2004

The purpose of this document is to clarify under what circumstances regulatory action taken by national regulatory authorities (“NRAs”) after the date of application of the new regulatory framework (“NRF”), *i.e.* 25 July 2003 (or alternatively 1 May 2004 for the ten new Member States) may fall within the scope of the transitional provisions contained in Article 27 of the Framework Directive.

Article 26 of the Framework Directive repeals the Open Network Provision (“ONP”) legislation from the date of application of the NRF. Article 27 of the Framework Directive¹ requires Member States to maintain in place certain specific obligations imposed in accordance with the previous, ONP framework, until such time as a determination is made in respect of those obligations in accordance with the market analysis procedure. The rationale behind this provision is that the legislator considered it necessary to ensure the continued application of certain obligations, primarily in order to ensure continuity of the regulatory framework (*i.e.* to guarantee legal certainty and avoid any legal vacuum) and to support NRAs in their ongoing supervisory role.

The question arises as to how these transitional provisions should apply in cases where an NRA has not yet completed market reviews under Article 16 of the Framework Directive, but where, either at its own initiative or through a dispute settlement procedure, it needs to update those pre-existing regulatory requirements. This may be required for different reasons, including in particular ensuring legal certainty, proportionality and non-discrimination or the continuity of existing agreements.

The Commission services recall that all existing obligations imposed in accordance with the provisions referred to Article 27 of the Framework Directive², must remain in force until a determination is made in respect of those obligations in accordance with the procedures provided by the NRF.

Pending completion of market reviews, the updating of pre-existing regulatory requirements (imposed under the provisions of the ONP framework referred to in Article 27 of the Framework Directive) would in principle fall within the scope of the transitional measures. In doing so, NRAs should take utmost account of the general principles and policy objectives enshrined in the NRF, and especially those referred to in Article 8 of the Framework Directive³. However, the Commission services are of the view that a conclusion as to the compatibility of any measure with the transitional arrangements is dependent on a proper case-by-case analysis being carried out. It should also be recalled that the Commission retains its powers under Article 226 of the EC Treaty, when an NRA applies an obligation under the ONP legislation that is not, in a particular case, proportionate and/or justified under Article 27 of the Framework Directive.

In cases where no obligations were imposed under the ONP framework, the NRA can only impose a new obligation following a determination made in accordance with the market analysis procedure under the NRF, or, alternatively, in exceptional circumstances and where

¹ In conjunction with Article 7 of the Access Directive and Article 16 of the Universal Service Directive.

² In conjunction with Article 7 of the Access Directive and Article 16 of the Universal Service Directive.

³ Article 10 of the EC Treaty obliges Member States, including their administrative authorities, such as NRAs, to refrain from taking any measures that could compromise the full effect of Community legislation.

there is an urgent need to act, by means of a measure taken under Article 7(6) of the Framework Directive.

Furthermore, the Commission services would like to stress that NRAs must complete their tasks as defined in Article 15 and 16 of the Framework Directive within the shortest possible timeframe. In this context, NRAs should not use the temporary mechanism offered by Article 27 of the Framework Directive to bypass or unnecessarily postpone the performance of their duties under the procedures provided by the NRF or to keep in force an ONP-based measure that is no longer appropriate under the principles of the NRF.

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