

## GAP ANALYSIS AND LEGISLATIVE ACTION PLAN – ACCESS DIRECTIVE

### 1. Introduction

#### 1.1. Document purpose

Annex XV-B of the Association Agreement cites which parts of EU Legislation need to be implemented in Georgian Law in the field of Electronic communication networks and services. Relevant EU Legislation includes the: Framework Directive, Authorization Directive, Access Directive, Universal Service Directive, Directive on Privacy and Electronic Communications and the Radio Spectrum Decision.

This overview summarises an analysis of gaps between the currently applicable Georgian law and the parts of the Access Directive (the “**Access Directive**” or “**Directive**”) which, according to the Accession Agreement, must be implemented in Georgian law by 1 September 2017.

We also provide initial guidance on the harmonisation of Georgian law with the remaining parts of the Access Directive, which are not mentioned in the Association Agreement.

#### 1.2. Scope of review

The review has been conducted for the purposes of performance of consulting services for the project „Georgia - Information Communication Technology Sector Development: Harmonisation of laws, regulation of next generation access and regulatory development“ (the „Project“) and is intended to be confidential and covered by the attorney-client privilege, the attorney work product doctrine, and any other applicable privilege and/or protection. All documents prepared in connection with the review, including this document, are intended to be confidential and privileged and produced for the sole purpose of providing legal advice within the scope of the Project.

This document is provided to and is capable of being relied on exclusively by GNCC and EBRD. The document may not be disclosed to, used by, or relied on by third parties without our explicit written consent, except as otherwise explicitly provided by us within the Project. Even if given, the consent will neither imply nor create any contractual relationship between third parties and us.

We conducted the review under the EU law in the scope stipulated in the Project and based on the English translations of the relevant laws and/or other documents were provided to use by GNCC. We are not qualified to provide legal advice under Georgian law. Unless we state differently in the document, we did not take into account any other law and any other document other than those provided to us by GNCC.

#### 1.3. Association Agreement Requirements

According to the Association Agreement Georgian Law must be approximated with the following provisions/parts of the Access Directive:

- Access to, and use of, specific network facilities;
- Price controls on access and interconnection charges, including obligations for cost-orientation;
- Transparency, non-discrimination and accounting separation.

#### 1.4. Colour code and document structure

This overview analyses individual requirements contained in the Association Agreement in relation to the Access Directive and indicates initial conclusions by the following colour code:

No Gap / Harmonised	Partial Gap / partially harmonised but additional legislative measures are needed	Gap / not yet harmonised	Not applicable

When “No Gap” is identified we provide no further comments.

When „Partial Gap“ or „Gap“ is identified, we provide further comments on the nature of the gap and initial recommendations regarding how this gap could be addressed. In addition, we summarize these comments in an executive summary at the beginning of each chapter. Our initial recommendations are incorporated in this legislative Action Plan, taking into account also the outcome of our discussions with GNCC.

„Not applicable“ refers to the parts of the Access Directive that cannot apply in Georgia, because Georgia is not yet a Member State. This would typically indicate provisions that implement certain competences or coordination roles of the European Commission or other bodies, such as BEREC.

### 1.5. Abbreviations and terms used

- ECA –Law of Georgia on Electronic Communications,
- BRA –Law of Georgia on Broadcasting,
- COA –Law of Georgia on Competition,
- INRA –Law of Georgia on Independent National Regulatory Authorities,
- GNCCC – GNCC Charter
- SMP – significant market power
- ALP – Act on Licences and Permits
- Res13 – Resolution No.13 Of the Georgian National Communications Commission “On Approval of the Regulations on Conducting Auction for the Right to Use Radiofrequency Spectrum or/and Numbering Resource”, dated December 12, 2005
- PCRS – Protection of Consumer Rights Resolution<sup>1</sup>

## 2. Executive Summary

We have identified the following gap areas where Georgian law would need to be further harmonised with the Access Directive:

- Georgian law (the ECA) currently does not allow the GNCC to mandate functional separation as a remedy imposed on an authorised person with SMP. This remedy is explicitly included in the EU regulatory framework and shall be therefore included in the ECA.
- The definitions included in the ECA are not aligned with the definitions included in the Access Directive (or the other directives that shall be harmonised).
- The Directive stipulates that all information acquired during negotiation on provision of access or interconnection may only be used for the reason such information was supplied and the acquiring operator shall keep them confidential. By contrast, the ECA does not provide for corresponding confidentiality obligations. We recommend that the ECA be amended accordingly.

<sup>1</sup> Resolution No. 3 of Georgian National Communications Commission, Tbilisi, 17 March, 2006 Concerning the Approval of the Regulations in respect to the Provision of Services and Protection of Consumer Rights in the Sphere of Electronic Communications.

- Under the Access Directive, the national regulatory authorities (NRAs) have the right to impose, in specific situations, access obligations on operators even if the latter do not have significant market power. While the ECA does provide for such access obligations, these apply by virtue of law as statutory obligations, and the GNCC does not have any powers to amend or cancel them. We recommend that the access obligations in the ECA are harmonised with the Access Directive.
- We have further identified several minor gaps that would be presumably remedied after Georgia's EU accession such as, for example, rules aimed at promoting pan-European services (currently missing).

### 3. Detailed Gap Analysis

#### A Access to, and use of, specific network facilities

	Access Directive		Georgian Legislation	Gap
Art 2/a	<p>'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, including when they are used for the delivery of information society services or broadcast content services. It covers inter alia: access to network elements and associated facilities, which may involve the connection of equipment, by fixed or non-fixed means (in particular this includes access to the local loop and to facilities and services necessary to provide services over the local loop); access to physical infrastructure including buildings, ducts and masts; access to relevant software systems including operational support systems; access to information systems or databases for pre-ordering, provisioning, ordering, maintaining and repair requests, and billing; access to number translation or systems offering equivalent functionality; access to fixed and mobile networks, in particular for roaming; access to conditional access systems for digital television services and access to virtual network services;</p>	Art 2/q ECA	<p>q) access - making available for use by an electronic communication network operator, under the conditions (including tariffs) determined by such operator, of the relevant elements and technical facilities of its own network, as well as of their available functional resources or capacities, or of the types of electronic communication services provided (or capable of being provided) through them, which includes making available for use:</p> <p>q.a) by the electronic communication network operator of the relevant elements of its physical infrastructure and technical facilities;</p> <p>q.b) the elements of a local access network and their free resources, including sewage canals and wells, subscriber pairs, masts and poles;</p> <p>q.c) the co-location area;</p> <p>q.d) the relevant network elements of fixed and mobile communication network operators, their free operational and functional resources and capacities (including resources related to the provision of roaming);</p> <p>q.e) a subscriber's individual access system and electronic programme (services) guide;</p> <p>q.f) the operational software management resources of electronic communication networks and user information</p>	

			<p>databases, and resources related to the portability (translation) of subscriber numbers;</p> <p>q.g) virtual network services;</p> <p>q.h) the functional resources and capacities of other relevant elements of an electronic communication network or the types of communication services;</p>	
Art 2/b	<p>‘interconnection’ means the physical and logical linking of public communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking, or to access services provided by another undertaking. Services may be provided by the parties involved or other parties who have access to the network. Interconnection is a specific type of access implemented between public network operators;</p>	Art 2/z <sup>36</sup> ECA	<p>z36) interconnection - physical and logical linking of electronic communication networks used by one or several electronic communication network providers in order to allow users of one electronic communication network operator to communicate with users of the same or another electronic communication network operator, and/or to access services provided by another electronic communication network operator, and which is carried out through unlimited, mandatory and non-discriminatory mutual access of providers to the appropriate elements of their networks;</p>	
		Art 2/z1 ECA	<p>z1) electronic communication network operator - an authorised person intending to provide or providing public electronic communication networks or relevant network elements, and providing access, for a certain fee, to an interested authorised person to these elements and to their resources and capacities, as well as providing electronic communication services through them to users;</p>	

**Comment**

The Directive limits the definition of interconnection only to linking of public communications networks.

The definition of “interconnection” in the ECA does not directly specify that it only applies to public networks. However, we assess that there is no gap in the

ECA as the “publicly available” nature of the networks is implied by the definition of “electronic communication network operator”.				
Art 2/c	'operator' means an undertaking providing or authorised to provide a public communications network or an associated facility;	Art 2/f ECA	f) authorised person - any entrepreneurial person, as well as any non-entrepreneurial person registered by the Georgian National Communications Commission and providing electronic communication networks (electronic communication network operator) and/or electronic communication services (provider of electronic communication services);	
		Art 14/3 ECA	3. No authorisation of activities shall be necessary if electronic communication networks and facilities are used for:  a) organising special electronic communication networks;  b) organising a departmental electronic communications network of an enterprise, institution or organisation that is created for non-commercial purposes, and for providing internal communication in such enterprise, institution or organisation.	
		Art 2/z1 ECA	z1) electronic communication network operator - an authorised person intending to provide or providing public electronic communication networks or relevant network elements, and providing access, for a certain fee, to an interested authorised person to these elements and to their resources and capacities, as well as providing electronic communication services through them to users;	
		Art 2/z2 ECA	z2) electronic communication service provider - an electronic communication network operator or an authorised person allowed to access the relevant elements or resources of its network, who intends to	

			provide or who provides electronic communication services through these elements or resources of the network;	
<p><b><u>Gap 1 – Scope of obliged persons</u></b></p> <p>The Directive uses the term “operator” which covers only public networks operators. Based on Article 8 of the Directive, the NRAs may impose SMP obligations on “operators”, i.e. only in relation to public networks or associated facilities.</p> <p>On the other hand, the ECA in its Article 30 stipulates that SMP obligations may be imposed on “authorised persons”, which may cover also providers of electronic communications services, including non-public services. Based on the definitions in ECA, the person who provides non-public services is also included in the definition of “authorized person” and thus could be theoretically subject to any of the obligations. Although such person would not have a significant market power on any market, the definitions in ECA shall reflect the EU regulatory framework.</p> <p>There is a partial gap in relation to the scope of entities to which the obligations and/or rights under the Access Directive apply. Since this gap will most probably have no effect on the regulation of SMP operators and since Article 14/3 of the ECA allows to provide private electronic communications services without an authorisation, we do not recommend to remedy this and keep the current language.</p> <p>However, please note that we do not point out this (partial) gap in the following parts of this gap analysis. Where a colour code “No gap/Harmonised” is used, it shall be taken without prejudice to the analysis scope of subjects according to this Article.</p>				
<p><b><u>Action plan</u></b></p> <p><b>Legislation:</b> ECA</p> <p><b>Section:</b> /</p> <p><b>Proposed change:</b> None</p> <p><b>Notes:</b> We propose to maintain the current wording of the ECA because the identified partial gap has no practical implications or consequences and any change would impact essential terminology in the ECA to which the market got used and have potentially other undesired consequences.</p>				
Art 3/1	1. Member States shall ensure that there are no restrictions which prevent undertakings in the same Member State or in different Member States from negotiating between themselves	Art 19/1 ECA	1. An authorised person may: a) request a provider of a public electronic communication network to provide access and/or interconnection to the	

	agreements on technical and commercial arrangements for access and/or interconnection, in accordance with Community law. The undertaking requesting access or interconnection does not need to be authorised to operate in the Member State where access or interconnection is requested, if it is not providing services and does not operate a network in that Member State.		relevant elements of its network;	
		Art 19/2/d ECA	2. An authorised person shall: d) upon request, ensure unlimited access of an interested authorised person to the relevant free elements of its own network and to their functional resources and capacities;	
Art 3/2	2. Without prejudice to Article 31 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) [ <i>must carry obligations for radio and TV transmission</i> ], Member States shall not maintain legal or administrative measures which oblige operators, when granting access or interconnection, to offer different terms and conditions to different undertakings for equivalent services and/or imposing obligations that are not related to the actual access and interconnection services provided without prejudice to the conditions fixed in the Annex of Directive 2002/20/EC (Authorisation Directive).	Art 20/2/b ECA	2. Objectives of the Commission are to: b) prohibit the discrimination against authorised persons, and ensure their equality; ensure that upon the request of interested authorised persons non-discriminatory access and/or interconnection is provided by the electronic communication network operator to the relevant elements of its own network and to their available functional resources and capacities;	
Art 4/1	1. Operators of public communications networks shall have a right and, when requested by other undertakings so authorised in accordance with Article 4 of Directive 2002/20/EC (Authorisation Directive), an obligation to negotiate interconnection with each other for the purpose of providing publicly available electronic communications services, in order to ensure provision and interoperability of services throughout the Community. Operators shall offer access and interconnection to other undertakings on terms and conditions consistent with obligations imposed by the national regulatory authority pursuant to Articles 5 to 8.	Art 19/1 ECA	1. An authorised person may: a) request a provider of a public electronic communication network to provide access and/or interconnection to the relevant elements of its network;	
		Art 19/2/d ECA	2. An authorised person shall: d) upon request, ensure unlimited access of an interested authorised person to the relevant free elements of its own network and to their functional resources and capacities;	
Art 4/2	2. Public electronic communications networks established for the	Art 56	1. Providers of public electronic communication networks,	



	distribution of digital television services shall be capable of distributing wide-screen television services and programmes. Network operators that receive and redistribute wide-screen television services or programmes shall maintain that wide-screen format.	ECA	<p>which carry out their activities through the facilities of a local access network in providing digital broadcasting to end-users, shall ensure that the technical characteristics of their networks and technical facilities are able to transmit wide-screen digital television signals and distribute programmes.</p> <p>2. Transit connection (service) operators providing digital broadcasting, which carry out the transit of wide-screen digital television signals to end-users shall ensure that the technical facilities of its network have appropriate characteristics, and provide wide-screen television programmes to end-users maintaining the format.</p>	
Art 4/3	3. Without prejudice to Article 11 of Directive 2002/20/EC (Authorisation Directive) [ <i>obligation to provide information to the NRA</i> ], Member States shall require that undertakings which acquire information from another undertaking before, during or after the process of negotiating access or interconnection arrangements use that information solely for the purpose for which it was supplied and respect at all times the confidentiality of information transmitted or stored. The received information shall not be passed on to any other party, in particular other departments, subsidiaries or partners, for whom such information could provide a competitive advantage.	N/A		

**Gap 2 – Confidentiality of information acquired during negotiations**

The Directive requires that all information that undertaking acquire in relation to negotiating interconnection or access arrangements must be used solely for the purpose for which it was supplied.

While the ECA stipulates a confidentiality obligation covering information about users and user data (Art. 8), it does not provide for a confidentiality obligation covering information acquired in relation to negotiating access and/or interconnection arrangements.

We assess this as a gap and recommend that confidentiality obligation covering information acquired in relation to negotiating access/interconnection

agreements is included in the ECA.			
<b>Action plan</b>			
<b>Legislation:</b>		ECA	
<b>Section:</b>		19	
<b>Proposed change:</b>		Include a general obligation imposed on the authorized persons to use all information acquired from another authorized person in relation to the process of negotiating access or interconnection arrangements only for the purpose for which it was supplied and respect at all times confidentiality of such information. This shall be without prejudice to the authorized persons' obligation to provide information to the GNCC according to the ECA, in particular Section 19/2/a and without prejudice to remedies imposed on SMP operators (in particular transparency).	
<b>Notes:</b>		/	
Art 5/1	<p>1. National regulatory authorities shall, acting in pursuit of the objectives set out in Article 8 of Directive 2002/21/EC (Framework Directive), encourage and where appropriate ensure, in accordance with the provisions of this Directive, adequate access and interconnection, and the interoperability of services, exercising their responsibility in a way that promotes efficiency, sustainable competition, efficient investment and innovation, and gives the maximum benefit to end-users.</p> <p>In particular, without prejudice to measures that may be taken regarding undertakings with significant market power in accordance with Article 8, national regulatory authorities shall be able to impose:</p> <p>(a) to the extent that is necessary to ensure end-to-end connectivity, obligations on undertakings that control access to end-users, including in justified cases the obligation to interconnect their networks where this is not already the case;</p>	Art 19/3 ECA	<p>3. An electronic communications network operator providing services to end-users in a local service area <b>through subscriber numbering resources</b> shall ensure the provision of direct or indirect interconnection to other interested operators or owners of a departmental electronic communication network by providing unlimited and non-discriminatory access, <b>at cost-oriented tariffs</b>, to the relevant elements of its own network. It shall be prohibited to terminate the active interconnection between electronic communication network operators. If a provider of an interconnected electronic communication network does not fulfil the conditions of an active interconnection agreement, the other party to the agreement may suspend the active interconnection in order to ensure performance of these conditions only with the consent of the Commission and for the period of time and under the conditions determined by the Commission.</p>

	<p>(ab) in justified cases and to the extent that is necessary, obligations on undertakings that control access to end-users to make their services interoperable;</p> <p>(b) to the extent that is necessary to ensure accessibility for end-users to digital radio and television broadcasting services specified by the Member State, obligations on operators to provide access to the other facilities referred to in Annex I, Part II on fair, reasonable and non-discriminatory terms.</p>	Art 57 ECA	<p>1. A provider of digital interactive television services shall ensure the use of open application program interface; unlimited access of interested authorised persons to the relevant elements of a digital interactive television network, including to the resources of a subscriber's individual access system and electronic programme guide.</p> <p>2. An operator authorised to provide digital television broadcasting networks and facilities shall ensure the interoperability and the compliance of the open application program interfaces with the established technical standards, also provide information to the Commission on the characteristics of the selected application program interface.</p>	
Art 5/2	2. Obligations and conditions imposed in accordance with paragraph 1 shall be objective, transparent, proportionate and non-discriminatory, and shall be implemented in accordance with the procedures referred to in Articles 6, 7 and 7a of Directive 2002/21/EC (Framework Directive).	N/A		
Art 5/3	3. With regard to access and interconnection referred to in paragraph 1, Member States shall ensure that the national regulatory authority is empowered to intervene at its own initiative where justified in order to secure the policy objectives of Article 8 of Directive 2002/21/EC (Framework Directive), in accordance with the provisions of this Directive and the procedures referred to in Articles 6 and 7, 20 and 21 of Directive 2002/21/EC (Framework Directive).	N/A		

**Gap 3 – Symmetrical access obligation**

The Directive requires that GNCC is able, at its own initiative, to impose (i) interconnection and (ii) interoperability on operators who control access to end-users and (iii) access to application program interfaces (APIs) and to electronic programme guides (EPGs) if necessary to ensure access to digital radio and television services for end-users.

The ECA stipulates access, interconnection and/or interoperability as a statutory obligation. The interconnection obligation is imposed in the ECA at cost-oriented prices and includes also indirect interconnection.

The ECA thus not only implements the Directive but in the aspects of cost orientation and indirect interconnection imposes even a stricter regulation. On the other hand, the ECA does not clearly stipulate the interoperability obligation related to interconnection, which is however implied.

The ECA foresees a slightly different procedural mechanism than the Directive. Under the Directive the GNCC would assess the circumstances and based on this assessment impose (i) interconnection, (ii) interoperability or (iii) access to APIs and/or EPGs. Under the ECA these obligations are imposed by law, under certain conditions and GNCC would thus enforce these obligations, while assessing whether the conditions for their application were met. We believe that in essence the same result is achieved and therefore there is no obvious gap related to the procedural mechanism.

A partial gap relates to the fact that under the ECA the general interconnection and access obligation stipulated Article 19 paragraph 3 ECA seems to apply only to persons who have rights to use numbering resources in a specific geographical area, not to other authorised persons. While this may be a formal gap, we believe that in practice interconnection is relevant in most cases to operators with assigned numbering resources and can hardly be implemented without these. The implementation in the ECA may thus be more clear than the general provision in the Directive requiring interconnection in cases when interconnection is necessary to ensure end to end connectivity.

To address the concerns identified in this gap analysis we recommend that GNCC considers (i) deleting the cost orientation principle in relation to interconnection and (ii) clarifying that interconnection includes an interoperability obligation.

#### **Action plan**

**Legislation:** ECA

**Section:** 19/3

**Proposed change:** We have been informed by the GNCC that there is currently an ongoing legislative process regarding an amendment proposing to delete the obligation to provide access at cost-oriented prices. Therefore, there is no need to implement this in the ECA at this time.  
We propose to keep the current wording limiting the obligation on operators providing their services “*through subscriber numbering resources*” because the identified partial gap has no practical implications or consequences and the ECA wording may in this respect provide more clarity than the general provision contained in the Directive.

We propose to specify that interoperability obligation is inherently covered by the obligation of interconnection.

Notes: /	
<p>Art 12/1</p> <p>1. A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations on operators to meet reasonable requests for access to, and use of, specific network elements and associated facilities, inter alia in situations where the national regulatory authority considers that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest.</p> <p>Operators may be required inter alia:</p> <p>(a) to give third parties access to specified network elements and/or facilities, including access to network elements which are not active and/or unbundled access to the local loop, to, inter alia, allow carrier selection and/or pre-selection and/or subscriber line resale offers;</p> <p>(b) to negotiate in good faith with undertakings requesting access;</p> <p>(c) not to withdraw access to facilities already granted;</p> <p>(d) to provide specified services on a wholesale basis for resale by third parties;</p> <p>(e) to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services;</p> <p>(f) to provide co-location or other forms of associated facilities sharing;</p> <p>(g) to provide specified services needed to ensure interoperability of end-to-end services to users, including facilities for intelligent</p>	<p>Art 2/q ECA</p> <p>q) access - making available for use by an electronic communication network operator, under the conditions (including tariffs) determined by such operator, of the relevant elements and technical facilities of its own network, as well as of their available functional resources or capacities, or of the types of electronic communication services provided (or capable of being provided) through them, which includes making available for use:</p> <p>q.a) by the electronic communication network operator of the relevant elements of its physical infrastructure and technical facilities;</p> <p>q.b) the elements of a local access network and their free resources, including sewage canals and wells, subscriber pairs, masts and poles;</p> <p>q.c) the co-location area;</p> <p>q.d) the relevant network elements of fixed and mobile communication network operators, their free operational and functional resources and capacities (including resources related to the provision of roaming);</p> <p>q.e) a subscriber's individual access system and electronic programme (services) guide;</p> <p>q.f) the operational software management resources of electronic communication networks and user information databases, and resources related to the portability (translation) of subscriber numbers;</p> <p>q.g) virtual network services;</p>

	<p>network services or roaming on mobile networks;</p> <p>(h) to provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services;</p> <p>(i) to interconnect networks or network facilities;</p> <p>(j) to provide access to associated services such as identity, location and presence service.</p> <p>National regulatory authorities may attach to those obligations conditions covering fairness, reasonableness and timeliness.</p>	<p>Art 34/1, 2, 3 ECA</p>	<p>q.h) the functional resources and capacities of other relevant elements of an electronic communication network or the types of communication services;</p> <p>1. An authorised person with significant market power that owns an electronic communication network shall ensure unrestricted, transparent and non-discriminatory access to the relevant elements, technical facilities of its network and other types of electronic communication services.</p> <p>2. In order to properly perform the obligation of providing access to the relevant elements of a network, an electronic communication network operator with significant market power shall ensure that the functional and technical characteristics of the relevant elements of its network meet the standards specified in the legislation.</p> <p>3. In order to properly perform the obligation of providing access and interconnection to the relevant elements of a network, an electronic communication network operator with significant market power, which provides services to end-users by using subscriber numbering resources in the local service area, shall ensure that the functional and technical characteristics of the relevant elements of its network provide sufficient co-location areas and operational capacities in the interconnection points located in those areas.</p>	<p style="background-color: yellow; height: 20px;"></p> <p style="background-color: green; height: 500px;"></p>
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**Comment**

The Directive stipulates that the NRAs may impose access on SMP operators. The Directive further lists a number of specific obligations related to access.

The ECA does not expressly stipulate all obligations related to access which are set out in the Directive.

Although we do not consider this to be a gap because the list of access obligations in the ECA is not exhaustive, we recommend to align the access

obligations in the ECA with the list included in the Directive.	
<p>Art 12/2</p>	<p>2. When national regulatory authorities are considering the obligations referred in paragraph 1, and in particular when assessing how such obligations would be imposed proportionate to the objectives set out in Article 8 of Directive 2002/21/EC (Framework Directive), they shall take account in particular of the following factors:</p> <p>(a) the technical and economic viability of using or installing competing facilities, in the light of the rate of market development, taking into account the nature and type of interconnection and/or access involved, including the viability of other upstream access products such as access to ducts;</p> <p>(b) the feasibility of providing the access proposed, in relation to the capacity available;</p> <p>(c) the initial investment by the facility owner, taking account of any public investment made and the risks involved in making the investment;</p> <p>(d) the need to safeguard competition in the long term, with particular attention to economically efficient infrastructure-based competition;</p> <p>(e) where appropriate, any relevant intellectual property rights;</p> <p>(f) the provision of pan-European services.</p>
<p>Art 34/7 ECA</p>	<p>7. In order to further develop electronic communication networks, and to diversify the service types provided to users and to facilitate the introduction of new communication technologies, the Commission may, by a relevant decision, request an electronic communication network operator to provide access to the relevant elements of the network and to their free functional resources and capacities, taking into account the conditions required by the interested authorised person. When making a decision, the Commission shall take into account the following circumstances:</p> <p>a) the development level of the relevant segment of the service market;</p> <p>b) the technical and economic capabilities of the access-providing operator;</p> <p>c) the existence of free functional resources and requested capacities of the network elements of the access-providing operator;</p> <p>d) the amount of investment to be made by the electronic communication network operator and the relevant investment risks;</p> <p>e) the necessity to ensure long-term competition in the relevant segment of the service market;</p> <p>f) the protection of intellectual property rights.</p>
<p><b><u>Gap 4 – Pan-European scope</u></b></p> <p>The Directive states that when imposing access obligations regulators shall take into account the provision of pan-European services.</p> <p>The ECA does not list this criterion.</p> <p>We asses this as a gap, but believe that this gap could be remedied after Georgia EU accession. It is understandable that before acceding the EU Georgia</p>	

will not implement legislation aimed at promoting pan European services.

**Action plan**

**Legislation:** ECA

**Section:** /

**Proposed change:** None

**Notes:** We propose to maintain the current wording of the ECA After Georgia's EU accession the criteria for imposing the access obligation would need to be complemented by the provision of pan-European services.

Art  
12/3

3. When imposing obligations on an operator to provide access in accordance with the provisions of this Article, national regulatory authorities may lay down technical or operational conditions to be met by the provider and/or beneficiaries of such access where necessary to ensure normal operation of the network. Obligations to follow specific technical standards or specifications shall be in compliance with the standards and specifications laid down in accordance with Article 17 of Directive 2002/21/EC (Framework Directive).

Art 34/2  
ECA

2. In order to properly perform the obligation of providing access to the relevant elements of a network, an electronic communication network operator with significant market power shall ensure that the functional and technical characteristics of the relevant elements of its network meet the standards specified in the legislation.

**Gap 5 – Obligation on access beneficiaries**

The Directive requires that the NRAs may impose organizational and technical conditions on access providers and on access beneficiaries.

Under the ECA the GNCC may only impose such conditions on access providers and not on access beneficiaries.

We assess this to be a minor gap that would be remedied by extending the scope of GNCC's competence to impose obligations to cover also obligations addressed to access beneficiaries.

**Action plan**

**Legislation:** ECA



<b>Section:</b>	30/3, 34/2
<b>Proposed change:</b>	We propose to include GNCC's competence to impose organizational and technical conditions also on the access beneficiary (and not only on the access provider) to ensure normal operation of the network.
<b>Notes:</b>	/

## B Price controls and interconnection charges, including obligations for cost orientation

	Access Directive		Georgian legislation	Gap
Art 13/1	1. A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of interconnection and/or access, in situations where a market analysis indicates that a lack of effective competition means that the operator concerned may sustain prices at an excessively high level, or may apply a price squeeze, to the detriment of end-users. To encourage investments by the operator, including in next generation networks, national regulatory authorities shall take into account the investment made by the operator, and allow him a reasonable rate of return on adequate capital employed, taking into account any risks specific to a particular new investment network project.	Art 30/4 ECA	4. Specific obligations imposed on an authorised person by the Commission shall correspond to the market power of the authorised person in the relevant segment of the service market and to the nature of the abuse of such power, and shall be proportionally balanced and objectively substantiated.	
		Art 35/1,2, and 4 ECA	<p>3</p> <p>1. An electronic communication network operator with significant market power shall provide access and/or interconnection for interested authorised persons to the relevant elements of its own network, and to their functional resources and free capacities, or electronic communication service types, at cost-oriented and non-discriminatory tariffs.</p> <p>2. A tariff set by an electronic communication network operator shall take account of the expenses incurred to provide the relevant elements, resources and capacities of the network used for the provision of services, and the right of the operator to receive a reasonable return on the investments made and a long-term tendency for further development and expansion of the communication networks of the operator.</p> <p>3. In regulating tariffs and imposing cost accounting obligations, the Commission may, by a decision, set:</p> <p>a) a requirement that evidence is provided confirming that the tariffs set by the authorised person are cost-oriented and comply with the requirements of the methodological rules established by the Commission;</p> <p>b) a requirement that data verified by an independent auditor</p>	

			<p>are submitted to the Commission by an authorised person;</p> <p>c) a requirement that the competition-restricting tariffs set by authorised persons are changed;</p> <p>d) maximum tariffs for access to the relevant elements of a network, to their functional resources and free capacities and for providing electronic communication services.</p>	
Art 13/2	<p>2. National regulatory authorities shall ensure that any cost recovery mechanism or pricing methodology that is mandated serves to promote efficiency and sustainable competition and maximise consumer benefits. In this regard national regulatory authorities may also take account of prices available in comparable competitive markets.</p>	Art 35/4, 5 ECA	<p>4. A tariff set by a provider of access and of electronic communication services, or in the cases determined by the legislation, a maximum tariff set by the Commission, shall ensure a long-term and effective competition in the field of electronic communications, the provision of economically affordable and quality services to end-users, and shall not allow unreasonably high tariffs or tariff pressure in the relevant segments of the service market.</p> <p>5. The Commission may establish methodological rules for authorised persons to make cost estimates and to separately record expenditures, and such rules shall be binding on authorised persons in order to properly carry out tariff regulation and cost accounting obligations.</p>	
Art 13/3	<p>3. Where an operator has an obligation regarding the cost orientation of its prices, the burden of proof that charges are derived from costs including a reasonable rate of return on investment shall lie with the operator concerned. For the purpose of calculating the cost of efficient provision of services, national regulatory authorities may use cost accounting methods independent of those used by the undertaking. National</p>	35/3 ECA	<p>3. In regulating tariffs and imposing cost accounting obligations, the Commission may, by a decision, set:</p> <p>a) a requirement that evidence is provided confirming that the tariffs set by the authorised person are cost-oriented and comply with the requirements of the methodological rules established by the Commission;</p>	

	regulatory authorities may require an operator to provide full justification for its prices, and may, where appropriate, require prices to be adjusted.	Art ECA 28/4	4. The burden of proving the existence of the circumstances that objectively determine the nature and the reasons of non-fulfilment of obligations imposed on an authorised person shall be on the authorised person. If objectively substantiated proof is presented, the Commission may amend the conditions of the specific obligations imposed on the authorised person taking into account the nature of the non-fulfilment of these obligations.	
Art 13/4	4. National regulatory authorities shall ensure that, where implementation of a cost accounting system is mandated in order to support price controls, a description of the cost accounting system is made publicly available, showing at least the main categories under which costs are grouped and the rules used for the allocation of costs. Compliance with the cost accounting system shall be verified by a qualified independent body. A statement concerning compliance shall be published annually.	Art ECA 35/6	6. In the case of imposition of tariff regulation and cost accounting obligations, an authorised person shall create a cost accounting system in accordance with conditions specified by the Commission, and publish its description, submit it to the Commission and keep records of expenses in accordance with this system.	
		Art ECA 35/3/b	3. In regulating tariffs and imposing cost accounting obligations, the Commission may, by a decision, set:  b) a requirement that data verified by an independent auditor are submitted to the Commission by an authorised person;	
		Methodology of cost accounting and separate allocation of expenditures by authorized undertakings	<i>The GNCC informed us that a decree with methodology does exist in the form of a decree which is mandatorily published.</i>	

**Gap 6 – Publishing cost accounting system**

The Directive requires that compliance with the cost accounting system shall be published annually. The ECA does not contain this publicity requirement.

We consider this a gap and recommend that it is remedied by including a publication requirement in the ECA

**Action plan**

**Legislation:** ECA

**Section:** 35

**Proposed change:** We propose to include in Section 35/3/b ECA that the verification by independent auditor shall be also made publicly available on an annual basis.  
We propose to stipulate in the ECA that the GNCC may take into account benchmark prices from other comparable countries. .

**Notes:** /

## C Transparency, non-discrimination and accounting separation

	Access Directive		Georgian legislation	Gap
Art 9/1	1. National regulatory authorities may, in accordance with the provisions of Article 8, impose obligations for transparency in relation to interconnection and/or access, requiring operators to make public specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, including any conditions limiting access to and/or use of services and applications where such conditions are allowed by Member States in conformity with Community law, and prices.	Art 31/1 ECA	1. An authorised person with significant market power shall ensure the transparency of information related to access to the relevant elements of its own network and to the provision of interconnection, and shall make public the following information: a) financial reporting documents reflecting its activities; b) description of the relevant elements, technical facilities, functional resources and interfaces of the network, as well as information on free capacities; c) technical characteristics of the network, including the description of used interfaces, of co-location areas and interconnection points; d) conditions of access to the relevant elements of the network, to their functional resources and free capacities and the conditions for providing interconnection, taking into account the requirements of authorised persons interested in a relevant segment of the service market; e) tariffs of access and interconnection, and payment conditions.	
Art 9/2	2. In particular where an operator has obligations of non-discrimination, national regulatory authorities may require that operator to publish a reference offer, which shall be sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested, giving a description of the relevant offerings broken down into components according to market needs, and the associated terms and conditions including prices. The national regulatory authority shall, inter alia, be able to impose changes to reference offers to give effect to obligations imposed under this Directive.	Art 31/2, 3, 4 ECA	2. An authorised person shall publish an offer (invitation offer) to access appropriate elements of its own network and the provision of interconnection, which shall contain detailed information on: the elements of the operator's network, their functional resources and free capacities, as well as on the tariffs for access and interconnection, so that interested authorised persons are not required to pay an additional fee for those elements, technical means or functional resources of the network that the person has not requested.  3. In order to ensure the transparency of information, the Commission may determine what essential data are to be included in the information referred to in paragraph 1 of this article and in the offer (invitation offer) concerning access and interconnection of an authorised person with significant market power, also to request that	

			changes or additions be made to the published invitation offer of the operator to ensure conformity with the defined conditions.	
Art 9/3	3. National regulatory authorities may specify the precise information to be made available, the level of detail required and the manner of publication.	Art 31/3 and 5 ECA	<p>3. In order to ensure the transparency of information, the Commission may determine what essential data are to be included in the information referred to in paragraph 1 of this article and in the offer (invitation offer) concerning access and interconnection of an authorised person with significant market power, also to request that changes or additions be made to the published invitation offer of the operator to ensure conformity with the defined conditions.</p> <p>5. Information that is essentially related to the development of a competitive environment in the relevant segment of the service market and to the provision of non-discriminatory free choice to access-seeking persons, and that helps such persons to make a decision on the selection of conditions for electronic communication services, shall not be regarded as a commercial secret of the operator providing access.</p>	
Art 9/4	4. Notwithstanding paragraph 3, where an operator has obligations under Article 12 concerning wholesale network infrastructure access, national regulatory authorities shall ensure the publication of a reference offer containing at least the elements set out in Annex II.	Art 31/4 ECA	4. If the Commission imposes an obligation of unlimited access on an authorised person to the relevant local access network, the local service operator shall ensure the publication of an offer (invitation offer) on access and interconnection, which shall contain the conditions of access, including joint access, to the local access network and other essential conditions specified by the Commission.	
Art 9/5	5. The Commission may adopt the necessary amendments to Annex II in order to adapt it to technological and market developments. The measures, designed to amend non-essential elements of this Directive, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 14(3). In implementing the provisions of this paragraph, the Commission may be assisted by BEREC.	N/A		
Art 10/1	1. A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations of non-discrimination, in relation to interconnection and/or access.	Art 32/1 ECA	1. In offering access to the relevant network elements, technical facilities, free functional resources and capacities, an electronic communications network operator with significant market power shall, in the case of essentially similar circumstances and under equivalent requirements, provide the requested electronic	

			communication services and associated information to interested authorised persons in a non-discriminatory (unrestricted) manner, within the same time limits and under the same conditions.	
Art 10/2	2. Obligations of non-discrimination shall ensure, in particular, that the operator applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners.	Art 32/2-5 ECA	<p>2. The determination of non-discriminatory conditions by an electronic communication network operator shall include the provision of homogeneous conditions, as well as: availability, quality, tariffs, delivery time limits, transparency of other essential information related to the provision of services, and interoperability</p> <p>3. An interested authorised person may request access to the relevant elements of the network under the same conditions that are not less favourable than those defined, in the case of essentially similar relations, for a structural subdivision of an access-providing operator, or for affiliated and other authorised persons.</p>	
		Art 32/4-5 ECA	<p>4. An electronic communication network operator may offer to interested authorised persons the provision of access and interconnection under better conditions than those specified in its access and interconnection offer (invitation offer). In order to avoid discrimination, when offering better conditions, the operator shall make changes to the conditions of its invitation offer within 30 days after entering into the agreement.</p> <p>5. Where an interested authorised person is successfully provided with access and interconnection under conditions different from those specified in an offer (invitation offer) of access and interconnection, the electronic communication network operator shall introduce relevant changes or additions to its invitation offer, and publish the conditions of access to the relevant network elements, their free functional resources and capacities.</p>	

**Gap 7 – Non-discrimination**

The ECA goes into detail regarding the conditions of non-discrimination in case the SMP operator has already specified its reference offer. In general, we assess the provisions of Article 32 par- 4 and 5 ECA as in compliance with the Directive, but we also identified several potential issues. In particular, the ECA only stipulates that if SMP operator provides access or interconnection under better conditions than stipulated in the reference offer, it shall change its reference offer accordingly. However, the ECA does not stipulate whether the conditions of already signed agreements with other interested parties shall be



changed in order to reflect the new reference offer and in what time-frame. This in our opinion creates potential risk of discriminatory behaviour.

**Action plan**

**Legislation:** ECA

**Section:** 32

**Proposed change:** We propose to clarify the treatment of the contracts signed before a change of the reference offer according to Section 32/4 and 5 ECA In the sense that contracts signed based on a reference offer prior to a change of the reference offer beneficial to the other contracting party must be changed by the SMP operator within 30 days upon request of the other contracting party.

Based on our discussions with the GNCC we propose to change the publication place of reference offers from the GNCC's website to the website of the SMP operator.

**Notes:** /

<p>Art 11/1</p>	<p>1. A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations for accounting separation in relation to specified activities related to interconnection and/or access.</p> <p>In particular, a national regulatory authority may require a vertically integrated company to make transparent its wholesale prices and its internal transfer prices inter alia to ensure compliance where there is a requirement for non-discrimination under Article 10 or, where necessary, to prevent unfair cross-subsidy. National regulatory authorities may specify the format and accounting methodology to be used.</p>	<p>Art 33/1,2 and 4 ECA</p>	<p>1. An authorised person with significant market power shall be obliged not to allow activities restricting competition, including subsidisation of tariff preferences of any group of users at the expense of other authorised persons or groups of users.</p> <p>2. An electronic communication network operator shall, in accordance with methodological rules approved by the Commission, keep separate, objective and transparent records of the expenditure and income related to access to the relevant network elements and/or to the provision of interconnection and distribute them according to the network elements, operating activities and electronic communication service types.</p> <p>4. In order to avoid discrimination in the process of providing electronic communication services to interested authorised persons, a vertically integrated electronic communication network operator or electronic communication network operator with joint significant market power, shall ensure the transparency of access to the relevant free elements of the electronic communications network, as well as transparency of the wholesale tariffs and transfer tariffs</p>	
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			offered in the service market between intraindustrial structural divisions.	
Art 11/2	2. Without prejudice to Article 5 of Directive 2002/21/EC (Framework Directive), to facilitate the verification of compliance with obligations of transparency and non-discrimination, national regulatory authorities shall have the power to require that accounting records, including data on revenues received from third parties, are provided on request. National regulatory authorities may publish such information as would contribute to an open and competitive market, while respecting national and Community rules on commercial confidentiality.	Art 33/3	3. In order to record and distribute expenditures and income separately, and ensure the transparency of information and performance of specific obligations of non-discrimination, the Commission may request an authorised person to submit accounting and financial information, including information on the distribution of expenditures and on income received from other authorised persons. In accordance with Article 31(5) of this Law and the provisions of the General Administrative Code of Georgia concerning the protection of commercial secrets or personal data, and the Law of Georgia on Personal Data Protection, the Commission may, by a decision, make public all the information submitted by an authorised person or only that part of the information that effectively ensures the stimulation of competition in the relevant segment of the service market.	

**Comment**

We did not identify any gaps in relation to the obligation of accounting separation.

The only possible issue could be related to the different scope of definitions and unclear specifications, such as the “transfer tariffs offered in the service

market between intra-industrial structural divisions” stipulated in Article 33 paragraph 4 ECA. We assume this is an issue of translation that has no impact on the purpose and scope of the obligation. .

## D Provisions of the Access Directive not mentioned in the Association Agreement

	Access Directive		Georgian legislation	Gap
<b>GENERAL AND PROCEDURAL PROVISIONS RELATING TO IMPOSITION OF OBLIGATIONS SPECIFIED IN THE ASSOCIATION AGREEMENT</b>				
Art 8/1	1. Member States shall ensure that national regulatory authorities are empowered to impose the obligations identified in Articles 9 to 13a.	Art 29 ECA	<p>1. The Commission may, by a decision, impose on an authorised person with significant market power in the relevant segment of the service market one or several of the following specific obligations:</p> <ul style="list-style-type: none"> <li>a) obligation to ensure transparency of information;</li> <li>b) obligation to prohibit discrimination;</li> <li>c) obligation to record expenditure and income separately in accordance with the methodological rules approved by the Commission;</li> <li>d) obligation to provide access to relevant elements of an electronic communication network;</li> <li>e) obligation to regulate tariffs and prepare cost estimates.</li> </ul> <p>2. Fulfilment of the obligations specified in paragraph 1 of this article shall not preclude the fulfilment by the authorised person of other obligations determined by the legislation of Georgia.</p>	
Art 8/2	2. Where an operator is designated as having significant market power on a specific market as a result of a market	Art 30/1 ECA	1. Specific obligations shall be imposed only on an authorised person with significant market power in the	

	analysis carried out in accordance with Article 16 of Directive 2002/21/EC (Framework Directive), national regulatory authorities shall impose the obligations set out in Articles 9 to 13 of this Directive as appropriate.		relevant segment of the service market.	
Art 8/3	<p>3. Without prejudice to:</p> <ul style="list-style-type: none"> <li>— the provisions of Articles 5(1) and 6,</li> <li>— the provisions of Articles 12 and 13 of Directive 2002/21/EC (Framework Directive), Condition 7 in Part B of the Annex to Directive 2002/20/EC (Authorisation Directive) as applied by virtue of Article 6(1) of that Directive, Articles 27, 28 and 30 of Directive 2002/22/EC (Universal Service Directive) and the relevant provisions of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) containing obligations on undertakings other than those designated as having significant market power, or</li> <li>— the need to comply with international commitments,</li> </ul> <p>national regulatory authorities shall not impose the obligations set out in Articles 9 to 13 on operators that have not been designated in accordance with paragraph 2.</p>	Art 30/5 ECA	5. If a study and analysis of the service market reveals that there is no authorised person with significant market power in the relevant segment of the market, the specific obligations shall be annulled and the relevant segment of the market shall be considered to be competitive.	
Art 8/2 continued	In exceptional circumstances, when a national regulatory authority intends to impose on operators with significant market power obligations for access or interconnection other	N/A		

	<p>than those set out in Articles 9 to 13 in this Directive, it shall submit this request to the Commission. The Commission shall take utmost account of the opinion of the Body of European Regulators for Electronic Communications (BEREC). The Commission, acting in accordance with Article 14(2), shall take a decision authorising or preventing the national regulatory authority from taking such measures.</p>			
Art 8/4	<p>4. Obligations imposed in accordance with this Article shall be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of Directive 2002/21/EC (Framework Directive). Such obligations shall only be imposed following consultation in accordance with Articles 6 and 7 of that Directive.</p>	Art 16 INRA	<p>1. The sessions of an independent regulatory Authority shall be open to public, except for the cases provided for by the applicable law. The decisions of an independent regulatory Authority shall be published pursuant to the established procedure.</p> <p>2. An independent regulatory Authority must retain the minutes of its sessions and other relevant documentation for the period of at least 7 years. Commissioner and interested persons may have unrestricted access to all records and other documentation available at the relevant regulatory Authority.</p> <p>3. All decisions, records and other documentation of an independent regulatory Authority shall be available for public discussions. The procedure for the maintenance of confidentiality of the information kept by an independent regulatory Authority shall be determined by the regulatory Authority concerned in conformity with the Georgian Legislation.</p>	
		Art 110/1-4 GAC	<p>1. An administrative body shall make a decision only on the basis of an oral hearing.</p> <p>2. Interested parties must be notified of an oral hearing at least seven days before the hearing and must be summoned to participate in the oral hearing.</p> <p>3. The subpoena shall specify the powers of the administrative body to review the case and make a decision even without participation of an interested party, except as provided for by law.</p>	

			4. If the number of interested parties exceeds 50, an administrative body may summon the interested parties to participate in the oral hearing by publishing a notice in the official gazette. The notice must contain the subject of the oral hearing, the name of the administrative body holding the hearing, the basis for initiating the administrative proceedings, and the time and place of the hearing.	
		Article 34/1 GAC	1. A collegial public institution shall be obliged to announce publicly one week earlier about a coming session, including the place, time and agenda of the session, and upon making the respective decision, announce about concluding the session as well.	

### **Gap 8 Public consultation**

The Directive requires that obligations on SMP operators be imposed only following public consultation.

The ECA does not anticipate any public consultation prior the decision by which the GNCC imposes obligations on SMP operators. The Law on Independent Regulatory Authorities only anticipates that the decision itself shall be published and available for public discussions. The conditions for running a public consultation pursuant to Framework Directive has not yet been introduced in the Georgian law. The General Administrative Code does stipulate oral hearing prior each decision (including market analysis and SMP designation) which may be generally considered as public consultation according to the Framework Directive. However, we recommend to introduce a more formal public consultation procedure when the parties will have the opportunity to comment on the proposed decision in writing and the GNCC will settle these comments also in writing and will publish results of the public consultation.

The gap shall be remedied by introducing a public consultation procedure which would precede GNCC's decision on SMP obligation. In relation to public consultation pursuant to Article 7, consultation with the Commission shall be implemented following accession of Georgia to the EU.

### **Action plan**

**Legislation:** ECA

**Section:** 29

**Proposed change:** Include a legal framework for carrying out public consultations in general. Then specify decisions and administrative acts of the GNCC that shall be subject to a public consultation as follows:

1) *Before the Commission issues a decision on:*

a) **XXX**

*the Commission must publish at its website the proposal of such decision. The publication of the proposal must be in such a manner that the Commission deems appropriate for bringing the proposal to the attention of all persons who, in the Commission's opinion, are likely to be affected by the proposal.*

2) *The Commission shall specify the period within which comments, representations and observations may be made to the Commission in relation to the proposal. The period must be at least 30 calendar days after the day of the publication of the proposal.*

3) *The Commission may give effect, with or without modifications, to the proposal following a public consultation under this Article **XXX** only if the Commission has considered every comment, representation or observation about the proposal that is made to the Commission within the period specified in the proposal in accordance with paragraph 2 above. The Commission shall publish the comments, representations and observations as well as the Commission's reactions within 3 weeks from the lapse of period stipulated in paragraph 2.*

4. *The Commission may issue rules and procedures for public consultations under this Article **XXX**.*

Include derogation to the general proceedings on public hearing and replace it with the public consultation procedure.

**Notes:**

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Art 8/5	5. In relation to the third indent of the first subparagraph of paragraph 3, national regulatory authorities shall notify decisions to impose, amend or withdraw obligations on market players to the Commission, in accordance with the procedure referred to in Article 7 of Directive 2002/21/EC (Framework Directive).	N/A		
Art 15/1	1. Member States shall ensure that the specific obligations imposed on undertakings under this Directive are published and that the specific product/service and geographical markets are identified. They shall ensure that up-to-date information, provided that the information is not confidential and, in particular, does not comprise business secrets, is	Art 24 ECA	Decisions of the Commission made on the basis of the analysis of preliminary regulation of competition and the service market specified in this Chapter, except for personal data and the parts containing state or commercial secrets, shall be published on the website of the Commission. The following information shall also be published:  a) a list of the relevant segments of the service market	



	made publicly available in a manner that guarantees all interested parties easy access to that information.		<p>indicating the criteria determining geographic boundaries and economic indicators;</p> <p>b) a list of authorised persons having significant market power in the relevant and closely related segments of the service market;</p> <p>c) specific obligations imposed on authorised persons with significant market power and specific conditions of these obligations;</p> <p>d) description of the primary and secondary criteria by which an authorised person has been designated as having significant market power.</p>	
Art 15/2	2. Member States shall send to the Commission a copy of all such information published. The Commission shall make this information available in a readily accessible form, and shall distribute the information to the Communications Committee as appropriate.	N/A		
Art 16/1	1. Member States shall notify to the Commission by at the latest the date of application referred to in Article 18(1) second subparagraph the national regulatory authorities responsible for the tasks set out in this Directive.	N/A		
Art 16/2	2. National regulatory authorities shall notify to the Commission the names of operators deemed to have significant market power for the purposes of this Directive, and the obligations imposed upon them under this Directive. Any changes affecting the obligations imposed upon undertakings or of the undertakings affected under the	N/A		

	provisions of this Directive shall be notified to the Commission without delay.			
Art 6	<p>1. Member States shall ensure that, in relation to conditional access to digital television and radio services broadcast to viewers and listeners in the Community, irrespective of the means of transmission, the conditions laid down in Annex I, Part I apply.</p> <p>2. In the light of market and technological developments, the Commission may adopt implementing measures to amend Annex I. The measures, designed to amend non-essential elements of this Directive, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 14(3).</p> <p>3. Notwithstanding the provisions of paragraph 1, Member States may permit their national regulatory authority, as soon as possible after the entry into force of this Directive and periodically thereafter, to review the conditions applied in accordance with this Article, by undertaking a market analysis in accordance with the first paragraph of Article 16 of Directive 2002/21/EC (Framework Directive) to determine whether to maintain, amend or withdraw the conditions applied.</p> <p>Where, as a result of this market analysis, a national regulatory authority finds that one or more operators do not have significant market power on the relevant market, it may amend or withdraw the conditions with respect to those operators, in accordance with the procedures referred to in Articles 6 and 7 of Directive 2002/21/EC (Framework</p>	<p>Article 52<sup>2</sup>/1,2 ECA</p>	<p>1. A holder of the licence to use a radio frequency spectrum for the provision of digital terrestrial television network and an authorised person owning a local digital terrestrial television network shall provide access for broadcasters authorised to provide on-air broadcasting under the Law of Georgia on Broadcasting to their free-to-air multiplex platforms on non-discriminatory, homogeneous conditions and at cost-oriented tariffs, and provide them with services of similar quality.</p> <p>2. Broadcasters authorised to provide on-air broadcasting under the Law of Georgia on Broadcasting shall be permitted to access the free-to-air multiplex platforms of a holder of the licence to use a radio frequency spectrum for the provision of digital terrestrial television network and of an authorised person owning a local digital terrestrial television network in accordance with the principles provided for by this Law and the order of priority and procedures established by the Commission</p>	
		<p>Decree on Procedure for providing access to the free-to-air</p>	<p><i>We have been informed by the GNCC that a decree has been issued in 2016 which covers the conditional access rules in more detail.</i></p>	

	<p>Directive), only to the extent that:</p> <p>(a) accessibility for end-users to radio and television broadcasts and broadcasting channels and services specified in accordance with Article 31 of Directive 2002/22/EC (Universal Service Directive) would not be adversely affected by such amendment or withdrawal, and</p> <p>(b) the prospects for effective competition in the markets for:</p> <p>(i) retail digital television and radio broadcasting services, and</p> <p>(ii) conditional access systems and other associated facilities,</p> <p>would not be adversely affected by such amendment or withdrawal.</p> <p>An appropriate period of notice shall be given to parties affected by such amendment or withdrawal of conditions.</p> <p>4. Conditions applied in accordance with this Article are without prejudice to the ability of Member States to impose obligations in relation to the presentational aspect of electronic programme guides and similar listing and navigation facilities.</p>	<p>multiplex platforms (N5, 30.06.2016)</p>		
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**Comment**

The Directive stipulates that a list of conditions stipulated in Annex I shall be ensured in relation to conditional access systems.

The ECA generally stipulates that the holders of license for digital television and broadcasters shall provide access to on non-discriminatory, homogeneous conditions and at cost-oriented tariffs. However, the conditions listed in Annex I are broader than those stipulated in the ECA. From discussion with GNCC we understand that these remaining conditions not covered directly by the ECA provision are included in the GNCC's Decree on Procedure for providing

access to the free-to-air multiplex platforms, We therefore do no assess this as a gap.

<p>Art 13a</p>	<p>1. Where the national regulatory authority concludes that the appropriate obligations imposed under Articles 9 to 13 have failed to achieve effective competition and that there are important and persisting competition problems and/or market failures identified in relation to the wholesale provision of certain access product markets, it may, as an exceptional measure, in accordance with the provisions of the second subparagraph of Article 8(3), impose an obligation on vertically integrated undertakings to place activities related to the wholesale provision of relevant access products in an independently operating business entity.</p> <p>That business entity shall supply access products and services to all undertakings, including to other business entities within the parent company, on the same timescales, terms and conditions, including those relating to price and service levels, and by means of the same systems and processes.</p> <p>2. When a national regulatory authority intends to impose an obligation for functional separation, it shall submit a proposal to the Commission that includes:</p> <p>(a) evidence justifying the conclusions of the national regulatory authority as referred to in paragraph 1;</p> <p>(b) a reasoned assessment that there is no or little prospect of effective and sustainable infrastructure-based competition within a reasonable time-frame;</p> <p>(c) an analysis of the expected impact on the regulatory</p>	<p>N/A</p>		
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<p>authority, on the undertaking, in particular on the workforce of the separated undertaking and on the electronic communications sector as a whole, and on incentives to invest in a sector as a whole, particularly with regard to the need to ensure social and territorial cohesion, ► C1 and on other stakeholders including, in particular, the expected impact on competition and any potential consequential effects on consumers; ◀</p> <p>(d) an analysis of the reasons justifying that this obligation would be the most efficient means to enforce remedies aimed at addressing the competition problems/markets failures identified.</p> <p>3. The draft measure shall include the following elements:</p> <p>(a) the precise nature and level of separation, specifying in particular the legal status of the separate business entity;</p> <p>(b) an identification of the assets of the separate business entity, and the products or services to be supplied by that entity;</p> <p>(c) the governance arrangements to ensure the independence of the staff employed by the separate business entity, and the corresponding incentive structure;</p> <p>(d) rules for ensuring compliance with the obligations;</p> <p>(e) rules for ensuring transparency of operational procedures, in particular towards other stakeholders;</p> <p>(f) a monitoring programme to ensure compliance, including the publication of an annual report.</p> <p>4. Following the Commission's decision on the draft</p>			
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	<p>measure taken in accordance with Article 8(3), the national regulatory authority shall conduct a coordinated analysis of the different markets related to the access network in accordance with the procedure set out in Article 16 of Directive 2002/21/EC (Framework Directive). On the basis of its assessment, the national regulatory authority shall impose, maintain, amend or withdraw obligations, in accordance with Articles 6 and 7 of Directive 2002/21/EC (Framework Directive).</p> <p>5. An undertaking on which functional separation has been imposed may be subject to any of the obligations identified in Articles 9 to 13 in any specific market where it has been designated as having significant market power in accordance with Article 16 of Directive 2002/21/EC (Framework Directive), or any other obligations authorised by the Commission pursuant to Article 8(3).</p>			
Art 13b	<p>1. Undertakings which have been designated as having significant market power in one or several relevant markets in accordance with Article 16 of Directive 2002/21/EC (Framework Directive) shall inform the national regulatory authority in advance and in a timely manner, in order to allow the national regulatory authority to assess the effect of the intended transaction, when they intend to transfer their local access network assets or a substantial part thereof to a separate legal entity under different ownership, or to establish a separate business entity in order to provide to all retail providers, including its own retail divisions, fully equivalent access products.</p>	N/A		

	<p>Undertakings shall also inform the national regulatory authority of any change of that intent as well as the final outcome of the process of separation.</p> <p>2. The national regulatory authority shall assess the effect of the intended transaction on existing regulatory obligations under Directive 2002/21/EC (Framework Directive).</p> <p>For that purpose, the national regulatory authority shall conduct a coordinated analysis of the different markets related to the access network in accordance with the procedure set out in Article 16 of Directive 2002/21/EC (Framework Directive).</p> <p>On the basis of its assessment, the national regulatory authority shall impose, maintain, amend or withdraw obligations, in accordance with Articles 6 and 7 of Directive 2002/21/EC (Framework Directive).</p> <p>3. The legally and/or operationally separate business entity may be subject to any of the obligations identified in Articles 9 to 13 in any specific market where it has been designated as having significant market power in accordance with Article 16 of Directive 2002/21/EC (Framework Directive), or any other obligations authorised by the Commission pursuant to Article 8(3).</p>			
<p><b><u>Gap 11 – Functional separation</u></b></p> <p>There is currently no obligation of functional separation or voluntary vertical separation stipulated in the ECA.</p>				
<p><b><u>Action plan</u></b></p>				

**Legislation:** ECA

**Section:**

**Proposed change:** Implement functional separation as a possible SMP remedy.

**Notes:** /

This document has been prepared in connection with the project “**Georgia - Information Communication Technology Sector Development**” financed by the **European Bank for Reconstruction and Development**. Any legal advice contained in this document has been provided under the EU law. Georgian legislation has been taken into account based on the English translations provided to us by GNCC. We are not qualified to provide legal advice under Georgian law.

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