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### **Draft BEREC Report on Member States' best practices to support the defining of adequate broadband internet access service (BoR (23) 178)**

As follows: **Position Paper** of the Verband der Anbieter von Telekommunikations- und Mehrwertdiensten e.V. (VATM e.V) (Association of the German Alternative Providers of Telecommunications and Value-added Services)).

#### *VATM's general comments on the report*

In the current "Draft report on the member state's best practices to support the defining of an adequate broadband internet access service (IAS)", BEREC aims to give an overview of methods applied with regard to the Universal Service Obligation (USO). Overall, the report provides a comprehensive view on the state of USO implementation in the individual countries based on the provisions set by Art. 84 and Annex V of the European Electronic Communications Code (EECC). However, the report has some gaps in adequately representing the markets as it compiles a set of observations without analyzing them. In addition, the report does not provide guidance or recommendations for the way forward.

As a general remark on the provision of Universal Service in its current form, VATM would like to emphasize that USO has not been an effective tool to reach its declared objective of protecting consumers with low income and special social needs. In 2020, nearly 20 years after the concept of Universal Service was introduced, only nine Member States started USO initiatives. In addition, there is a significant divergence in the interpretation and litigation of the USO by European and national courts, which deepens the controversies of the implementation approaches across the Member States.

#### *VATM's views on the key questions of the public consultation*

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

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In our view, the overall picture in the report illustrates the divergences in the Member States when it comes to the implementation of USO. Examples include the broadband speed required ranging from 4 Mbps downstream (Italy, ongoing consultation) and 1 Mbps upstream (Croatia) to 30 Mbps downstream and 1.5 Mbps upstream (Malta). In Germany, the NRA defined three criteria for adequate broadband internet - 10 Mbps downstream, 1,7 Mbit/s upstream, 150 ms latency.

The recent approach taken by the Dutch government, for example, fully underlines the view on USO as a last resort measure. After investigating the extent to which universal service should be expanded to include internet services, the Dutch Ministry of Economic Affairs concluded that imposing a universal service obligation is not reasonable at this time. According to their analysis the universal service is a safety net to ensure that a certain minimum of services and facilities are available and affordable for everyone. If this cannot be guaranteed through the normal functioning of the market, the Minister of Economic Affairs and Climate Policy can, as *ultima ratio*, impose universal service obligations on the market. However, the state has an obligation to limit market disruptions as much as possible. Therefore, guaranteeing the availability of the adequate broadband internet access service must be done foremost on the basis of the normal functioning of the market or, where necessary, through other, less market-disruptive government interventions such as state aid. According to the Dutch Ministry imposing a universal service obligation is not reasonable at this time given the good availability of fast internet, including wireless solutions, which generally provide speeds of at least 30 Mbps. The Dutch government expressed the view that while the market is still investing in the rollout of high-speed internet in rural areas the market dynamic should not be disrupted.

The development on the Dutch market relates to a bigger trend pointing towards a shift in the consumer behavior as the majority of consumers start purchasing higher subscription speeds. It must be noted that wireless solutions may not be able to provide these speeds despite advancing technological developments. However, these are market trends reflecting consumer choices and preferences, not their minimal needs as listed in Annex V EECC. In order to address this development, it is more suitable to use state aid solutions for deployment of broadband connections and only if this path does not provide for any positive results a universal service obligation would be appropriate as per definition is a last resort measure.

We, therefore, urge for a more balanced approach, which gives an opportunity for the stepwise evaluation of the market conditions. The lack of financial resources for the rollout of high-speed internet is insufficient reason to skip the step of state aid and directly resort to imposing USO.

A positive example for this approach is Italy where public interventions aiming at financing networks have already been taken and prove far more performant (i. e. broadband deployment strategy) even in areas of market failure. Their success has been evident both on the supply and demand side. Considering the ongoing consultation on USO there, it is essential that a duplication of interventions is avoided in order to prevent any competitive distortion.

Another example that USO is considered and implemented as ultima ratio is Czechia, where a “state subsidy” (CZK 200/EUR 8 per month) to people with special social needs (with disabilities and with low incomes) was adopted instead of imposing USO for internet access services.

We consider the approach of Czechia to be more appropriate as it constitutes a measure on the demand side for the benefit of consumers which truly need the support. As a consumer-based solution, vouchers have been implemented in Italy as well. Therefore, we call out on BEREC for leaving the different voucher schemes aside implying that they are not part of USO. This is remarkable since the BEREC explicitly acknowledged the usage of social vouchers before.<sup>1</sup> VATM would like to underline that the implementation of vouchers can be an effective tool to address the inclusion of low-income households that are not equipped with sufficient connectivity. Member states would, therefore, have benefitted from insights of the implementation of vouchers.

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.)?*

The EECC provides that every household needs a stable connection to use the services listed in Annex V (Art. 84 EECC). This provides a set of services which must be applicable by the end users. There are no guidelines for determining specific downstream or upstream speeds or any limit of latency. Nonetheless, the NRAs can apply specific requirements in case they see a necessity to enhance the level of broadband provision for the end users.

In Germany, the NRA defines three criteria for adequate broadband internet (10 Mbit/s, downstream, 1,7 Mbit/s, upstream, 150 ms latency). It is our view that this set of criteria sufficiently addresses the ultima ratio cases where no other solution is available while even internet services with slightly higher latency might also be considered (e. g. satellite). However, the specific problem we see in Germany is how the NRA analyzes reports of end-users’ complaints regarding missing broadband availability. In most cases, end users check their fixed broadband connection and do a report that they only experience 6 Mbit/s via a copper line. Regarding the minimal requirements of 10 Mbit/s downstream, end users request help from the NRA in getting a better broadband provision. Mainly due to miscommunication by governmental parties, media and the NRA regarding a promise that everyone should get a fast broadband access the end users claim to be entitled to a better fixed broadband connection, more specifically, a fiber connection. This slows down the whole process significantly and hinders internet deployment to those households, which do not have connection at all.

However, the EECC and the guidelines of the NRA have not implemented a right for a fiber connection. On the contrary, one of the leading principals of EECC is technological neutrality. Therefore, the right of a sufficient broadband connection does not depend on a specific technology. Nonetheless, we face the issue that the NRA does not communicate correctly to the end users

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<sup>1</sup> BEREC response to the public consultation on the draft revised European Commission Guidelines on State aid for broadband networks (10.02.2022), p. 5.

that, independent of the technology, a broadband connection is possible and largely available to the public. VATM would like to emphasize that mobile and satellite-based internet solutions are also broadband technologies, which could provide the minimal requirements of 10 Mbit/s in downstream, 1,7 Mbit/s in upstream and even more. In addition, the take-up rate of broadband reaches 97.9% and 99.6% in mobile EU-wide. Solutions are thus almost universally available and must not be cancelled by the politics and the media.

We, therefore, urge a stepwise evaluation of the USO appropriate cases taking into account all available technological solutions and then determining the appropriate measures. It is not acceptable that technologies which are technically capable to cover the USO criteria are preliminary excluded of the evaluation if an end user gets a sufficient broadband provision or not. From this point of view, we urge BEREC to issue a guidance for the NRAs to consider all kinds of technologies for providing the minimal determined bandwidth. Especially satellite-based internet, which would be a feasible solution in many cases, currently seems not to be taken into consideration because of high monthly fees. Here, state-funded vouchers for the respective households could be a pragmatic solution.

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

In our view, USO is a measure which especially addresses consumers with low income and special social needs. Therefore, first and foremost individuals with social or physical vulnerabilities or households with established social and financial constraints must be entitled to benefit from it. In some cases, scattered households in secluded geographical regions might be considered experiencing social constraints as well. However, these are all cases, which must be individually evaluated, and the appropriate measure must be determined based on that. VATM underlines that the demand on the consumer side originating in certain market dynamics must not be mistaken for a need that USO necessarily has to address.

In this context, we also urge BEREC to clarify, that the specific technical USO criteria are valid for each household as a unit. Regulators are currently evaluating whether the USO should relate to every single person in one household or to the household as a whole. Art. 84 EECC clearly does not refer to each person in one household, so that the technical criteria need to be fulfilled per household, not per person. Any other interpretation of the law would be out of scope.

Beyond that we see the necessity to underline that the general concept of universal services is limited to consumers. Member States may introduce exceptions in limited cases for small enterprises only with a solid justification. Enterprises independent from their size should not by default fall into the personal scope of the right of universal services defined in Art. 84 EECC. It is not appropriate to grant enterprises the same rights as consumers since their starting conditions are different. An entrepreneur is free to choose the place of business and does not need the same protection as the consumer. Therefore, we would like to underline that it would be more appropriate to structure Art. 86 EECC in the same manner as Art. 84 and Art. 85 in the sense that it is generally applicable only to consumers while an exception for certain enterprises can be made with a reasonable justification.

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?*

As stated above, across Europe there is general trend towards demand for higher broadband, more data, and even more expensive subscriptions meeting the higher demands of the consumers. Provided by this market development there are more and more offers directed to all possible consumer profiles, which indicates the high competitiveness of the telecommunications sector. Therefore, this creates the question whether there is a need of the USO to ensure affordability. VATM's position is that in these cases where interventions are still required, these should be funded publicly and designed as demand-side subsidies or social tariffs targeting above all the vulnerable consumers.

We affirm that in the future all end users should have access to a gigabit broadband connection. However, this is not possible under the current circumstances in Germany. This means that the USO and the consideration of adequate broadband services should provide a bandwidth for consumers that they can participate in the internet life. Every kind of broadband provision displays an interim solution until the network operators deploy gigabit connections. NRAs should support these developments instead of obliging network operators to provide a gigabit connection for a single under provisioned household. Here, NRAs should concentrate their support on the network operators enabling them to deploy gigabit infrastructure as fast as possible for as many households. For under provisioned households, NRAs should find an economically efficient solution for broadband connection, which takes into account the available broadband solutions on the market. For the time being, such a solution could be provided much faster and be economically more feasible than a newly deployed gigabit connection.

In such discussions in Germany, we face the argument of the NRA that satellite internet, for example, would not be affordable for end users. The German NRA sets 30 Euros as an affordable price, which means that all other tariffs are not affordable. To illustrate the contradiction - the network operators should provide a gigabit connection, but the monthly price should not exceed 30 Euros. Taking into account the current market situation, most network operators offer prices around 80 Euros for a gigabit connection to get back the sunk costs for fiber deployment. This shows that 30 Euros is not applicable in case of a new deployment of gigabit infrastructure.

In other words, the average of 30 Euro originates in a consideration of old already depreciated copper infrastructure, where the incumbent can offer cheaper prices. It does not cover any costs for deploying a new gigabit infrastructure. Therefore, we urge separate consideration for determining the affordable price reflecting the evolving market conditions. If the NRA wants to force the deployment of gigabit connections (also in case of USO), the average prices should be determined on the basis of newly deployed infrastructure. Tariffs and access to the old infrastructure should be excluded from the consideration. Otherwise, if the NRA considers all kinds of technologies, the average of all tariffs could be correct, but then the NRA needs to correctly communicate to end users about the accessibility of other technologies to use broadband internet.



Furthermore, in consideration of USO, we urge a stepwise approach by the NRA. In the first step, the NRA should evaluate which kind of technology is capable to provide a sufficient broadband connection. In the second step, the margin of affordability can be considered. In Germany, we face a direct mix of both approaches, without the necessary differentiation. The NRA excludes satellite internet based on the notion that no tariff of the provider achieves the margin of 30 Euros. This is controversial, taking into account that gigabit network operators have also no tariffs below the 30 Euros margin. Therefore, the different treatment between the various technologies cannot be supported.

From this point of view, the guidelines from BEREC focus on analyzing whether a USO broadband provision can be applied by technology. If a technology is capable to provide sufficient broadband access, then the NRA can consider the price setting. If the NRA is in the opinion that the price is not affordable, they can oblige a network operator to set an affordable price (independent which technology the operators deploy and use). Following this approach, no operator would be excluded for affordability reasons.

VATM would like to conclude by emphasizing that a *one-size-fits-all* approach for evaluating the conditions across Europe and the needs of the population would not be beneficial. Due to the different stages of broadband deployment, differing deployment costs, especially in the rural areas, and the different social and economic conditions in the single countries, it is possible that measures appropriate for one country would not be applicable to the reality in another. However, we would urge BEREC to analyze and prepare a set of criteria for defining the relevant measures which set the direction and relate to choosing a certain policy. In our view, implementing USO is directly related to determining whether there is a market failure in a certain area or not. In a first analysis, it should be noted if one operator wants to deploy broadband on its own. In case every network operator declines to make a broadband provision, public funding should be used. A universal service obligation must be ultima ratio to approaching a broadband internet provision. We are convinced that the rise of number of USO cases is a result of lack of prioritization and following these steps would provide for almost universal coverage everywhere.

VATM is looking forward to the future work of BEREC on the matters highlighted in the draft report and hopes that our comments and suggestions would be taken into account in the final version of the report when addressing these topics.