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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).

In particular the use of a majority test for evaluation of individual electronic communications services is problematic. The necessary threshold to constitute a substantial majority (or a deprived minority, for this matter) is not more closely specified in the Universal Service Directive. The role that specific qualities of the affected groups (for instance, their vulnerability based on age or income) could play in this assessment and in the subsequent evaluation of social exclusion is also not specified. The majority test refers to the whole EU population, and without additional mechanisms it does not account for specific national developments and needs. It is therefore counterproductive with regards to the social objective of inclusiveness, and it cannot prevent development of digital divides between the countries.

A majority test is by definition quantitative and cannot take into account the value of a service for the society and economy. Social exclusion resulted from lack of availability or non-use of a service can be considered a proxy for the societal value, “general net benefit” – a criterion for the economic value. However, there is no mechanism to compare one service to another (for example, narrowband to broadband or broadband to voice telephony) so that during the selection of a candidate service no comparative substantial evaluation can be carried out in relation to the existing universal service scope. A majority test is biased towards an established service with a great market presence, although it is precisely that which most likely does not need special promotion policies in order to become cheaper and to cover the whole market; if outdated and defeated by smarter new competitors, it could even disappear (more quickly) if the artificial upkeep was discontinued. Therefore, when selecting and assessing a candidate service, the value of some services might be underestimated or misunderstood. This leads to the situation where the status quo is favoured, even if it might be outdated and, possibly, deterring or distorting further development of ICT.

2.2. Lack of further clear review criteria

Additionally, several other issues shall be taken into account when contemplating a modification of the universal service scope (Recital 25 USD). These issues are not part of the twin test, but elements of the existing regulatory framework and impact the decision taken as a result of the review in a restrictive and/or conditional manner. Principles of technological neutrality and competitive neutrality shall be respected during the review. Natural technological evolution shall not be hindered, and certain technological choices shall not be artificially promoted above others. Competition and innovation on the market shall not be disrupted by imposing a disproportionate financial burden on sector undertakings. Universal service is established in the interest of consumers, so modifications of its scope shall not fall to the financial detriment of consumers, especially those on lower income.

Remarkably, even though universal service is an instrument of a more general ICT policy, there is no requirement to take into account its broader goals. The review mechanism seems detached from the EU's forward-looking policies of Information Society and Digital Agenda. However, an unambitious universal service may negatively affect development of electronic communications by entrenching a status quo and contributing to digital divide.

Even though the costing and financing of universal service provision is a central theme of political, economical and scholarly discussions, possible implications of an alternation of the universal service scope on financing arrangements are not properly addressed by the review mechanism. Arguably, the cost of universal service significantly impacts the decision about an extension of the universal service scope, as it is indirectly expressed by the majority criterion and by the objective to avoid a too heavy financial burden for providers and financial detriment for consumers as mentioned above. Disregarding this fact, Recital 25 USD contains only an explanation that “any change of scope automatically means that any net cost can be financed via the methods permitted in this Directive”. It seems illogical that there is no legal requirement to examine and/or reform provisions of the Universal Service Directive on financing when changing the universal service scope. In a converging ICT environment where universal service provision is mainly shouldered by the industry such questions as who should pay and how the contributions should be calculated acquire a particular significance (unless the complete universal service provision is financed from the budget) (Jordan, 2009; Xavier & Ypsilanti, 2007).

2.3. Political nature of universal service

Last but not least unclear element of the review process lies in the political nature of universal service as a concept and a policy (Nihoul & Rodford, 2004). The Commission is not the final decision-maker on the question of extension or redefinition of the universal service scope. According to Article 15 USD, the Commission shall report about the outcomes of the review to the European Parliament and to the Council. If the Commission comes to the conclusion that changes to the universal service scope are necessary, it shall make a respective legislative proposal to both legislators in compliance with the ordinary legislative procedure (Articles 289 (1) and 294 of the Treaty on the Functioning of the European Union). Such proposal may be examined and discussed in the Parliament and in the Council on completely different grounds than the criteria of the review used by the Commission, as nothing in the Universal Service Directive suggests that the respective provisions are conditional on the legislators as well.

2.4. Intermediary conclusion

It can be concluded that a qualitatively significant change to the universal service scope is difficult under the existing review mechanism for the following reasons. First, the review mechanism favours the existing universal service scope by using the majority test and not providing for examination to establish an absolute or comparative merit of electronic communications services for citizens. Second, the wording and relative weight of the review criteria are not sufficiently

precise to allow for an appropriate choice and a comprehensive evaluation of the services under consideration. The possibility to consider services in the light of other ICT policies of the EU is lacking. Also, the issue of financing remains largely in the background, being disconnected from the review. All this leaves a lot of room for the Commission's discretion in evaluating individual services and decision-making and turns the periodic review into a political process. The Commission holds the key in initiation both the review process and actual reformation of the universal service scope, while the final decision is taken by the EU legislators that are not bound by the criteria of the review.

3. Deficient practice of reviews

Since the adoption of the 2002 regulatory package for electronic communications services, which introduced the 3-year periodical review, three such reviews were undertaken by the Commission, namely in 2005, 2008 and 2011.

3.1. First review

In the first review the Commission examined whether to maintain or expand the universal service scope by including "mobile or broadband communications" (European Commission, 2006a), although it was not specified why these two services were selected and what exactly was meant by them, for instance, how broadband was defined and whether mobile communications meant mobile voice or subscription to a package of services provided over mobile networks.

For both mobile and broadband communications the Commission established in its preliminary analysis that they did not fulfil the conditions for their inclusion in the universal service scope, and the subsequent public consultations confirmed this conclusion. Mobile communications were already provided by the market on a universal basis (about 95% of the EU population) and at an affordable price, so a market failure justifying regulatory intervention was absent. In the case of broadband internet access, the condition of the use by a majority of consumers was not fulfilled as only 11,5% of the EU population had a fixed broadband connection. Therefore, the Commission decided not to propose any changes in the universal service scope. Thus, in practical terms the first review was oriented only at extension of the universal service scope at the EU level, not at redefinition.

The Commission made use of broad public consultations to verify its conclusions and to discuss how universal service should evolve in the future, in particular whether public payphones, directory and directory enquiry services should remain a part of universal service. With regard to these services, the Commission did not conduct the twin test, but pointed out risks and concerns and identified information and evidence needed for the future analysis, in detail described in the Annex to the Report regarding the outcome of the first review. The Annex contains a description of the methodology used in the review, an analysis of likely impacts, a comparison of different options for regulatory changes, risks involved and sources of information. This made the approach, conclusions and decision by the Commission rather plausible and transparent.

3.2. Second review

The second review (European Commission, 2008) basically reaffirmed the conclusions of the first one and covered the same candidate services, although, once again, it was not clear what exactly was meant and why those services were selected. Even though in 2011 the Commission claimed that the candidate services did not pass the conditions of the twin test (European Commission, 2011), the review report did not contain any evidence that the Commission moved beyond the majority test (European Commission, 2008). On the basis of the amount of subscriptions (over 110% of the EU population or 83% of the household penetration rate), the Commission established that the widespread access to mobile communications was provided by the market and that affordability was ensured because a monthly price for a basket of mobile services was cheaper than a monthly rental of a fixed line. The growing importance and increasing coverage and penetration of broadband connection was acknowledged, yet the take-up was still found to be too low (about 20% of the EU population) to satisfy the requirements of a substantial majority use. The Commission also concluded that soon narrowband might not fulfil the requirement of being sufficient to permit functional internet access and decided to closely monitor the situation in the EU.

By comparison to the first review, the report on the second review is rather scant and does not give any information regarding prior consultations, their participants, methodology of the assessment and other issues. At the same time, in the second report the Commission followed up on a public discussion about the future role of universal service in provision of electronic communications and provided a list of questions with a view of updating the Universal Service Directive.

Neither the first nor the second periodic review reports contain indications as to how and whether the Commission evaluated the necessity for a review of the universal service scope in terms of relevant technological, social and market changes, as required by Annex V USD. On the contrary, the reviews seem to have been undertaken hastily and automatically. At the same time, the second review launched a full-scale examination of economic and social developments in the form of public discussion on the role universal service in the development of electronic communications. Although this public discussion has led to extensive amendments of the regulatory framework, it has not brought about significant changes to universal service regulation and to the universal service scope in particular.

3.3. Third review

The third review differs from the older ones in the way it used the public consultation in 2010 as a preparatory step to decide whether a review is necessary. The consultation issues did not simply address the question as to whether particular services should be included in the universal service scope, but were aimed at the assessment of the technological, economic and social context of the universal service policy and its relation to other ICT policies of the EU (European Commission, 2011). The information and opinions received set the scene for the review.

During the course of the third review, the Commission once again dealt with broadband and mobile communications without properly explaining their meaning and the reasons for their choice. Moreover, in this review the Commission was explicitly concerned only with the extension of the scope.

Mobile communications were examined under the title “Mobility”, although the relation between the two was not more closely explained. It was established that mobile subscriptions by far exceeded the fixed ones (89% against 71% of EU households respectively) and were available at declining prices. From this, the simple and not further elaborated conclusion was made that “widespread affordable access” provided by the competitive market also ensures that there was “no risk of social exclusion” (European Commission, 2011). “Including mobility within the universal service scope” was therefore not an option, although mobility in the sense of access in any location and mobility in the sense of mobile communications were two different things, as was emphasised by the Commission itself already during the course of the first review (European Commission, 2006a). Back then the Commission noted that the participants of the public consultations interpreted questions of mobility differently in their replies to the questionnaire. Some pointed out to the possibility of delivering universal service at any location by using various technologies. Others linked mobility to mobile communications, so that it would appear that access at any location was already provided. The relation between mobile communications as a candidate service and “introduction of mobility” to the universal service also known as “access at any location” was not conclusively clarified in any of the reviews. However, the logic suggests that those are different issues – disregarding the fact that mobile communications may mean different mobile services or baskets of services – and introduction of mobility within the universal service scope might require a different evaluative framework.

Fixed broadband – predictably – failed the majority test. Even though the data which was used showed that household penetration in the EU-27 was 61%, the Commission pointed out that it did not reach the necessary substantial majority. Additionally and “more importantly”, the Commission remarked, the provision of broadband connection on the universal service basis would have been too expensive (European Commission, 2011) as the impact assessment study ordered by the Commission in preparation to the review had found (Van Dijk Management Consultants, 2010). Due to the fact that high cost of universal service would fall disproportionately on telecom providers and consumers in the Member States with lower broadband penetration levels, the criterion of conveying general benefit to all consumers also was not satisfied.

3.4. Common features of the review practice

3.4.1. Inconsistency in the review procedure

Procedural rules are lacking in the review mechanism. Respectively, all three reviews were set in different ways. While all reviews relied on the evidence of empirical data to conduct the twin test, stakeholder consultations were not always held, and the representation and questions asked at those consultations varied strongly. Public consultations were launched during the 2005 review, and their participants could comment on the preliminary findings of the Commission. There is no indication, however, that public consultations were conducted during the second review. Public consultations in 2010 dealt with more general issues of universal service in e-communications discussing the concept of universal service at the EU level, the role of universal service in the broadband development, balance between EU level harmonisation and national flexibility and financing. For the fourth review, a questionnaire was sent to national regulatory authorities in March 2014² whose contents have not been disclosed or even discussed in advance.

The preliminary evaluation of economic and social conditions that potentially changed the context of universal service was not always clearly outlined. While in the course of the first review certain trends in mobile and broadband communications were established and analysed (European Commission, 2005), the subsequent reviews simply followed up those trends.

3.4.2. Uncertainty about the choice of candidate services

Grounds for the choice of the candidate services remained secret as was the exact identity of services. It was never explained what service or services were understood under mobile communications. There was a hint in the second review that voice calls and SMS might be relevant because a respective low usage basket was used for price comparison with a rental of fixed line (European Commission, 2006a); the question remains whether such comparison was plausible. However, in 2011 the Commission used a high usage basket of pre- and post-paid mobile services to demonstrate widespread availability of “mobility” (European Commission (2011), in conjunction with Teligen Strategy Analytics (2010)).

² See the note on the BEREC website: http://berec.europa.eu/eng/document_register/subject_matter/berec/reports/4479-ec-questionnaire-on-the-implementation-and-application-of-the-universal-service-provisions-8211-a-synthesis-of-the-results. Accessed 10.11.15.

The same concerns apply to broadband connection. The term “broadband” denotes high data transfer rates, usually relative to the state-of-the-art technology. Obviously, different rates were considered “high-speed” in 2005 and in 2011. For instance, in 2005 broadband was usually delivered via a DSL connection with data transfer rates of 144–512 kbps in rural areas and 512–1000 kbps in urban areas (European Commission, 2006b). In 2011 high speeds of the past were barely considered in broadband statistics: the data used by the Commission for the third periodic review did not mention speeds of below 2 Mbps at all (Communications Committee, 2011). “Basic broadband” speed was already set at 2 Mbps mark (European Commission, 2010a), and further developments were measured against it. An introduction of a more basic broadband or a broader-than-narrowband was not considered necessary.

3.4.3. *Insufficient examination of candidate services*

The evaluation of services in the reviews was limited to their physical availability and affordability. Only the third review considered the value of broadband for the European economy and society more profoundly in the light of the objectives of the Digital Agenda for Europe. The economic and social merits of broadband are discussed in other European documents (European Commission, 2010b, 2010c), but it is not clear to what extent any of these observations were taken into account in the review. A proper comparison of candidate services to the services that are already included in the universal service scope is lacking. When mobile communications were being studied, a proper examination of voice telephony service could have been undertaken. The data used by the Commission showed a decline in telephone subscription from 92% in 1999, when universal service was introduced, to 71% in 2011 (European Commission, 2011). One immediate question arises whether the falling subscriptions numbers and fixed-mobile substitution point to fading social importance of this service? Can it be possible evidence that fixed telephone is less critical to social inclusion? Also relevant is the question as to whether it still reaches the threshold of a required substantial majority. In fact, assuming that fixed telephone has always stayed within the necessary limits would help to quantify the threshold of substantial majority and put it at 71% of household penetration – the lowest, but still acceptable rate according to the Commission's 2011 review. However, telephone service has never been subject of proper scrutiny on the basis of the twin test.

A comparison of candidate services to other services on the market was not undertaken. In all reviews broadband penetration rates were given in relation to the numbers of households having internet access. For instance, in 2011, 70% of households had internet access which could represent a substantial majority if the same threshold as voice telephony applies. However, neither of the reviews considered qualitative characteristics of internet and compared it with broadband connection in order to establish the necessity of the former or the latter.

3.4.4. *No examination of the current universal service scope*

The Commission's practice demonstrates that the review is misconceived as being oriented mainly at extension of the universal service scope to new services. Only the first review considered, to a limited extent, the possibility of redefining the scope (with regard to payphones, directory and directory enquiry services) and indicated information and examination needs for this purpose. Yet, this programme was not followed up in the second and third reviews which were solely focused on inclusion of new services and kept away from examining the existing universal service scope.

3.4.5. *Flaws of the twin test*

The analysis of the practice of review supports the previously expressed criticism regarding an unclear relation between the parts of the twin test. The Commission did not always carry out all parts of the test. Risk of social exclusion was not considered for broadband connection in the third review, probably because there was no substantial majority of use achieved, however the general net benefit was examined. At the same time, for mobile communications with their more than substantial majority, the risk of social exclusion and a general net benefit for consumers were never examined. Satisfaction of one element of the twin test was habitually interpreted as satisfaction of another one. For instance, widespread use of mobile communications (89% of households) at affordable prices apparently resulted in the absence of risk of social exclusion, according to the third review. In all reviews a disproportionate weight was put on the majority test: none of the three reviews went far beyond it and applied other elements of the test properly. In the case of broadband, if the majority test was not passed, other criteria were not considered. “Risk of social exclusion” is arguably the most neglected element of the twin test. Its meaning was never clarified, and it was not examined. In the second and third reviews affordability or, rather, low prices were indicative of the absence of such risk. However, social exclusion is usually understood as denial of or hindering enjoyment of rights, opportunities or resources and the resulting inability to fully participate in normal activities of a particular society (Rawal, 2008; Taket et al., 2009). It is a complex phenomenon where a particular communications service can be one of the enablers. A comprehensive contextual analysis is necessary to understand the social norm of societal participation and to assess the contribution of a particular service to its realisation in application to a certain group of consumers at risk. The group at risk also needs to be identified. Such analysis would inevitably be more demanding than the determination and comparison of prices and should take both the merits of the service and needs and (financial) possibilities of a particular group of consumers into account.

3.5. Intermediary conclusion

The practice of reviews of the universal service scope raises various concerns with regard to the thoroughness of the analysis and adequate consideration legal requirements for the review. Inconsistent use of public consultations is responsible for the lack of deliberation and transparency at the EU level and is critical for policy acceptance.

Skipping the stage of preparatory assessment of social, economic and technological development in the forefront of the review turns the review into an automatic procedure and may result in the loss of efficiency. The role of the preparatory assessment is to prevent unnecessary efforts where the objective conditions for universal service have not changed.

Since the first review in 2005, the Commission has been focusing mobile and broadband communications. Closely following the developments in these fields, it re-examined the respective services establishing trends highly relevant for a possible extension of the universal service scope (to include fixed broadband access in particular). The unfortunate side-effect of this approach is that current scope of the EU-level universal service is effectively exempted from the examination according to the review criteria. This could lead away from the purpose of the review instrument, which is to change or redefine, not only to extend the universal service scope. This also casts doubts on the technologically neutral application of the instrument as it seems to be trapped into analysis of the same technologies/services.

The lack of clarity in defining the exact services considered for inclusion in the universal service scope has implications in the context of public consultations. There is a high risk that participants of public consultations may interpret the term in different ways as happened in the case of “mobility” (European Commission, 2006a). Such situation may naturally highlight some new aspects of the service at issue. But it also may become a cause of discord and reduce plausibility of the results of review because empirical evidence of take-up and price levels is more difficult to process.

The practice that twin test is not always applied in full to individual services has its merits when it is manifestly evident that one of the test parts cannot be fulfilled under current circumstances. From this perspective, under the first and second review it was justified to stop the examination of fixed broadband when it was established that the majority use criterion was not satisfied. However, the examination of mobile communications was reduced the majority test, which is unsatisfactory as no full picture of the social and economic role of this service could be produced. There is a threat that significant issues, relevant from the universal service perspective, were neglected or completely ignored, in particular the non-use by the (socially disadvantaged) minority and the impact on its social exclusion.

With regard of the “risk of social exclusion” all reviews basically asserted that affordability, expressed as low market prices, was indicative of the absence of such risk. This is a rather simplistic and one-dimensional understanding of the complex phenomenon of social exclusion. By focusing on prices alone, the reviews underestimated the broader context: identification of the group at risk, establishment of the social norm of participation in the European society, contribution of the service in question to realisation of this participation for the identified group.

The examination of the Commission's practice of reviews in general supports the critical concerns expressed during the course of the analysis of regulatory provisions. Vague provisions in combination with a significant discretion of the Commission result in an inconsistent application of the review mechanism and lack of transparency and plausibility of the results. This reduces legal certainty and predictability in the course of the review that is desirable and is an actual aim of legal framing. The identified flaws of the practice can be rectified, in the first line, by improving the regulatory framework.

4. Concluding remarks

The critical shortcomings of the EU review mechanism for the universal service scope provide an opportunity for significant discretion of the Commission at all stages of revision. The review procedure is not spelled out so that at the end of the day the Commission decides how to prepare to the review, who to consult and whether to consult at all. The review mechanism, especially in the Commission's practice, focuses more on the extension of the scope of universal service and thus shields the already included services sparing them a proper examination. The wording of the review criteria is not sufficiently precise to allow for an appropriate choice and a comprehensive evaluation of services – candidates for inclusion in the universal service scope. The possibility to assess an absolute or comparative merit of electronic communications services for the citizens and society is lacking as is the possibility to consider services in the light of other ICT policies of the EU.

In these circumstances a qualitative change of the universal service scope is uncertain and is most likely only as a policy decision, i.e. in presence a strong political will of the Commission and legislators, but not as a result of a mechanism that is to be routinely applied in order to ensure flexible and dynamic nature of universal service reacting to technological advances, economic developments and social needs. It means that universal service will be developed in the course of legislative reforms, not reviews. By this token, universal service – as a concept and regulatory instrument – will be exposed to the competence conflict between the supranational level responsible for the internal market and related social policy³ and EU Member States responsible for industrial policy.

If the review mechanism is to fulfil its function, it needs to be improved to build a solid and unambiguous framework, as far as this is possible to achieve, and its application should be brought in compliance with the regulatory requirements. For

³ It shall be reminded that currently universal service is conceptualised as a safety net (see, for instance, European Commission (2008, 2011)).

instance, a preparatory assessment of social, economic and technological development in the forefront of the review needs to be conducted in order to prevent unnecessary reviews in the first place. A procedural requirement of public consultations involving interested parties from NRAs, industry and consumers should be introduced to precede the review, as a part of the preparatory assessment and to make the procedure more transparent and inclusive. The necessity to justify the selection of candidate services is necessary to increase the transparency and plausibility of the process. The requirement could be introduced to conduct the twin test in full, except for the cases where it is evident that one of the test parts cannot be fulfilled. Values should be assigned to different elements of the twin test based on the social significance of the universal service instrument as a safety net. This means that a more comprehensive analysis of social exclusion of deprived groups shall be carried out and that adequate parameters need to be developed that allow the broader implications of individual services to be looked at beyond the electronic communications market. In this context, it is high time that the services currently included in the universal service scope are examined according to the review criteria and especially with regard to their role as enablers of social inclusion. For this, the current evaluation paradigm should be substantiated to allow for a comparative assessment of the services in question and services that are candidates for inclusion in the universal service scope taking into account their relevance for Information Society and for the internal market policies of the EU.

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