



Can a revision of the universal service scope result in substantive change? An analysis of the EU's universal service review mechanism

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ABSTRACT

In the EU, the repeated application of the universal service review mechanism has not resulted in any changes to the universal service scope so far. Due to the fact that the design of an exercise shapes its outcomes, this contribution explores the legal framework and the practice of the said review mechanism in order to determine whether its construction effectively corresponds to its intended functionality. The analysis determines a number of serious shortcomings in the legal procedural and substantive provisions on the review mechanism that result in its inconsistent and deficient application and its puzzling results. Drawing on the identified shortcomings and gaps of the regulatory framework and practice, concrete recommendations are made which could improve the transparency of the review process and the quality and plausibility of the examination of the universal service scope.

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1. Introduction

The outcomes of the ongoing fourth periodic review of the universal service scope carried out by the European Commission¹ are likely to be expected with bated breath. The previous reviews of 2005, 2008 and 2011 have not resulted in any changes in the universal service scope because the services considered for the extension of the scope failed to fulfil the necessary criteria, according to the Commission's evaluation. However, since the last review, various national and EU policies have borne fruits, in particular the achievement of 100% coverage with basic broadband in 2013 ([European Commission, 2013](#)), so that the long-standing and much advocated candidate service – broadband connection – has decisively strengthened its position to be included in the Union-wide universal service scope.

This study is a critical legal analysis of the review rules and of the relevant Commission's practice with the aim to understand better the results of the previous reviews and to establish whether the current review mechanism is appropriate and effective in bringing about substantial changes to the universal service scope, necessary in the light of Information Society policies of the European Union. To this end, the paper studies the Universal Service Directive, the Commission's reports on the conducted reviews and relevant preparatory and statistical documents. The paper focuses on the review

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¹ See the note on the BEREC's official website: http://berec.europa.eu/eng/document_register/subject_matter/berec/others/4255-letter-from-the-european-commission-to-berec-in-relation-to-the-implementation-of-the-universal-service-provisions. Accessed 10.11.15.

procedure because the design of decision-making processes (time, participants, decision criteria, approaches, tools and techniques used) influences their outcomes.

The paper argues that the mechanism for the review of the universal service scope as such does not provide for an appropriate selection and effective examination of eligible electronic communications services and is, in fact, counterproductive. Due to procedural shortcomings, terminological vagueness and orientation mainly towards the extension of the scope, the current review rules do not provide for a comprehensive evaluation of services. Flaws in the design of the legal framework strengthen Commission's discretion, enhance the role of legislators in the revision of the universal service scope and, therefore, political dimension of universal service. Based on the lessons learned, the paper suggests several changes to the regulatory framework governing the review of the universal service scope in order to improve its effectiveness and usability.

The paper intends to contribute to the ongoing scholarly debate on the scope of universal service in the EU by highlighting and examining the connection between the review mechanism and the scope of universal service. Recently, a number of authors have discussed the possibility of inclusion of broadband in the universal service scope (see, for example, Bohlin and Teppayayon (2009) and Garcia Calvo (2012), on the relation between universal service and broadband policy; Prasad, 2013, on broader criteria for the inclusion of broadband), and some have argued in its favour (e.g. for the EU level – Nucciarelli, Sadowski, & Ruhle, 2012; for Spain – Síndic, 2013). The present paper complements this research by raising the question of impact of the procedural rules on the material provisions governing the universal service scope. In the light of the creation of the EU Digital Single Market, the paper hopes to attract attention of EU lawyers and practitioners to the necessity of improvement of the EU legal framework on universal service and its application.

2. Shortcomings of the EU's mechanism for review of the universal service scope

The understanding that “the concept of universal service needed to evolve to keep pace with advances in technology, market development and changes in user demand” (European Commission, 1995) was formed at the inception of the EU's regulatory framework. The EU Universal Service Directive of 2002 (USD) (European Communities, 2002) employs a dynamic concept of universal service allowing for modifications of the scope and contains a number of substantive and procedural provisions for its revision in the light of certain political, economic and social objectives.

The dynamism of the universal service concept is guaranteed by the review mechanism built into the Universal Service Directive. As the wording of the relevant USD provisions indicates, the term “review” refers to an examination of actual or potential elements of the universal service scope according to defined criteria with a view to alter – change or redefine it. Article 15 USD imposes the obligation of a periodical review of the universal service scope on the Commission. This does not mean, however, that a review is triggered automatically every three years. According to Annex V USD, as a very first preparatory step, the Commission has to consider whether there are any grounds for a review. For this, the Commission has to analyse economic and social conditions in order to establish whether the context for universal service has changed. It shall take into consideration social and market developments, namely services used by consumers and availability and choice of services to consumers, and technological developments in terms of the way services are provided to consumers. If as a result the Commission concludes that a review shall be undertaken, it shall consider the evolving social, commercial and technological conditions, taking into account, among other things, mobility and data rates in the light of the prevailing technology used by the majority of subscribers (Article 15 (2) USD).

The Universal Service Directive spares any procedural details of how evaluations and tests of the review shall be undertaken. The Commission is free to decide whether and how to involve the public and which of the public to involve. The timing of reviews is not sufficiently clear, in particular with regard to the questions when reviews should be launched within the 3-year period and within what period of time they need to be completed. There is no obligation for the Commission to provide explanations why the review is or is not undertaken. The substantive requirements seem better elaborated, but are not free of shortcomings.

2.1. Flaws of the twin test

During the actual review any possible alterations are examined on the basis of a so called twin test (Recital 25 USD). The two parts of the test are complementary and, basically, represent a combination of a majority use test with a market failure test. The wording of the Universal Service Directive is not clear on the issue as to whether both parts of the twin test shall be satisfied in order to alter the universal service scope. From the respective provisions it follows that all the elements described below shall be merely addressed and taken into account by the Commission during the examination, but no decisive value is ascribed to them.

In the first part of the test, the Commission shall identify services that are candidates for the inclusion in the universal service scope and/or examine services that are already part of the universal service scope with a view to redefine it. The criteria of examination of such services are their availability to and use by a substantial majority of consumers, and the effect of social exclusion resulting from the lack of availability or non-use by a minority of consumers.

In the second part of the test, the Commission has to assess possible implications of the intended changes for all consumers. It evaluates whether availability and use of candidate services conveys a “general net benefit to all consumers such that public intervention is warranted in circumstances where the specific services are not provided to the public under normal commercial conditions” (Annex V para. 2 USD).

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