

Brief Note on the European Commission's Draft Recommendation on implementing universal service for digital society

1. General comments

The BEREC Chair received, on the 14 February 2013, a letter from the European Commission's (EC) Directorate-General for Communications Networks, Content and Technology (DG Connect), inviting BEREC to provide comments of a technical nature regarding a "draft Recommendation on implementing universal service for digital society", by the 11 March 2013.

BEREC participated in the consultation on universal service principles in e-communications conducted by the EC in March-May 2010 and also provided an input and Opinion in 25 April 2012 on the EC's Communication on universal service in e-communications of 23 November 2011. Therefore, BEREC welcomes the opportunity to provide further input.

Despite the evolution between the recent draft Recommendation and the previous EC's Communication on Universal Service in e-communications, issued on 23 November 2011, a number of concerns expressed by BEREC in its input and Opinion of 25 April 2012 remain relevant in the framework of the current draft recommendation.

In particular, BEREC highlights that any guidance with regard to universal service should be fully consistent with the principles of the European regulatory framework, namely with the principle of subsidiarity enshrined in the Universal Service Directive provisions and in the Treaty on the Functioning of the European Union (TFEU).

In this context, this paper sets out a response from BEREC on the text of the draft Recommendation and is generally confined to technical comments – without entering a discussion concerning the ultimate purpose of the issues specifically considered in the draft Recommendation - taking also into account that, as referred by the DG Connect, the EC document is based on Article 292 TFEU, which does not require a formal opinion from BEREC.

Moreover, the draft Recommendation (similarly to the previous EC's Communication) does not make it clear whether it relates to all universal services or whether it is limited to the provision of broadband as a universal service. Hence, it should be absolutely clear that the provisions of the draft Recommendation are not envisaged to apply retroactively or retrospectively either to past (or even ongoing) decisions of Member States and National Regulatory Authorities (NRAs) or to services other than broadband.

Hence, the draft Recommendation, as currently worded, would create (contrary to the pursuit of the legal certainty environment that seems to drive the draft recommendation) legal uncertainty regarding existing universal service obligations, particularly concerning designation and financing processes. Therefore, BEREC strongly suggests that the EC should revise the draft Recommendation in order to clarify that it does not, in any way, invalidate decisions that have been taken by Member States and or NRAs to date.

2. Financing options regarding universal service net costs

BEREC notes that Article 13 of the Universal Service Directive gives Member States full responsibility to decide on the options to finance the net costs of universal service, including the possibility of not relying on public funds. In fact, some Member States have, in full conformity with the Universal Service Directive, transposed it into their national laws so that the funding mechanism is to be borne solely by the providers of networks and electronic communication services without no possibility of public funding. The draft Recommendation does not respect this aspect of the Universal Service Directive.

In addition, Article 13(3) of the Universal Service Directive states that *“A sharing mechanism shall respect the principles of transparency, least market distortion, non-discrimination and proportionality, in accordance with the principles of Annex IV, Part B. Member States may choose not to require contributions from undertakings whose national turnover is less than a set limit.”*

The draft Recommendation therefore considerably misquotes the Universal Service Directive and purports to remove Member State discretion granted by the Universal Service Directive when it states that *“Pursuant to Article 13(3) of the Universal Service Directive Member States should not require contributions from providers of electronic communications networks or services whose national annual turnover is less than a set*

limit. For this purpose, Member States should not require contributions from providers whose annual turnover is less than 5% of the total national electronic communications turnover.”

As was mentioned already in its input and Opinion of 25 April 2012, BEREC agrees with the possibility of setting a *de minimis* threshold for contributions to an universal service fund, but it must be reiterated that such a threshold, if deemed appropriate, must take full account of national specificities related namely with different market structures, market shares and operators sizes. BEREC also understands that some Member States have already established thresholds for contributions, which do not necessarily match the upper limit specified in the draft recommendation, but fully respect nevertheless the provisions of the Universal Service Directive and meet the requirements of transparency, least market distortion, non-discrimination and proportionality. Accordingly, BEREC does not consider appropriate setting a *de minimis* threshold at EU level.

In any event, BEREC cannot comment on the proposed threshold of 5% of the total national electronic communications turnover, since no justification is provided as to why this precise limit is proposed.

In addition, without putting aside the eventual merits of public funding for the net costs of universal service provision to be assessed in the light of specific national circumstances, the intrinsic merit of the argument presented in the draft Recommendation according to which public funds should finance, at least partially, the universal service net costs because of the externalities that the society in general enjoys with broadband dissemination (which would anyway also be true for other elements of the universal service obligations) is not overwhelmingly convincing.

It is agreed that broadband adoption and usage results in considerable benefits for society, namely due to “spill-over” externalities arising from multifactor productivity gains, ultimately reflected upon the growth of GDP, employment and competitiveness¹. On the other hand, broadband service providers benefit iteratively from these externalities, for

¹ See, for instance, ITU (2012). Impact of broadband on the economy (available at http://www.itu.int/ITU-D/treg/broadband/ITU-BB-Reports_Impact-of-Broadband-on-the-Economy.pdf) and FSR (2011). Broadband Diffusion: Drivers and Policies (available at [http://www.irg.eu/streaming/CN%20\(11\)%2081_FSR_Study_on_BB_Promotion_FINAL.pdf?contentId=547201&field=ATTACHED_FILE](http://www.irg.eu/streaming/CN%20(11)%2081_FSR_Study_on_BB_Promotion_FINAL.pdf?contentId=547201&field=ATTACHED_FILE)).

instance, due to the increased income available to consumers, to an augmented degree of sophistication regarding consumer needs or to more educated users. That is to say that, in a dynamic economy, these iterative externalities may tend to a certain equilibrium (even if not all the externalities are appropriated by the broadband service providers) and it is not sufficient to argue, solely on the basis of externalities, as the draft Recommendation does, that the universal service net costs should be financed from public funds.

3. Indication of caps concerning the undertakings' contributions to the financing of universal service net costs

The draft Recommendation, when establishing a cap on operators' contributions is similarly restricting the provisions set out in the Universal Service Directive, as any shortfall would require that part of the net cost of universal service must be financed by public funds, thus contributing to legal uncertainty (as discussed in section 2 above).

Furthermore, as mentioned in section 2 above, some Member States have excluded in their legislation the possibility to finance the net costs of universal service provision with resource to public funds. Hence, if the current text of the draft Recommendation is kept, the NRAs from those Member States would not be able to follow the final Recommendation.

It is also evident that the proposed cap corresponding to 0.5% of the individual undertakings national annual turnover does not fully take into account the average size of the operators active in the different Member States, the market maturity or other national specificities.

In addition to this, it is not clear why a specific cap is required in advance of an assessment of actual market conditions.

4. Metrics to define a majority of subscribers

The previous EC's Communication on Universal Service in e-communications, issued on 23 November 11, reflected recital 25 of the Universal Service Directive when mentioning that services covered should be available to a "*substantial majority of the population*". It further suggested certain thresholds applicable to determine whether the required "*critical*

mass of broadband take-up” was achieved, referring that, at that stage, Member States could be asked to consider including broadband connections in universal service obligations where the data rate in question is used at national level (a) by at least half of all households and (b) by at least 80% of all households with a broadband connection.

The draft Recommendation does not present concrete metrics to assess the “*majority of subscribers*” concept. Hence it is now doubtful if the aforementioned criteria to qualify the “*majority of subscribers*” concept remains as put forward in the Communication issued on 23 November 2011 or if it was superseded by the current draft recommendation, thus recognizing more room to the Member States regarding its concrete definition.

5. Methodological approaches to net cost assessment

BEREC notes that the text included in the former EC’s Communications is less prescriptive, requiring the NRAs to set out in advance not a precise methodology but an overall “*methodological approach*”. This is highlighted in paragraph 14 of the draft Recommendation, which establishes that NRAs should “*set out the approach underpinning the methodology to be used to identify the net costs resulting from universal service provision and estimate those net costs in advance of designating undertakings with universal service obligations*”.

It should also be acknowledged, namely in paragraph 14 of the draft Recommendation, that where the method of designation of the universal service provider(s) is by way of a reversed auction or competitive public tenders (pursuant to Article 12(1b) of the Universal Service Directive), the result of the auction / public tender could be considered, *per se*, to be, the net cost of universal service provision in the context of its financing, as it is clearly established in Articles 8(2) and 12(1) of the Universal Service Directive.

In fact, as already stated in the “BEREC Report on Universal Service – reflections for the future” (BoR(10)35)² the public tender procedure “*inherently contains important guarantees of cost-effectiveness and objectivity by its competitive character. An ex post verification mechanism would introduce a degree of uncertainty for the candidates that*

² Available at http://berec.europa.eu/eng/document_register/subject_matter/berec/reports/?doc=187.

risks undermining the attractiveness of the public tender with the effect of reduced participation of market players in such procedures”.

This is without prejudice to the possibility of an *ex-post* revision, by the government or NRA, of the cost value of the auction / public tender, when the review methodology and its timing are known by the candidates previously to their engagement in the auction / public tender procedures, especially when contributing to avoid market distortions.

It is clear from the Universal Service Directive that both scenarios are permissible (the establishment of a net cost solely at tendering stage or its establishment at tendering stage accompanied by a subsequent pondered review) and it would be encouraged that the draft Recommendation recognises the flexibility that is provided by the Universal Service Directive in the context of the different methodologies adopted by each NRA.

6. Disabled citizens

It would be useful that the draft recommendation recognizes also the benefits and costs associated with broadband dissemination with regard to disabled citizens, in line with its statement on the EC’s Communication on Universal Service in e-communications, issued on 23 November 2011, according to which *“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 in designing their national USO, in accordance with the principle of ensuring equivalence of access”.*

7. Conclusions

BEREC considers that the current draft recommendation could be refined in order not to limit the policy decisions of Member States in relation to universal service, namely its financing, which according to the provisions of the Universal Service Directive is clearly a matter of national competence. BEREC also considers important that the EC ensures the respect for the subsidiarity principle enshrined in the Universal Service Directive and in the TFEU, allowing Member States to exercise their competences, taking into account specific national conditions.

Finally, while recognizing the utility of some harmonization regarding universal service designation procedures, cost assessment methodologies, definition of unfair burden and financing issues, BEREC draws attention to the fact that a considerable number of Member States and NRAs have already taken important decisions in this regard and that the application of the final Recommendation to those decisions, explicitly in contravention with the options provided in the Universal Service Directive are to be avoided in order to promote an environment of legal certainty.