

VATM Comments on the Review of the Scope of Universal Service

(Communication of the European Commission COM (2005) 203)



Background

The European Commission which, under the EU regulatory framework for e-communications, is charged with periodically reviewing the scope of universal service, has issued Communication COM (2005) 203. It has also launched a broader policy debate on universal service provision in view of the overall assessment of the EU regulatory package for e-communications scheduled for 2006.

The Commission invites comments on the conclusions and longer-term issues presented which affect the assessment of the “technological convergence” and their effects on the regulatory framework.

VATM (The Association of Telecommunications and Value-Added Service Providers) welcomes this opportunity to offer the following comments on the issues presented:¹

Comments on the Commission’s Analysis and Assessment

In its analysis and assessment of developments in e-communications and their effects on the scope of universal service, the Commission reviewed mobile and broadband communications.

Mobile Communications

The Commission finds that consumers have widespread and affordable access to mobile communications, so there is no need to include mobile communications in the scope of universal service (as set out in the directive).

VATM agrees with this assessment. The Commission concludes that the current scope of universal service is still primarily a connection to the public telephone network at a fixed location, in spite of the growing trend in recent years to replace wired telephone connections with mobile phones. At this point in time, it is thus not necessary to include mobile communications in the scope of universal service. In fact, doing so would go directly against the subsidiarity principle of the universal service obligation which holds that private companies may only be obligated to provide service if the market forces alone are unable to do so.

¹ These comments follow the chronology of the Commission’s Communication; they do not represent any prioritization on the part of VATM.

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In Germany, a lively competition is having positive effects on the mobile communications market. So-called service providers, who offer the services of several carriers, continue to play an important role in the development and proliferation of mobile communications services in Germany.

Broadband Internet Access

The Commission concludes that it is currently not necessary to extend universal service requirements (as set out in the directive) to broadband services. This is due to the fact that only a small minority of European consumers are currently using broadband services; thus the decisive criterion for universal service, i.e. use of the service by a “majority of consumers” in the EU, has not been met.

We agree with this conclusion as well. The criterion of use by a “majority of consumers” exists against the background of the risk of a so-called “digital divide” between those with access to advanced e-communications services and those without. Only equal access to and use of these services ensures that the potential of a knowledge society is realized. As internet access via narrowband is widely available at the present time, there is no need to extend the scope of universal service. We also agree with the Commission that it is necessary to monitor developments with respect to the (desired) rapid proliferation of generally available broadband access (cf. Lisbon Strategy).

Longer-Term Issues Presented by the Commission

VATM welcomes the Commission’s approach of launching a longer-term policy debate on universal service. That will help ensure that EU rules and user rights keep pace with market developments as well as with technological and societal progress – as required by Article 15, in connection with Annex V of the directive – and that any required adjustments can be made with a long-term perspective. This far-sighted approach ensures that legislation will be as up-to-date as possible, which is absolutely necessary in view of not only the dynamic developments in the industry, but also the industry’s significance for overall economic development.²

VATM believes that the longer-term issues presented by the Commission are not only relevant to the scope of universal service, but also to the 2006 review of the EU regulatory framework. Therefore, we would like to point out the issues which we feel must be taken into

² See also the Commission's “i2010” initiative as an important component of the new Lisbon Strategy. “Working together for growth and jobs. A New Start for the Lisbon Strategy,” (COM (2005) 24).

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consideration by the European Institutions and the National Regulatory Authorities (NRAs) as they work on defining and setting the regulatory framework.

Future Challenges for the European Institutions and NRAs

Overall, the development of competition in the marketplace has been very positive – we are seeing an increase in both the number of market participants and in the market share of alternative providers. However, this most welcome circumstance – which was, of course, the intended effect of the regulatory framework – must not be allowed to obscure the fact that the successes in the fixed networks market are, to large measure, the result of the activities of the NRAs. It should also be mentioned that there are still significant market segments where the dominating market power of the incumbents continues to hold sway.

The current competitive situation in the fixed networks market is thus mostly due to regulatory intervention and is not yet self-sustaining, and regulatory controls should not yet be reduced. It is still essential that the NRAs have at their disposal effective controls to maintain the competitive level that has been achieved and to stimulate competition in those areas where the market structures are reminiscent of the former monopolies. This includes effective controls to preclude competitive injury (*ex ante*) as well as to penalize anticompetitive practices of the incumbents (*ex post*). The availability of broadband provisioning products may serve as an example that illustrates the necessity of such controls. An ERG report³ shows that the strict regulation and making available of provisional products affects the “digital divide” since the availability of the provisional products increases broadband penetration, thus reducing the risk of a social division.

Effective regulatory controls are also important in view of the “technological convergence” cited by the Commission. The increased significance of IP-based networks as a common platform for the transmission of all types of data means that requirements have massively changed for all participants in the market. This holds true above all for the European regulatory authorities and for the European Institutions that define the regulatory framework on which the NRAs’ activities are based. They are charged with guiding and utilizing the potential which technological progress brings to society as a whole. The transition to Next Generation Networks (NGN) is currently quite likely “the” most essential and far-reaching step for future technological development. It is thus all the more important to set the correct course for the future; otherwise the intensity of competition might diminish.

³ Broadband Market Competition Report, ERG (05) 23.

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It is this background against which one must consider the incumbents' argument that, due to the legal uncertainties which they face, regulation of the transition to NGN will hamper necessary investments. This line of reasoning obscures the real risk which would arise without regulatory intervention: the incumbents could expand their fixed networks, giving rise to a market power which could stifle and prevent competition in the long term and which might even destroy existing competition. Moreover, this line of reasoning misjudges the lively investment activity of the competitors who have contributed significantly to the modernization and security of the communications infrastructure.

The transition to NGN is thus an opportunity for the NRAs to target their regulatory controls with a view towards creating an environment which fosters competition and which will be equal to the challenges that lie ahead. The necessary regulatory controls are already contained in the current European regulatory framework. But if the NRAs are to be able to effectively use these controls in achieving the regulatory objectives, there must be no reduction of the current regulatory scope in the course of the 2006 overall assessment of the regulatory framework. It is important to be able to quickly recognize and counteract the predatory competitive practices of those companies that have considerable market power and to prevent a transfer of market power. At the same time, alternative providers must be put in a position where they are able to offer innovative services at reasonable conditions.

Universal Service

Differentiation between Access to the Infrastructure/Provision of Service

In analogy to the principle of the neutrality of technology, there should be no distinction between access to the infrastructure on one side and the provision of services on the other. Universal service should thus not be tied to devices and technologies, but to services. The objective of universal service is to ensure the availability of a minimum set of high-quality services which are available to all end-users at an affordable price, so as to avoid a "digital divide." From the end users' perspective, however, it is more important that they can avail themselves of these modern electronic communications *services*, whereas the access through which they reach these services is secondary.

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Universal Service Requirements Limited to Fixed Locations

As noted above, we agree with the conclusions of the Commission in that we currently do not see a necessity to extend universal service requirements beyond a connection to the public telephone network at a fixed location. In considering whether a service should fall within the scope of universal service, the following principles should be borne in mind:

- The service must be clearly and unambiguously defined.
- There must be clear evidence that the service is a social necessity and that its provision is in the best interest of the entire population.
- There must be clear evidence of a “service gap” that the market forces have not filled.
- Access and/or affordability barriers must be clearly defined.
- There must be clear evidence that the market will be unable to fill the “service gap” in the foreseeable future.

As always, the overriding criterion is that a universal service obligation be “subsidiary,” i.e. that the obligation be imposed only if the market itself does not meet the need.

Directory Information Services

With respect to the market situation for directory information and directory inquiry services, we note that the existing competition satisfies the availability requirement of universal “Directory Information and Directory Inquiry Service” (cf. Art. 5 USD) as there are competing directory information services in many countries. In our opinion, this holds true in e.g., Spain or Austria just as it does in other EU Member Countries, such as Germany. Thus there is no need for an explicit universal service obligation. Neither is an adjustment of the scope of universal service necessary, as telephone directories and at least one directory information service in all EU Member Countries continue to be an important means of accessing the public telephone services.

In this context, we would like to point out one practical problem that arises out of the interpretation of Art. 25, para. 2, USD, which could be resolved by changing the wording in the course of the URL review.

Article 25, para. 2 of the USD sets forth the requirement “to make available, for the purposes of the provision of publicly available directory enquiry services and directories, the relevant information [...] on terms which are fair, objective, cost-oriented and non-discriminatory.” In practice, the relevant subscriber data are made available via online access to a directory

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information database which holds the data for all telephone service providers (carriers). In most EU Member Countries,⁴ this database is made available by the incumbent. Arguing that Article 25 applies only to the data of a single carrier, not to the cross-carrier directory information database, many incumbents charge directory information service providers who are not carriers themselves, unreasonable fees to access the directory information database. This discrimination is unacceptable in view of the fact that cross-border online access to international directory information is an essential facility. Pursuant to the principles set out in Article 82 of the EC-Treaty, which the European Court holds to be applicable to access to subscriber data (cf. Case C-109/03), access for the purpose of providing an international directory information service must, according to the provisions of Art. 25, para. 2, USD, also be on terms which are fair, objective, cost-oriented and non-discriminatory. VATM respectfully suggests that the wording be clarified in order to eliminate the current anticompetitive practices of the incumbents.

Financing

As a matter of principle, financing of universal service from public funds, i.e. from tax revenues, is preferable. Universal service is in the public interest. It is incumbent upon the government to ensure the adequate availability of telecommunications services, and from that it follows that the Member Countries are also responsible for financing these services.

Berlin, July 15, 2005

More than 50 of the telecom companies and service providers operating in the German market are active members of VATM. All are in direct competition with the former monopolist Deutsche Telekom AG. Our members account for about 80 per cent of total sales by private providers in the German telecommunications market.

⁴ On 7/7/2005, the Commission initiated Treaty infringement proceedings against several member countries for failing to properly implement EU rules on electronic communications, including the requirement of comprehensive subscriber directories; cf. COM Press Release of 7/7/2005, IP/05/875.