

BEREC Response to the European Commission's consultation on Universal Services principles in e-Communications

May 2010

Introduction

The BEREC Regulation¹ sets out that “BEREC should continue the work of the ERG, developing cooperation among NRAs, and between NRAs and the Commission, so as to ensure the consistent application in all Member States of the EU regulatory framework for electronic communications networks and services, and thereby contributing to the development of the internal market”.

BEREC welcomes this opportunity to contribute to this important debate on the Universal Service principles in e-communications. It is clear that the issues that are covered in this debate impact on our society in many different ways, and as such, require careful consideration. While BEREC is committed to participating in the debate, we also recognise that within the wide scope of issues raised, some represent policy issues which are primarily under the remit of Member States rather than NRAs.

The Commission will have noted that BEREC recently finalised its work programme for 2010. This work programme includes several workstreams which will address some of the areas covered by these questions. These include assessing the future of the Universal Service Obligation and conducting an analysis of accessibility services that are, and should be, available for disabled end-users. BEREC will publish the results of these analyses; however, as these workstreams are still ongoing, it would be premature to provide a finalised opinion at this time. This document should therefore only be seen as an initial set of indicative and preliminary contributions to this debate.

Background

In the context of the revised regulatory framework, the new Recital 5 of the Citizens’ Rights Directive speaks of the flexibility required by Member States seeking to define Internet access in the context of Universal Service Obligations. Limitation of the universal service requirement to a single narrowband network connection has been removed, as have references to a data rate of 56 Kbit/s. Data rates which are sufficient to permit Functional Internet Access are to be defined by the Member States, “taking due account of specific circumstances in national markets, for instance the prevailing bandwidth used by the majority of subscribers in that Member State or technological feasibility”. Flexibility is required to allow Member States to take measures where necessary to ensure that a data connection can offer Functional Internet Access, “provided that these measures seek to minimize market distortion” – therefore, care should be taken as to their impact on competition.

¹ BEREC Regulation ((EC) No 1211/2009)

Reference to alternative financing of infrastructure rollout has been introduced: “Alternative financing of underlying network infrastructure, involving Community funding or national measures in accordance with Community law, may also be implemented.”

As part of the 2009 Work Programme, ERG began to examine aspects of Universal Service including:

- whether the concept and scope of universal service at EU level should be changed to include or exclude different categories of services,
- whether the criteria for including different services in the scope of the universal service should be re-evaluated in the context shaped by the new technological developments,
- whether the scope of the universal service should take into consideration the “different speeds” of market development across the EU Member States, which might give flexibility to individual countries
- whether universal service is an appropriate tool to advance broadband development, or whether this should be left to other EU policy instruments or to national measures.

BEREC intends to continue its analysis of Universal Service, and sets out some preliminary views here.

Question 1: *In today's competitive environment, can the market be relied on to meet demand for basic e-communications services from all sections of society, thereby ensuring social inclusiveness?*

Since the beginning of the liberalization process in Europe, competition and private initiative have led to an increase in service diversity, quality and availability of services throughout Europe. In this context, Universal Service has played its part as a specific mechanism for guaranteeing that all sections of society gained from the growth of e-communications services.

BEREC consequently considers that the concept of Universal Service remains a relevant instrument for ensuring social inclusion in electronic communication services. The extent of its obligations depends on the extent to which the market development actually meets demand in each Member State. In general, competition has led in many areas to a sufficient provision of telecommunication services (e.g. competition in the mobile market; price competition with positive effects for low income users).

The question is whether Universal Service should be maintained and even extended, in order to promote the interests of all European citizens and meet their expectations regarding the provision of basic e-communications services in a rapidly evolving environment. On the other hand, there may be elements of the Universal Service that could be excluded from obligatory provision. However it is clear that the decision of excluding any element within the scope of the Universal Service should be left to each Member State to decide, taking national circumstances into account.

Question 2: *If not, what is the best policy to allow disabled consumers, those on low incomes and those living in geographically remote or isolated areas to access and use basic e-communications services?*

BEREC believes that there continues to be a need to ensure that disadvantaged users, such as those who have disabilities, or low incomes, or are located in remote or geographically isolated regions, have access to affordable telecommunication services. BEREC further believes that the strategies needed to ensure this level of access and affordability for these users are best addressed at national level. The imposition of universal service obligations is one way to achieve social inclusion, but it is not the only one. Different approaches are currently taken by different Member States to ensure that such access to, and usability of, electronic communication services for these users is comparable to the levels enjoyed by the majority of users.

The majority of Member States currently use obligations based on the 2002 Universal Service Directive as the current mechanism to achieve this objective. BEREC is of the view that the obligations are likely to be reviewed at national level in the light of the application of the revised provisions in May 2011.

As previously noted, as part of the 2010 work programme, BEREC will review how accessibility services are currently provided, and will conduct a high-level analysis of the costs and benefits associated with different accessibility services and produce a report to facilitate consideration of the issues at national level. However the revised Directives provide for the possibility for accessibility requirements to be specified outside the scope of Universal Service Obligations.

Question 3: *Broadband for all is a widely-stated policy objective at national and European level. What role if any should universal service play in meeting this objective?*

The determination of policy regarding the provision of broadband within the USO is a matter outside the remit of many NRAs. Nonetheless, all NRAs recognise the important role that broadband can play in continuing and enabling future economic and social development within Europe. BEREC shares the objective of complete broadband coverage in Europe, and supports the need to encourage greater use of broadband based services.

In line with the recent amendment of Universal Service Directive², BEREC is of the opinion that each Member State should decide whether broadband connectivity (and relevant technical characteristics) should be included in the scope of universal service by, in the first instance, allowing them full flexibility on the definition of Functional Internet Access. Nonetheless, as explained later in this document, there are other factors, including the level of market development, that need to be taken into account when considering this issue.

There are several different possible implementation strategies to ensure “broadband for all”. A majority of BEREC members have expressed a preference for allowing the possibility to determine such strategies at a national level. Should the inclusion with the USO be chosen by a Member State, this would be possible using the existing reference to Functional Internet Access in the USD.

Such flexibility would also have the benefit of enabling Member States (or where appropriate, NRAs) to tailor the provision of broadband to the specific needs of their country. This could include defining coverage, speeds, quality standards, pricing,

² Recital 5 of 2009/136/CE Directive

technological options and affordability, commensurate with the needs of its citizens and the marketplace.

The requirement for the inclusion or the exclusion of broadband within/from the USO varies from country to country. The imposition of a one-size-fits-all approach that does not take into consideration the national circumstances of individual Member States could well result in higher costs for all, distort competition and unnecessarily displace vital and scarce investment capacity.

***Question 4:** What impacts could an extension of the role of universal service to advance broadband development have in relation to other EU and national policies and measures to achieve full broadband coverage in the EU? What other impacts would be likely to arise regarding competition, the single market, competitiveness, investment, innovation, employment and the environment?*

BEREC considers that a potential extension of the role of universal service to advance broadband development should be considered in the context of other EU and national policies and measures to achieve full broadband coverage (e.g. European funds, national measures, involvement of local authorities, fostering broadband coverage by using radio communications solutions - in particular the “digital dividend”). Nonetheless, market development and increasing competition are considered the most efficient instruments for the rollout of broadband.

The impact that the introduction of broadband in the scope of universal service will have on competition, the single market, competitiveness, investment, innovation, employment and the environment cannot be accurately predicted.

On the positive side, the inclusion of Broadband in a USO might be that an increased number of broadband users generate more demand for products and services. This self-enforcing virtuous circle may contribute to the objective of delivering the full economic, social and cultural potential of an Internet-enabled society. Increasing consumer welfare involves improving the general access to public services, entertainment media, political, democratic, educational and cultural resources. The extension of the scope of Universal Service could serve such purposes and relate to other policies aiming at digital inclusion.

On the other hand, the introduction of broadband in the Universal Service could have negative effects on competition and market dynamics. For instance the designated undertaking might artificially strengthen its position in the electronic communication market. Also, companies, local authorities, or other entities that today voluntarily participate in infrastructure development may decide to abandon it in the context of

any extension to the USO. Such an evolution could, in turn, have a negative effect on innovation.

There is also a possibility that the extension of the role of Universal Service to advance broadband development would not have a significant impact on either competition or end users welfare, especially in those countries where there is almost 100% coverage with such services, but where take-up remains low.

In the event that a decision is taken to include broadband in Universal Service, consideration would need to be given to minimising the negative effects on competition. It is important to both correctly target the areas where broadband services might be required as part of USO and those who need assistance in relation to special tariffs and conditions. The potential impact on competition will be heavily influenced by the stage of development of each respective market and the current state of broadband deployment. Other measures, such as public procurement, could be a less market distorting option than an obligation. Finally, if broadband access should be guaranteed through the USO, measures such as end users subsidies could be used as a less distorting mechanism for competition in order to foster the affordability of broadband service.

Consequently, the implications of including broadband in the USO should be evaluated in light of (at least) the following factors:

- market dynamics – only if markets fail to deliver universal broadband access, and in the absence or failure of other policy tools or levers such as state investment in broadband roll-out would the introduction of a Universal Service Obligation concerning broadband generate a positive impact on competition and consumers welfare;
- criteria for determining the relevant geographic areas and groups of people – if the areas where to deploy broadband services as part of USO are correctly targeted and only those who need help are subject to special tariffs and conditions, the introduction of broadband in the scope of the universal service would have a minimum impact on competition;
- funding method – depending on the details the funding mechanism it could have serious effects on competition. It would also be important to consider the possible impact on overall investment and the effects this may have in the deployment of NGNs;
- enforcement principles – public procurement could be a less market distorting option than an obligation generated by the designation of the universal service provider;

-
- complementary measures - national measures to stimulate the demand such as direct subsidies to the end users.

Question 5: *If universal service obligations should prove necessary to achieve the policy objective of broadband for all, at what level (EU or national) should such obligations be defined, taking into account the different levels of market development across the current Union of 27 Member States?*

Given the different levels of market development across the Member States, BEREC considers that it is essential to define any universal service obligations that may prove necessary to achieve the policy objective of broadband for all at national level.

As noted earlier, flexibility should be left to the Member States to establish the technical characteristics (such as speed) that would define a broadband connection, and the current requirements around Functional Internet Access (once de-coupled from narrowband access) provide the flexibility to adapt the solution to specific market needs as well as providing a basis to future-proof the solution in line with technological and consumer-driven developments. Different degrees of market development and the generally economic and geographic differences among the Member States as well as between the demands of citizens of the respective Member States underline the importance of a flexible solution.

Question 6: *If a common harmonised universal service needs to be defined at EU level, should a mechanism be put in place to balance the need for national flexibility and a coherent and coordinated approach in the EU?*

If there is a need for a common harmonised approach at EU level in relation to the Universal Service, BEREC believes that only a minimum set of standards, acting as a safety net, should be established, allowing for a flexible mechanism to be put in place in order to adapt these standards to the national circumstances.

Universal Service should allow flexibility, taking into account a common minimum set of standards (definition of a harmonised common target for instance). In other words, flexibility should be allowed taking into account the subsidiarity principle that allows Member States to consider national circumstances. For instance the disparities between countries are such that it does not appear to be possible to define a common procedure to achieve the target or a common schedule. There remain great economic and geographic discrepancies between the Member States as well as between citizens' demands of the respective Member States. Currently, a harmonized approach might result in failure of implementation or an artificial limitation

to market development because targets might be set too high or too low compared to the financial resources available.

Question 7: *Irrespective of the scope of universal service, are mechanisms whereby funding is provided by the sector appropriate in the context of a regulatory environment that seeks to eliminate distortions of competition and promote market entry?*

In the context of a mechanism where funding is provided by the sector, BEREC has identified above a set of measures that may in principle seek to minimise market distortion and promote market entry.

While many of the NRAs have not currently activated a funding mechanism, those that have done so, have indicated that exempting small operators from contribution (identified by a variety of criteria such as threshold of turnover, time since market entry, market share etc.) could lessen market distortion. Also, in recognition of the fact that this principle could also be regarded as an expression of the proportionality principle, some authorities consider that the market distortion could be minimised by the imposition of contributions in proportion to undertakings' position in the market, generally reflected by turnover.

Question 8: *In the context of the roll-out of broadband in Europe, is it still appropriate to limit the financial arrangements of universal service to market players in the e-communications sector, while this provision would have wide-ranging benefits outside the sector, for instance, the delivery of information society services and digital content? Are other means of financing more appropriate?*

BEREC believes that the context of the revision of universal service provisions is an opportunity to consider different types of funding mechanisms.

Various methods could be considered in this respect, and could include European structural funds, national public funds and contributions from market players or combinations of these. The option of alternative financing solutions, for instance public private partnerships for financing the potential net cost generated by the introduction of broadband in the Universal Service, should also be considered. Likewise, the funding of the underlying networks by local authorities could be effective, as long as it remains within the frame of state aid rules. Compatibility with national broadband strategies should be ensured.