

BEREC Input and Opinion on Universal Service

Introduction

1. BEREC welcomes the opportunity to provide its opinion on the European Commission's Communication on Universal Service in e-communications, issued on 23rd of November 2011¹ ("the Communication") [REDACTED]
[REDACTED]
[REDACTED].
2. The Commission invited BEREC's input by letter received on 6th of February 2012 and BEREC therefore appreciates to present its views, in particular on:
 - a) the main issues raised in the Communication on universal service;
 - b) [REDACTED]
[REDACTED]
[REDACTED]
 - c) [REDACTED]
[REDACTED].
3. BEREC participated in the public consultation exercise conducted by the Commission in March-May 2010, and provided an initial set of indicative/ preliminary contributions to that debate on the future scope and funding of universal service.²
4. BEREC understands that there is a continuing discussion on the appropriateness and legal basis for the follow-up that the Commission envisages for clarifying the Universal Service provisions contained in the Universal Service Directive ("USD"). The aim of this paper is not to give an opinion on those broader discussions, but nonetheless BEREC

¹ COM(2011) 795 final COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS on Universal service in e-communications: report on the outcome of the public consultation and the third periodic review of the scope in accordance with Article 15 of Directive 2002/22/EC.

² [http://erg.eu.int/doc/berec/berec_bor\(10\)33.pdf](http://erg.eu.int/doc/berec/berec_bor(10)33.pdf)

considers it important that these be brought to a speedy conclusion to avoid any legal uncertainty that might result from a long drawn-out process.

5. BEREC welcomes the Commission's stated intention to engage in further discussions with the Member States, the European Parliament and other stakeholders and will actively participate in further dialogues. Further, BEREC would welcome the opportunity to provide its opinion on any final text that the Commission prepares on this topic. In this regard, BEREC would welcome clarity on the Commission's next steps on universal service.
6. In general, NRAs are entrusted with the executive aspects of Universal Service Obligations ("USO") only. BEREC notes that in a number of Member States, NRAs do not have responsibility for all of the matters addressed in the Communication, with some responsibilities being reserved by, or shared with, central or local Government bodies. The comments contained in this Opinion are therefore limited to the executive aspects and do not relate to policy issues.
7. BEREC shares the Commission's aim to foster the development of the single market, by contributing to regulatory certainty and improving consistency in the application of the European Regulatory Framework. BEREC shares the goal of establishing common principles for universal service, which are necessary to provide more transparency and achieve harmonization in the application of the USD provisions by Member States. However, this harmonization should be achieved through the appropriate legal instrument, taking into account the existing legal framework and the principle of subsidiarity.
8. The aim of the document is not to give an opinion on the general principles regarding the inclusion or exclusion of broadband capability within the scope of USO. This paper presents a technical analysis on the issues raised by the Commission. It does not, for instance, deal with measures to increase broadband penetration through social tariffs of universal service or with the split between access and services introduced by the USD.

General Remarks

9. BEREC notes that any further guidance with regard to universal service should not go further than the fundamental principles of the European Regulatory Framework. The

Regulatory Framework applies the principle of subsidiarity to considerations on universal service and this should be respected when guidance on the application of the USD is provided.

10. In the event that all principles included in the Communication were to be specified by a Recommendation, BEREC believes that this would create valid concerns regarding the potential impact on legal certainty. BEREC believes that such a Recommendation would then risk conflict with the USD and could impose, in practice, restrictions on the transposition or application of the USD by Member States.
11. In this respect, BEREC considers that due regard should be given to the possible consequences for the current executive aspects of USO. Future guidance should not risk invalidating these existing provisions and/or ongoing designation procedures which are in conformity with the USD.
12. In the given context, BEREC considers that the wording of the Communication is more suitable for the purpose of providing guidance than that used previously in the withdrawn Draft Recommendation, since it better reflects the principle of subsidiarity.
13. The Communication is unclear as to how it will affect other universal services. In the event that the Commission decides to provide further guidance on the inclusion of broadband in USO, BEREC would welcome a clarification on this matter, since we see that the principles outlined in the Communication would also have a significant effect on current universal services, and in particular on the designation mechanism and financing.

Specific issues identified in Section 5 of the Communication

Scope of USO relating to ‘functional internet access’ at broadband speeds

14. The obligations set out in Article 4.1 and 4.2 of the USD refer to the provision of a network connection that is capable of permitting functional internet access. BEREC considered whether the Communication might imply that all Member States/NRAs should specify a particular data rate for functional internet access (using the formula described in Section 5 of the Communication – “Scope of the USO relating to

functional internet access at broadband speeds”) for which all USO connections must be enabled.

15. Article 4.2 of the USD refers to the connection (at a fixed location to a public communications network) provided under an obligation imposed under Article 4.1 of the USD being “*capable of supporting ... data communications at data rates that are sufficient to permit functional internet access*”. In terms of USO services to be provided over the network connection, Article 4.3 of the USD confines this to a publically available telephone service for originating and receiving national and international calls.
16. Recital 5 of the Citizens’ Rights Directive³ makes explicit that data rates sufficient to permit functional internet access should not be defined at Community level. It also states that flexibility is required to allow Member States to take measures, where necessary, to ensure data connection capable of supporting satisfactory data rates which are sufficient to permit functional internet access, as defined by the Member States, taking due account of specific circumstances in national markets. BEREC agrees with this approach and BEREC members are generally in favour of regarding data rates for functional internet access as dynamic in a market that is constantly changing both in terms of technological development and in terms of adoption and increased usage by end-users.
17. By referring to an approach that should be used to define a data rate for functional internet access in a broadband context, the Communication could however risk establishing the formula (50%/80%), or any alternative formula, as a *de facto* mechanical determination for the existing obligation in Article 4.2 of the USD. This would be apart from any consideration of whether an obligation to require all USO connections at a specified minimum data rate would be proportionate.
18. The Communication also suggests criteria for considering the proportionality of defining broadband data rates for functional internet access reflecting Article 15, Annex V and Recital 25 of the USD. BEREC welcomes the fact that the Communication refers to the need for an *ex ante* analysis at Member State level when considering the

³ Directive 2009/136/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 November 2009 amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws

requirement to define the network connection permitting functional internet access at broadband speeds.

19. In general, it appears that the Communication does not fully take into account that the USD does not require a Member State to formally specify a data rate for functional internet access. BEREC would welcome a clarification that Member States need to specify a data rate for functional internet access and carry out an assessment thereof, only when a Member State is considering the inclusion of broadband connections in USO. When conducting this assessment, Member States should take particular account of national circumstances.

Eligibility criteria

20. Section 5 of the Communication requires that, when assessing whether to define the network connection permitting functional internet access at broadband speeds, Member States should assess:
 - a) the level of overall national broadband take-up in terms of the percentage of national households using broadband access; and
 - b) the percentage of households using a broadband speed equal to or above the selected speed level.
21. It then specifies that the obligation to provide broadband connections at a given speed under universal service obligations should only be considered in cases where the data rate in question is used (“the 50/80 rule”) by at least:
 - a) 50% of all households at national level; and
 - b) 80% of households with a broadband connection.
22. BEREC considers that the establishment of the new criterion (80%) could be questionable due to a number of factors which are listed below:
 - a) The new criterion amending the majority-criterion set out in the USD may not be in accordance with the USD.
 - b) The threshold value (set at 80% in the Communication) should not be arbitrary and justification should be developed if it is to be considered sufficiently robust.
 - c) BEREC is concerned that the establishment of such a criterion at EU level would introduce unnecessary rigidity, which may interfere with the required flexibility at a national level. For instance, it would restrict the freedom of those Member States that fall below that threshold to decide whether or not to include broadband connectivity in the USO.

- d) It could happen that a Member State does not define broadband speeds at the time of USO designation because broadband usage was below the threshold. However, the level of usage could change shortly thereafter, which would then require an amendment to the USO. Therefore, although a thorough prospective economic analysis would have justified this, the adoption of this criterion could potentially be in conflict with the need to provide regulatory certainty.
23. In most Member States, there are a number of public, private and public-private investment initiatives already in place or being negotiated. Extending USO to broadband in parallel could undermine these investment initiatives. This could in turn hinder the development of innovative and efficient ways to deliver broadband.
24. By establishing the same eligibility criteria across all Member States, the Communication appears to assume that demand characteristics (e.g. adoption rates) are uniform across the Union. This is not the case, and any supply strategy which is not supported by targeted demand measures could give rise to stranded assets for operators, the costs of which could be passed to end users in the form of higher retail prices, or higher taxation, thus reducing consumer welfare.
25. The eligibility criteria as set out in the Communication are static, and do not take into account the dynamic aspects of the broadband market. With continuing improvements in broadband technology and data speeds, there can be significant changes in the numbers of households using particular speeds during the term of a universal service designation. As the USO will be set for a fixed term, a decision of a particular speed (in accordance with the 50/80 rule) may result in the universal service providers deciding on a particular technology that may not be the most cost efficient in the future.

Common approaches to designation

26. Section 5 of the Communication – “Common approaches to designation” – requires that the designation of the universal service provider(s) for an excessive or indefinite period should be avoided, and such a period should not exceed a maximum duration of - for example - ten years.
27. BEREC shares the view that universal service providers should not be designated for an indefinite period. However, a key question remains as how to determine an appropriate upper limit for the duration of the designation.

28. The recovery of investment expenditure depends on various parameters which will differ between Member States. These include, for example the ambition of the USO target, the demographic structure and geographic conditions of a country, absolute level of investment undertaken, and demand characteristics.
29. BEREC's view is that, in the light of the USD, Member States should be allowed to set a reasonable designation period that would not hinder market developments, but would allow for the recovery of investments. In doing so, the (incremental) level of coverage to be achieved and the (additional) investment expenditure to be undertaken at the time of designation as well as other relevant factors should be taken into account.

Consistent approaches to calculating the net cost of universal service provision

30. Section 5 of the Communication – “Consistent approaches to calculating the net cost of universal service provision” – suggests that cost efficiency could be enhanced by setting out the methodological approach for calculating the net cost of USO in advance of any designation process, and by consulting publicly on it.
31. BEREC agrees that the procedure for establishing the net cost of USO should be set in advance of any designation process. However, BEREC considers that the sequencing of the determination of the net costs of USO should be left to the discretion of the Member States in accordance with Articles 12 and 13 of the USD.
32. Similarly, BEREC considers that the metrics to be used for the definition of an unfair burden should be settled at national level, taking into account, *inter alia*, existing case law on this matter.

Financing

The de minimis threshold for contributions

33. When determining the contributions to the financing of the net cost of USO, Section 5 of the Communication – “Financing” – specifies that using general taxation to finance USO can be seen as less distortive than sectoral funding. Member States are advised to implement a transparent, objective, proportionate and non-discriminatory financial mechanism that seeks to minimise market distortions. Specifically, it proposes that no contributions should be required from providers of electronic communications networks

or services whose national annual turnover derived from the provision of electronic communications networks and services is less than a fixed monetary amount (e.g. €5 million) or a percentage of the national turnover of the sector as a whole.

- 34. BEREC notes that Article 13 of the USD provides Member States with discretion on how the net costs of USO may be met, including the possibility of not relying on public funds.
- 35. Regarding a sharing mechanism, BEREC agrees with the possibility of setting a *de minimis* threshold for contributions to the universal service fund in order to safeguard competition and reduce market distortions. However, BEREC considers that it important to take into account specific national social and economic conditions. This could not be done when such a limit is determined at European Union level.

The cap on company contributions

- 36. The same section of the Communication specifies that, in order to ensure that the financial burden on the sector as a whole is not disproportionate, a maximum common limit may be set on the individual contributions of operators, with the balance of the net cost financed from public funds. Specifically, it proposes that individual contributions should be a percentage of the operators' national annual turnover from the provision of electronic communication networks and services, and could be within a range (e.g. from 0.40% to 0.65% of annual turnover).
- 37. Capping contributions to the universal service fund in such a manner would limit the policy decisions of Member States in relation to the financing of USO, which, from the USD, is clearly a matter of national competence. Moreover, setting an upper limit to contributions to this fund would result in a requirement to finance the remaining amount by public funds. This is outside the remit of NRAs. Further, such an approach may not always be possible where, for example, the national transposition in some Member States precludes imposing a burden on public funds, an option which is in full compliance with the USD.
- 38. [REDACTED]

Measures for end-users with disabilities

39. Section 5 of the Communication – “Measures for end-users with disabilities” – advises that in view of the strengthened provisions in the revised USD relating to disabled end-users, Member States could also be encouraged to take due account of the needs of such users when designing their national USO, in accordance with the principle of ensuring equivalence of access.
40. BEREC agrees with the Commission that appropriate action should be considered, whenever relevant, to protect end-users with disabilities and ensure equivalence of access and choice. In this respect, BEREC has already published a report⁴ on how to ensure equivalence of access and choice for disabled end-users. This report provides information to NRAs regarding the considerations to be taken into account when implementing Article 23a of the USD.

⁴ http://berec.europa.eu/doc/berec/bor_10_47Rev1.pdf

Conclusions

41. BEREC welcomes the Commission's stated intention to engage in further discussions with the Member States, the European Parliament and other stakeholders and will actively participate in further dialogues. Further, BEREC would welcome the opportunity to provide its opinion on any final text that the Commission prepares on this topic. In this regard, BEREC would welcome clarity on the Commission's next steps on universal service.
42. BEREC notes that any further guidance with regard to universal service should not go further than the fundamental principles of the European Regulatory Framework. The Regulatory Framework applies the principle of subsidiarity to considerations on universal service and this should be respected when guidance on the application of the USD is provided.
43. In the event that all principles included in the Communication were to be specified by a Recommendation, BEREC believes that this would create valid concerns regarding the potential impact on legal certainty. BEREC believes that such a Recommendation would then risk conflict with the USD and could impose, in practice, restrictions on the transposition or application of the USD by Member States.
44. In this respect, BEREC considers that due regard should be given to the possible consequences for the current executive aspects of USO. Future guidance should not risk invalidating these existing provisions and/or ongoing designation procedures which are in conformity with the USD.
45. In the given context, BEREC considers that the wording of the Communication is more suitable for the purpose of providing guidance than that used previously in the withdrawn Draft Recommendation, since it better reflects the principle of subsidiarity.
46. BEREC welcomes the fact that the Communication refers to the need for an *ex ante* analysis at Member State level when considering the requirement to define the network connection permitting functional internet access at broadband speeds. However, BEREC would welcome a clarification that Member States need to specify a data rate for functional internet access and carry out an assessment thereof, only when a Member State is considering the inclusion of broadband connections in USO. When

conducting this assessment, Member States should take particular account of national circumstances.

47. The 50/80 rule may not be in accordance with the USD and could have important economic implications across Member States. It does not take into account the dynamic aspects of the broadband market and introduces unnecessary rigidity which may interfere with the required flexibility on national level.
48. In the light of the USD, Member States should be allowed to set a reasonable designation period that would allow for the recovery of investments and not hinder market developments. In doing so, the (incremental) level of coverage to be achieved and the (additional) investment expenditures to be undertaken at the time of designation as well as other relevant factors should be taken into account.
49. BEREC agrees that the procedure for establishing the net cost of USO should be set in advance of any designation process. However, BEREC considers that the sequencing of the determination of the net costs of USO should be left to the discretion of the Member States in accordance with Articles 12 and 13 of the USD.
50. The metrics to be used for the definition of an unfair burden should be settled at national level, taking into account, *inter alia*, existing case law on this matter.
51. BEREC agrees with the possibility of setting a *de minimis* threshold for contributions to the universal service fund in order to safeguard competition and reduce market distortions. However, BEREC considers that it important to take into account specific national social and economic conditions. This could not be done when such a limit is determined at European Union level.
52. Capping contributions to the universal service fund (e.g. within a range from 0.40% to 0.65% of annual turnover) would limit the policy decisions of Member States in relation to the financing of USO, which, from the USD, is clearly a matter of national competence. Furthermore, the model underlying the calculation of the caps needs to be refined and the results would require regular updating in order to account for market developments. The suggested caps may therefore be unsustainable.

ANNEX 1

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