



EWE TEL GmbH | Postfach 25 09 | 26015 Oldenburg

By electronic mail:

PC_EU_MSbestpracticestoABB-IAS@distro.berec.europa.eu

BEREC
Brussels

Sie erreichen uns:

✉ EWE TEL GmbH
Postfach 25 09 | 26015 Oldenburg

• Tel. 0441 8000-3811

@ philipp.duile@ewe.de | www.ewe.de

Your contact: Philipp Duile

Your reference: BoR (23) 178

10.11.2023

Public consultation on your Draft Report on Member States' best practices to support the defining of adequate broadband internet access service – BoR (23) 178

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To whom it may concern:

We thank you for the opportunity to comment on your abovementioned Draft Report.
Our comments are set out below:

1. Could you please comment on relevant experiences or criteria considered valuable to support Member States in defining the adequate broadband internet access service?

The introductory section of the draft report correctly emphasizes that universal service represents a safety net for digital inclusion (page 4). Accordingly, the goals of the gigabit society should primarily be achieved by commercially funded network roll-out and secondly, by publicly funded network rollout in accordance with the EU Broadband Guidelines. Only where households cannot be served in either of these two ways, universal service is needed to secure an adequate digital participation. The subsidiarity of universal service must always be kept in mind when interpreting and applying rules pertaining to universal service.

Against this background, we think it misguided to draw on universal service to connect new development areas, as has sometimes been the case in Germany. Instead, Member States and their municipalities should use urban planning and telecommunications law tools other than universal service, as

well as adequate funding, to make sure that new development areas are connected in a future-proof manner, i.e. by way of FTTH/FTTB wherever possible. However, it is not correct, as has been done several times in Germany, to use universal service after the fact to finance residents' connections in new development areas. The understandable and obvious expectation of residents in development areas to be connected to a fixed network (preferentially by fibre) should not be met on the basis of universal service.

Instead, universal service must be understood in a technologically neutral fashion, i.e. it must be open to mobile or satellite communications solutions, to the extent such technologies meet the minimum requirements for universal service at the location in question. In our view, it is unlawful – but has already occurred on several occasions in Germany – to make a finding of insufficient supply, which may then trigger obligations to build out a network, when in fact a sufficient supply of telecommunications services is available via mobile and/or satellite communications and the alleged undersupply consists only in that the respective providers' tariff options are more expensive or offer a higher quality than consumers may be willing to pay for. Where commercial offers for mobile and/or satellite communications exceed the limit of affordability, the correct reaction can only be to require the respective providers to offer additional tariff options or service bundles that meet the conditions for universal service under Art. 85 Abs. 2 EECC.

2. Could you please comment on Minimum requirements for defining the adequate broadband internet access service within the framework of the universal service provision (e.g. upload and download speed, data volume, etc.)?

As per figure 4 on page 19 of the draft report, most Member States have currently set minimum speeds at 10 Mbit/s (download) and 1-2 Mbit/s (upload). This still appears sufficient. As set out in Annex 2 of the draft report, recent findings of the Federal Communications Commission (FCC) confirm that the only application that definitely requires greater bandwidths at this moment is Ultra HD 4K video streaming. Such video streaming is not included in Annex V to the EECC, and rightly so. It exceeds what is currently needed for digital participation.

When setting minimum requirements to be met by universal service, it should be taken into consideration that any tightening of these requirements beyond what is necessary can lead to significantly higher costs, which ultimately will have to be borne by end users (at least in their capacity as taxpayers). Particularly high minimum requirements for universal service may benefit a few individual end users. They are not, however, in the interest of end users in their entirety. A good balance is therefore needed.

For these reasons, it is our view that any tightening of the minimum requirements beyond 10 Mbit/s (download) and 1-2 Mbit/s (upload) as well as the current German latency requirements is currently inappropriate. We also think Member States should consider a volume cap for universal service. Such a volume cap could amount to 6 GB per month, as has been ascertained by the World Bank (page 14 of the draft report). Such a volume cap is particularly relevant for shared media such as mobile and satellite communications, but for reasons of technological neutrality, the same cap should apply to all types of network connections.

3. Which end users should benefit from the universal service provision and what constitutes a reasonable request (criteria)?

According to art. 84 EEC, universal service is primarily geared towards consumers. Any ideas to broaden the universal service concept to include very small enterprises as well as small and medium enterprises and non-profit entities should be met with utmost reluctance. On one hand, with regard to the social policy considerations underlying art. 85 EEC, the interests of enterprises carry lesser weight than those of consumers. On the other hand, art. 85 (5) EEC calls for market distortions to be minimized. Interventions into business communications markets are always at particular risk of causing market distortions, which then lead to macroeconomically inefficient resource allocation.

4. Could you please comment on the issue of Affordability (e.g. maximum retail price, special retail prices for special user groups, etc.) and/or availability measures (e.g. geographical criteria, distance from the existing network, connection cost, etc.) necessary to ensure access to adequate broadband internet access service?

There is insufficient supply of broadband services when existing services at the respective site do not meet the minimum requirements (see also our answer to question 3).

This problem is to be distinguished from the affordability of broadband services. A finding that broadband services at a given location are unaffordable must never lead to obligations to build out networks, but may only justify measures under Art. 85 (2) EEC (see also our answer to question 2).

In accordance with art. 85 EEC, the criteria for affordability should be the average market prices and consumer income. In that respect, we request to take the following into consideration:

- To the extent affordability is defined by reference to average market prices, it is not correct – as is the current regulatory practice in Germany – to exclusively look at tariff bundles which most closely reflect the scope of universal service. Instead, it is necessary to calculate *a weighted average of all tariffs* currently offered on the market. Otherwise, it is not possible to gauge consumers' average willingness and ability to pay for telecommunications services. Consumers living in places which due to geography and population density are relatively easy to connect may use their budget for telecommunications services by extending their demand to higher-quality tariff bundles. If such consumers are disregarded when determining average demand, consumers' actual willingness and ability will be systematically misjudged, which leads to a wrong standard of affordability.
- To the extent there is demand for mobile and satellite communications at a fixed location, the respective tariffs should – in contrast to current regulatory practice in Germany – also be included in the determination of average prices. Any other approach would run counter to the principle of technological neutrality.
- Contrary to current German practice, care has to be taken not to equate affordability with the average prices found as described above. If that were the case, the upper (price-weighted) half of all tariffs on offer would automatically be deemed unaffordable. By triggering public countermeasures and a subsequent recalculation of affordability thresholds, such an approach would result in a "race to the bottom". To avoid this, additional methods have to be applied on the basis

of the average price, e.g. an examination of standard deviation and a differentiated look at quantiles.

- Finally, it is necessary under art. 85 EECC to also assess consumers' income level. This is currently not done in Germany. However, taking consumers' income level into account is necessary as a matter of market surveillance, because higher levels of consumer income may result in higher prices for telecommunications services becoming affordable. Furthermore, when considering specific market interventions, it is necessary to look at the income level of the households specifically targeted with the planned measures. This is because under art Art. 85 (2) EECC, reduced tariffs are intended to benefit consumers with low incomes or special social needs. Therefore, care has to be taken to make sure that tariffs subsidized by the universal service mechanisms are not offered to consumers who are not in need, because reduced tariffs must ultimately be refinanced by all other consumers, at least in their capacity as taxpayers.

5. Do you have any other relevant comment?

In future reports, BEREC should include an overview of which criteria Member States use to define affordability. This would be helpful to gain an insight into potentially diverging approaches between Member States.

Best regards,



i.V. Dr. Dieter Wolfram, M.A.

i.V. Philipp Duile